Reported Decision: 172 LGERA 380

New South Wales
Court of Appeal

CITATION:	**Agostino v Penrith City Council [2010] NSWCA 20**
HEARING DATE(S):	3 February 2010
JUDGMENT DATE:	3 March 2010
JUDGMENT OF:	Giles JA at 1; Tobias JA at 2; McClellan CJ at CL at 60
DECISION:	(a) Extend the time for the filing by the appellants of their summons for leave to appeal up to and including 30 July 2009; (b) Grant leave to appeal; (c) Dismiss the appeal with costs.
CATCHWORDS:	APPEAL – Practice and procedure – New South Wales – Extension of time for appeal – Summons for leave to appeal filed late – Delay in the seeking of alternative advice with respect to the prospects of a successful appeal from the decision of the primary judge – Whether application for an extension of time in which to seek leave to appeal should be granted - ENVIRONMENT AND PLANNING – Environmental planning – Planning schemes and instruments – New South Wales – Local environmental plans – Penrith Local Environmental Plan No 201 – Development may be carried out for the purposes of a fruit and vegetable store with a maximum floor area of 150 sq. m – Development application to increase size of existing fruit and vegetable store from 150 sq. m to 765 sq. m – Application refused by Penrith City Council – Whether the words "with a maximum floor area of 150 sq. m" constitute a development standard or a prohibition upon development
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Local Government Act 1919 Penrith Local Environmental Plan No 201 State Environmental Planning Policy No 1 Uniform Civil Procedure Rules 2005
CATEGORY:	Principal judgment
CASES CITED:	Agostino v Penrith City Council [2009] NSWLEC 76 Agostino v Penrith City Council [2002] NSWLEC 222; (2002) 123 LGERA 305

	Blue Mountains City Council v Laurence Browning Pty Ltd [2006] NSWCA 331; (2006) 150 LGERA 130; (2006) 67 NSWLR 672 Lowy v The Land and Environment Court of NSW and Others [2002] NSWCA 353; (2003) 123 LGERA 179 North Sydney Municipal Council v P D Mayoh Pty Ltd [No 2] (1990) 71 LGRA 222 Residents against Improper Development Inc and Another v Chase Property Investments Pty Ltd [2006] NSWCA 323; (2006) 149 LGERA 360 Strathfield Municipal Council v Poynting [2001] NSWCA 270; (2001) 116 LGERA 319 Woollahra Municipal Council v Carr (1987) 62 LGRA 263
PARTIES:	Antonio Agostino Barbara Agostino Penrith City Council
FILE NUMBER(S):	**CA** 40254/09; 2009/298385
COUNSEL:	A: D Wilson R: A Galasso SC
SOLICITORS:	A: A R Walmsley & Co, R: Sparke Helmore
LOWER COURT JURISDICTION:	Land & Environment Court
LOWER COURT FILE NUMBER(S):	L&E 10015/09
LOWER COURT JUDICIAL OFFICER:	Pain J
LOWER COURT DATE OF DECISION:	4 June 2009
LOWER COURT MEDIUM NEUTRAL CITATION:	Agostino v Penrith City Council [2009] NSWLEC 76

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40254/09
LEC 10015/09

GILES JA

TOBIAS JA
McCLELLAN CJ at CL

Wednesday 3 March

ANTONIO AGOSTINO & ANOR v PENRITH CITY COUNCIL

FACTS
The appellants, Antonio and Barbara Agostino, have since at least 1992 operated a fruit and vegetable store on land being Lot 2 DP 221473 which is within Zone No. 1(a) (Rural "A" Zone – General) under Penrith Local Environmental Plan No 201 (the LEP). Clause 41(3) of the LEP provides: 'Notwithstanding any other provision of this plan, a person may, with the consent of the council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150 sq. m.'

On 1 September 2008, the appellants lodged a development application with Penrith City Council (the Council) for alterations and additions to their existing fruit and vegetable store which were intended to increase its gross floor area from its present 150 sq. m to 765 sq. m. The Council refused that application.

The appellants lodged a Class 1 appeal to the Land and Environment Court against the Council's decision. The primary judge found that the maximum floor area of 150 sq. m for a fruit and vegetable store permitted by clause 41(3) of the LEP comprised a prohibition upon development for the purpose of such a store having a floor area greater than 150 sq. m.

The appellants appealed against the decision of the primary judge. In accordance with s 57(1) of the *Land and Environment Court Act* 1979, the appeal was confined to a question of law.

HELD
Per Tobias JA, Giles JA agreeing:

As to whether the trial judge was correct in concluding that the provision in clause 41(3) of the LEP of a maximum floor area of 150 sq. m for a fruit and vegetable store permitted by that clause comprised a prohibition upon development for the purposes of a fruit and vegetable store having a floor area greater than 150 sq. m

What one is required to do is to identify the proposed development and then to determine whether it falls within the description of that which clause 41(3) makes permissible with consent. In performing this exercise it is necessary to identify which criteria are essential conditions in determining whether the particular development proposed is permissible. Thus, it is necessary to first address the LEP by reference not only to principle but also to its own structure and provisions. In so doing care is also to be taken to ensure that form does not govern substance.

Lowy v The Land and Environment Court of NSW and Others [2002] NSWCA 353; (2003) 123 LGERA 179; *Strathfield Municipal Council v Poynting* [2001] NSWCA 270; (2001) 116 LGERA 319 applied.

The definition of "development standards" is referable only to provisions of an environmental planning instrument "in relation to the carrying out of development". Thus the development standard must be one which may be carried out; that is one which is permitted or permissible. One can only determine that question by reference to the terms of the planning instrument.

Strathfield Municipal Council v Poynting [2001] NSWCA 270; (2001) 116 LGERA 319 applied.

It does not follow that only those elements that are included in the zoning table of a planning instrument are to be included as the essential elements of a development. There may be other elements in a particular instrument that should properly be treated in the same way as the zoning table.

Blue Mountains City Council v Laurence Browning Pty Ltd [2006] NSWCA 331; (2006) 150 LGERA 130; (2006) 67 NSWLR 672; *North Sydney Municipal Council v P D Mayoh Pty Ltd* [No 2] (1990) 71 LGRA 222 applied.

The criteria which are the essential considerations for determining the permissibility of the proposed development of the appellants are two-fold. First, the proposed development must be a fruit and vegetable store. Second, it must have a maximum floor area of 150 sq. m. That which is proposed satisfies the first criterion but not the second. It is therefore prohibited.

Per McClellan CJ at CL dissenting:

The question of whether or not a particular control on development is a development standard will depend upon whether the control falls within the definition of "development standard" in the *Environmental Planning and Assessment Act* 1979. Accordingly, to be a development standard a provision of a planning instrument must be one "in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development."

Blue Mountains City Council v Laurence Browning Pty Ltd [2006] NSWCA 331; (2006) 150 LGERA 130; (2006) 67 NSWLR 672 applied.

The relevant question is to identify the proposed development. One then asks is the relevant provision a "requirement" or "standard" in relation to an aspect of that development. If it is it will be a development standard.

Woollahra Municipal Council v Carr (1987) 62 LGRA 263 applied.

The question of whether the relevant provision comes within the definition of a development standard will not be answered by seeking to describe the provision as either a development standard or a zoning provision. That approach is productive of error.

Blue Mountains City Council v Laurence Browning Pty Ltd [2006] NSWCA 331; (2006) 150 LGERA 130; (2006) 67 NSWLR 672 applied.

Lowy v The Land and Environment Court of NSW and Others [2002] NSWCA 353; (2003) 123 LGERA 179; *Strathfield Municipal Council v Poynting* [2001] NSWCA 270; (2001) 116 LGERA 319 considered.

A provision in a planning instrument which specifies any numerical control of a proposed development almost certainly will be a "development standard" as defined. It will at the least be a provision fixing a requirement in respect of the identified aspect of that development. It is plain that the 150 sq. m maximum is a requirement fixed in respect of an aspect of the proposed development – i.e. its floor space. As such it is a provision within the meaning of development standard as defined.

North Sydney Municipal Council v P D Mayoh Pty Ltd [No 2] (1990) 71 LGRA 222 applied.

Orders of the Court
The time for the filing by the appellants of their summons for leave to appeal should be extended up to and including 30 July 2009;
Leave to appeal should be granted;
The appeal should be dismissed with costs.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40254/09
LEC 10015/09

GILES JA
TOBIAS JA
McCLELLAN CJ
at CL

Wednesday 3
March

ANTONIO AGOSTINO & ANOR v PENRITH CITY COUNCIL

Judgment

1 **GILES JA**: agree with Tobias JA.

2 **TOBIAS JA**: Antonio and Barbara Agostino (the appellants) have since at least 1992 operated a fruit and vegetable store on land being Lot 2 DP 221473 (the land) which is within Zone No. 1(a) (Rural "A" Zone – General) under Penrith Local Environmental Plan No. 201 (the LEP) which came into force on 12 July 1991.

3 On 1 September 2008 the appellants lodged a development application with Penrith City Council (the Council) for alterations and additions to their existing fruit and vegetable store which were intended to increase its gross floor area (as that expression is defined) from its present 150m² to 765m². The respondent Council refused that application whereupon the appellants lodged a Class 1 appeal to the Land and Environment Court against that decision (the proceedings).

4 A preliminary point of law arose in the proceedings whereby the Council contended that the

proposed additions and extensions were prohibited by clause 41(3) of the LEP. More particularly, the preliminary issue was stated in the following terms:

> "A preliminary point of law has arisen in these Class 1 proceedings on the Council's Notice of Motion. It requires the Court to consider: *Whether the provision in Clause 41(3) of Penrith Local Environmental Plan No 201 (Rural Lands) of a maximum floor area of 150 square metres for a fruit and vegetable store permitted by that clause, comprises a development standard or a prohibition upon development for the purposes of a fruit and vegetable store having an area greater than 150 square metres.* "

5 The preliminary point of law was determined by Pain J on 4 June 2009 in favour of the Council: *Agostino v Penrith City Council* [2009] NSWLEC 76. In so finding, her Honour's decision was consistent with that of Cowdroy J in *Agostino v Penrith City Council (Agostino No 1)* [2002] NSWLEC 222; (2002) 123 LGERA 305 at [14]-[17] that clause 41(3) was not a development standard but a prohibition on a fruit and vegetable store whose floor area exceeded 150m².

6 After considering the matter afresh, her Honour's formal finding (at [32]) was that the maximum floor area of 150m² for a fruit and vegetable store permitted by clause 41(3) of the LEP comprised a prohibition upon development for the purpose of such a store having a floor area greater than 150m². It is from that decision that the appellants appeal to this Court pursuant to s 57 of the *Land and Environment Court Act* 1979 (the Court Act). As her Honour's decision was interlocutory, the leave of this Court to appeal is required: see s 57(4)(d) of the Court Act. Any such appeal is confined to a question of law: see s 57(1).

A preliminary point

7 As I have indicated, the primary judge's decision was dated 4 June 2009. Under the relevant provisions of the Uniform Civil Procedure Rules (the UCPR), a summons for leave to appeal was required to be filed by 25 June 2009. The summons for leave in the present case was not in fact filed until 30 July 2009, being just over one month late. Accordingly, the appellants' summons included an application for an extension of time in which to seek such leave pursuant to r 51.10.2 of the UCPR. That application was opposed by the Council although, if granted, the Council did not oppose the grant of leave to appeal.

8 The application for an extension of time was supported by an affidavit sworn 28 July 2009 of Tony Agostino, the appellants' son, who deposed that he had had the day-to-day care of the proceedings on behalf of his parents. In paragraphs 7 and 8 of that affidavit Mr Agostino deposed that on 19 June 2009 he sought advice from Mr Adrian Walmsley, a solicitor in Windsor (a solicitor different to the one who had represented the appellants in the proceedings before the primary judge). On 24 June 2009 he instructed Mr Walmsley to brief new counsel (not being the counsel who had appeared on their behalf before her Honour).

9 There was some delay in the appellants' original solicitors providing their file to Mr Walmsley. He received the file on 13 July 2009 and thereafter sought counsel's advice.

10 On 16 July 2009 Mr Walmsley wrote to the solicitors for the Council wherein they were notified that appeal documents would be served upon them as soon as they were available.

11 The Council submitted that although it was not prejudiced by the fact that the summons was not filed in accordance with the UCPR, nevertheless the grounds advanced in Mr Agostino's

affidavit explaining his failure to file within time did not provide a sufficient basis for an extension of time as it related to a delay in the seeking of alternative advice with respect to the prospects of a successful appeal from the primary judge's decision. Nevertheless, the Council accepted that the delay was explained.

12 In my view the explanation provided by Mr Agostino in his affidavit is sufficient to support an extension of time which should therefore be granted. It follows from the foregoing that leave to appeal should also be granted, such leave being unopposed by the Council once an extension of time is granted. In any event, whether opposed or not, the appellants' case is sufficiently arguable to justify a grant of leave.

The relevant provisions of the LEP

13 The LEP was gazetted on 12 July 1991. As originally gazetted the LEP prohibited the development of the land for the purposes of a fruit and vegetable store under its Rural "A" zoning. This was because shops (other than convenience stores, general stores and produce stores) were prohibited by the combined operation of clause 9(2)(c) and clause 4 of the Table referred to in clause 9(1) of the LEP with respect to that zone.

14 Clause 41 was added to the LEP by LEP 201 Amendment No.1 and published in the Government Gazette on 20 March 1992. It was further amended by LEP 201 Amendment No. 8 which was published in the Gazette on 19 December 1997. It provides as follows:

> "(1) This clause applies to land situated adjacent to Third Avenue, Llandilo, being Lot 2, DP 221473, shown edged heavy black on the map marked 'Penrith Local Environmental Plan No. 201 (Rural Lands) (Amendment No. 1)'.
>
> (2) For the purpose of this clause:
>
> '**floor area**' means the whole of the area used for the display and storage of goods ad merchandise within a fruit and vegetable store, but does not include an area used for the bulk storage of produce (whether in a cool room or otherwise) pending display or sale;
>
> '**fruit and vegetable store**' means a building or place used primarily for selling or exposing for sale by retail, fruit and vegetables and, as an ancillary use only, the selling or exposing or offering for sale by retail of bread, milk, cigarettes, confectionary, soft drinks, fruit juice, flowers, potted plants, pasta, eggs and honey only.
>
> (3) Notwithstanding any other provision of this plan, a person may, with the consent of the council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150 sq.m.
>
> (4) The council shall not grant consent to the carrying out of development as referred to in subclause (3) unless arrangements satisfactory to the council have been made with the council or the Water Board with regard to the supply of water and disposal of effluent."

15 As the appellants place a deal of reliance upon clause 42 of the LEP (which was inserted in 2004) in support of its submission that the words "*with a maximum floor area of 150m²*" in clause 41(3) was a "*development standard*" within the meaning of the definition of that

expression in s 4(1) of the *Environment Planning and Assessment Act* 1979 (the EP&A Act), it is appropriate to set it out in full:

> "(1) This clause applies to land at Mamre Road, Kemps Creek, being land shown edged heavy black on the map marked 'Penrith Local Environmental Plan No 201 (Rural Lands) Amendment No 10'.
>
> (2) Despite any other provision of this plan, a person may, with the consent of the Council, carry out development on the land to which this clause applies for the purposes of a produce store and wholesale and retail plant nursery.
>
> (3) The Council must not grant consent to the carrying out of such development unless:
>
> (a) the Council has taken into consideration whether the development would adversely affect the existing or future service and safety levels of roads into and out of the development site, and
>
> (b) vehicular access into the development site is via the signal-equipped intersection of Mamre Road and Baker's Lane.
>
> (4) In this clause:
>
> ***produce store*** means a building or place, not exceeding 650m² in gross floor area with an attached awning not exceeding 330m², that is used for the sale by retail or storage of:
> (a) grain, or
>
> (b) stock feed, or
>
> (c) fertilizer, or
> (d) veterinary medicine,
> and includes any ancillary office or toilet facilities.
>
> ***wholesale and retail plant nursery*** means a building or place used for any one or more of the following purposes:
>
> (a) the growing and retail selling of plants, where the growing and propagation area does not exceed 1,600m²,
>
> (b) the storage of nursery items within a shade house,
>
> (c) the storage and retail selling of bulk landscape supplies including sand, mulch and compost, and materials such as fence rails, posts, gates, logs and firewood."

16 As I have indicated, subject to clause 41(3), a fruit and vegetable store was a prohibited use within the subject zone. In this respect it was common ground that such a store constituted a "*shop*" as that word is defined in clause 5(1) of the LEP, namely, a building or place used for the purposes of selling, exposing or offering for sale by retail, goods, merchandise or materials. It was not suggested that the appellants' fruit and vegetable store was a convenience store, general store or produce store, which uses are permissible within the zone and are exceptions to the general definition of "*shop*". Each of those terms is also defined in clause 5(1) of the LEP

but not in a manner that purports to limit their floor area. Thus a "*convenience store*" is relevantly defined to mean a building or place

> "used for the purpose of selling, exposing or offering for sale by retail principally groceries, small goods and associated small items."

17 A "*general store*" is defined to mean:

> "a shop used for the sale by retail of general merchandise and which may include the facilities of a post office"

and the expression "*produce store*" is defined to mean

> "a building or place used for the sale by retail of grain, stock feed, fertilizer and veterinary medicine."

18 Notwithstanding the generality of those definitions, clause 18 of the LEP seeks to limit the floor area and location of convenience and general stores. It is in the following terms:

> "The council shall only grant consent to the establishment of a convenience store or general store on land to which this plan applies where the gross floor area of the store does not exceed 200 square metres and the store is more than 3 kilometres from another general store or convenience store in the area."

19 There is no such limitation on a "*produce store*" which is probably understandable given the nature of such a store and its obvious appropriateness from a planning point of view within a rural zone.

20 It was properly conceded by the Council that clause 18 constituted a "*development standard*" as defined. That expression is relevantly defined in s 4(1) of the EP&A Act to mean:

> "provisions of an environmental planning instrument … in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing requirements or standards in respect of:
> (a) … the distance of any land … from any specified point,
> ….
> (d) the … floor space of a building."

21 It will be appreciated from the foregoing that clause 18 of the LEP contains both a requirement with respect to the floor space of a convenience store or general store as well as a requirement directed to the distance of any such store from a specified point.

22 The EP&A Act only makes one reference to the expression "*development standards*" and that is in s 26(1)(b) which relevantly provides as follows:

> "Without affecting the generality of section 24 or any other provision of this Act, an environmental planning instrument may make provision for or with respect to any of the following:
> …
> (b) controlling (whether by the imposing of development standards or otherwise) development."

23 The word "*control*" is relevantly defined in s 4(1) of the EP&A Act in relation to development to mean:

> (a) consent to, permit, regulate, restrict or prohibit that development …"

24 Clause 18 of the LEP is such a control. It seeks to regulate two forms of development which are made permissible with consent in, relevantly, the Rural "A" Zone pursuant to the Table to that zone. As such, being a development standard, it is subject to being relaxed pursuant to the provisions of *State Environmental Planning Policy No 1* (SEPP No 1).

The relevant principles for determining whether clause 41(3) contains a development standard

25 The issue of whether a particular provision of an environmental planning instrument constitutes a development standard or a prohibition has engaged the time of this Court on a number of occasions. Notwithstanding pleas by individual judges that such disputes, of which the present case is another example, constitute a waste of resources and could easily be resolved by appropriate drafting of such instruments, those pleas appear to have gone unheeded by those engaged in the drafting of local environmental plans and other such planning instruments.

26 The problem was adverted to by McClellan CJ at CL in *Residents against Improper Development Inc and Another v Chase Property Investments Pty Ltd* [2006] NSWCA 323; (2006) 149 LGERA 360 at [212] and [214], comments with which I agreed at [92]. The problems raised by the definition of "*development standards*" to which I have referred were also the subject of comment by Ipp JA in *Blue Mountains City Council v Laurence Browning Pty Ltd* [2006] NSWCA 331; (2006) 150 LGERA 130; (2006) 67 NSWLR 672 at [7]-[8]. In those and subsequent paragraphs of his judgment, his Honour exposes the difficulties associated with the resolution of the issue as to whether a particular provision of a local environmental plan is or is not a development standard: difficulties which could be avoided if the suggestions of McClellan CJ at CL were to be adopted.

27 As I have indicated, there are a number of decisions of this Court which discuss and state the principles or approaches to the resolution of a dispute such as the present. They are (in chronological order) *Woollahra Municipal Council v Carr* (1987) 62 LGRA 263 (Samuels, Priestley and McHugh JJA); *North Sydney Municipal Council v P D Mayoh Pty Ltd [No 2]* (1990) 71 LGRA 222 (Kirby P, Mahoney and Clarke JJA); *Strathfield Municipal Council v Poynting* [2001] NSWCA 270; (2001) 116 LGERA 319 (Giles and Heydon JJA, Young CJ in Eq); *Lowy v The Land and Environment Court of NSW and Others* [2002] NSWCA 353; (2003) 123 LGERA 179 (Mason P, Handley and Giles JJA); *Residents Against Improper Development Inc and Another v Chase Property Investments Pty Ltd* [2006] NSWCA 323; (2006) 149 LGERA 360 (Giles and Tobias JJA, McClellan CJ at CL); and *Blue Mountains City Council v Lawrence Browning Pty Limited* [2006] NSWCA 331; (2006) 150 LGERA 130; (2006) 67 NSWLR 672 (Ipp, Tobias and Basten JJA).

28 I do not propose to reiterate in detail the principles that have emerged from the above cases as I discuss them at some length in *Lawrence Browning* at [35] to [47]. Although we reached the same conclusion, Basten JA in that case adopted a slightly different approach at [74] to [85].

29 In *Poynting* Giles JA adopted what he referred to as a two-step approach, namely, whether the relevant provision prohibited a proposed development under any circumstances, in which event that provision was not a development standard, and a second step (which was only relevant if the first step was determined in the negative) as to whether the provision specified a

requirement or fixed a standard in relation to an aspect of the (non-prohibited) development. Ipp JA in *Lawrence Browning* at [15] noted that the first step involved determining whether the provision being considered prohibited the proposed development whereas the second step involved determining whether the provision specified a requirement or a standard in respect of an *aspect* of the development. At [16] he tended to agree with the observations of Basten JA in the same case which drew attention to the inherent difficulties of that two-step approach: see at [85]. However, it is unnecessary in the present case to elaborate further on that aspect of the debate.

30 Nevertheless, it would seem that Basten JA's preferred approach, as articulated by him in *Lawrence Browning* at [80] and [81] simply depended upon the terms and structure of the particular planning instrument under consideration. This is not inconsistent with the approach of Giles JA in *Lowy*: see at [116]. In particular, it could be said in summary that Basten JA's approach required one to first determine what were the essential elements of the permissible development. Thus, at [77], after referring to what McHugh JA (as he then was) had said in *Carr* (at 269-270), his Honour observed:

> "Thus a prohibition on a particular kind of development will not be a development standard if the characteristic or criterion engaging its operation is an essential element of the particular development, rather than a standard or requirement in respect of an aspect of the proposed development."

31 *Carr* was a classic case in this regard and one heavily relied upon by the appellants in the present case. Under the relevant zoning what was permissible with consent was "*professional consulting rooms*", an expression relevantly defined in the applicable planning instrument to mean

> "… a number of rooms forming part of … a dwelling house and used or intended for use by not more than … three dentists … who practise therein the profession of … dentistry … and … who employ not more than three employees in connection with such practice."

32 The respondent in that case had applied to the council for development consent to carry out the development described as

> "professional dental consulting rooms forming part of a dwelling house used by not more than three dentists who in partnership practise dentistry therein and who employ not more than seven employees in connection with such practice."

33 It was submitted that the requirement in the definition that there be only three employees was a development standard. This Court rejected that submission. McHugh JA observed (at 269) that the Land and Environment Court Assessor had overlooked

> "the essential condition that the requirements specified or standards fixed in respect of any aspect of the development must be requirements or standards which, ex hypothesi, are external to the aspects of that development. A provision is not a specified requirement or fixed standard 'in respect of' an aspect of a development until the development and its aspects are defined."

34 His Honour had earlier made the point on the same page that the only development that was permissible in the relevant zone was "*professional consulting rooms*" as defined. A dentistry

practice having more than three employees simply fell outside the terms of that definition. As such, it was a form of development that was not provided for by the planning instrument as being permissible.

35 In other words, as McHugh JA observed, the development could not be carried out even if the requirement of three employees was eliminated, as there was no other relevant category in the relevant planning instrument that permitted a dental surgery with more than three employees in the relevant zone. The use of premises as a dental surgery with more than three employees was not the use of a building for "*professional consulting rooms*" as defined.

36 *Carr* was referred to by Clarke JA in *Mayoh* where his Honour (at 237) noted that the point being made by McHugh JA was simply that the relevant provision in the definition of "*professional consulting rooms*" relating to the number of employees, did not lay down a standard against which the proposed development could be measured as the number of employees formed part of the definition of the permissible development. His Honour continued:

> "If, for instance, in the present case, residential flat buildings were defined in the table in clause 9 as meaning residential flat buildings with no more than two storeys, no part of that definition could be regarded as a development standard."

37 This last observation, in my view, is of particular relevance to the resolution of the present issue.

The decision of the primary judge

38 After referring to the relevant provisions of the LEP, the parties' submissions and the authorities there referred to, her Honour's conclusions are encapsulated in the following paragraphs of her judgment:

> "29 Clause 42 applies to specified land in the rural zone (as does cl 41 in relation to the Applicant's land) and allows development with consent of a produce shop and wholesale and retail plant nursery. The Applicant accepted that cl 42 did contain a prohibition on particular shops (and was not therefore a development standard) but argued that as the whole of the area of a produce store was included in the definition in cl 42(4), unlike cl 41(2), that supported a finding that the floor area in cl 41(3) is a development standard. The Applicant's submissions emphasised that the maximum floor area in cl 41(3) is but an aspect of the development, given that fruit and vegetable stores up to 150 sq m are permissible with consent under the clause. This argument was said to be strengthened by the fact that floor area as defined in the definition does not include the whole of the area of fruit and vegetable store, in contrast to cl 42 of the LEP. Clause 42 contains a definition of produce store and wholesale and retail plant nursery which includes all of the areas occupied by such stores. I do not consider that is an important distinction in the LEP, it simply reflects different drafting approaches taken to the LEP at different times. Clause 41 was inserted into the LEP in March 1992 and amended in December 1997 whereas cl 42 was inserted in May 2004.
> 30. That shops including fruit and vegetable stores are otherwise prohibited on the Applicant's land but for cl 41(3) is important in determining whether cl 41(3) is a development standard, contrary to the

> Applicant's submission (par 14). When the provisions of the LEP are considered as a whole the requirement in cl 41(3) that a fruit and vegetable store on the Applicant's land have no more than 150 sq m of floor space as defined in the clause is the description of the permissible development. The floor area is not a separately identified control imposed on the development, but rather is an essential element of the development, which are considerations referred to by Basten JA in *Browning* at [79]-[80] (at par 20). This suggests that cl 41(3) is not a development standard. That conclusion is not undermined by the existence of clause 18 which does deal generally with development standards for certain types of shops. That conclusion is supported by the provisions in clause 42 as discussed in the previous paragraph."

39 For the reasons set out below, in my opinion her Honour's reasoning in those paragraphs of her judgment is correct and discloses no relevant error.

The submissions of the parties

40 The appellants' submissions may be summarised as follows:

> (a) The definition of "*fruit and vegetable store*" in clause 41(2) did not contain any limitation on floor area;
>
> (b) It was to be contrasted with the definitions of "*produce store*" and "*wholesale and retail plant nursery*" in clause 42(4);
>
> (c) It was also to be contrasted with the definition of "*professional consulting rooms*" which was the subject of *Carr*;
>
> (d) It therefore followed that the essential elements of the development made permissible by clause 41(3) were those set out in the definition of "*fruit and vegetable store*" in clause 41(2) so that the additional words "*with a maximum floor area of 150m²*" did not form part of that which was permissible. In other words, that which was permissible was a fruit and vegetable store per se so that the additional requirement of a maximum floor area of 150m² was a requirement specified in respect of an aspect of the proposed additions and extensions to the existing store, namely, the floor area used for the display and storage of goods and merchandise within the store: see the definition of "*floor area*" in clause 41(2);
>
> (e) Accordingly, so much of clause 41(3) as provided for a maximum floor area of 150m² was neither relevant to nor determinative of the development which was made permissible by clause 41(3);
>
> (f) The draftsperson of clause 41 could not be taken to have overlooked the relevance of this Court's decision in *Carr* so that if he or she had intended that the maximum floor area of 150m² was to be an essential element of the permissible use, then that control would have been made part of the definition of "*fruit and vegetable store*" in clause 41(2). The influence of *Carr* on the drafting of clause 42 was manifest.

41 The Council's submissions may be summarised thus:

(a) The fact that the definition of "*fruit and vegetable store*" in clause 41(2) did not contain a floor space control so that the present case was different from *Carr*, did not require a finding that the words "*with a maximum floor area of 150m²*" in clause 41(3) did not constitute an essential element of that which that provision made permissible;

(b) On its proper construction the words "*fruit and vegetable store with a maximum floor area of 150m²*" in clause 41(3) must be read as a collate phrase and not as two separate aspects of the one development;

(c) Critically, but for clause 41(3) the appellants' proposed development was prohibited within the subject zone: clause 41(3) provided only a limited exception to that prohibition;

(d) It was open to the draftsperson to make the maximum floor area of 150m² an essential element of the permissible use in any appropriate manner provided that intention was made manifest by the words employed and the manner in which they were employed; he or she was not confined to imposing that control in the definition of "*fruit and vegetable store*" in clause 41(2) on the basis that if it did not appear in that definition then, on the authority of *Carr*, it must be a development standard;

(e) As far as the definition of "*development standards*" is concerned, it speaks of the provisions of an environmental planning instrument in relation to the "*carrying out*" of development; the development, therefore, to which reference is being made is one which may be carried out, that is, development which is permissible. It is thus necessary to determine precisely what is permissible before one can determine whether what is proposed is permissible;

(f) In the present case, what is permissible is a fruit and vegetable store (as defined) with a maximum floor area (as defined) of 150m². What is proposed is a fruit and vegetable store with a floor area (as defined) which substantially exceeds 150m². Such a development is simply not permissible. In essence clause 41(3), when combined with the definitions in clause 41(2), sets out the criteria of the only shop-type development that is permissible within the zone. It is, in effect, a zoning provision in that clause 4 of the zoning table to the Rural "A" Zone (which identifies the development prohibited in the zone) could have been amended to prohibit, relevantly,

> "shops (other than convenience stores, general stores, produce stores and a fruit and vegetable store with a maximum floor area of 150m²)."

42 If the zoning table had been so amended, it could not be suggested that a fruit and vegetable store having a floor area in excess of 150m² was a permissible use. The position is a fortiori given that clause 41 is applicable to only one parcel of land in the subject zone.

Prohibition or development standard?

43 As has been stated on a number of occasions in the authorities to which I have referred, at the end of the day what is involved in the resolution of the present issue is a question of construction of the particular provisions of the particular planning instrument under consideration. The starting point in the present case, in my view, is the proposition that prior to

the insertion of clause 41 into the LEP, a fruit and vegetable store, being a shop (as defined) was a prohibited use. Clause 41 was inserted as an exception to that general prohibition to provide for a particular permissible use on a particular parcel of land.

44 The description of that permissible use is to be found in clause 41(3). In my view the Council's submission that the proper description of that use is a "*fruit and vegetable store with a maximum floor area of 150m²*" should be accepted so that any such store with a floor area (as defined) exceeding that maximum falls outside the purview of clause 41(3) and is thus prohibited.

45 In *Lawrence Browning* Basten JA (at [102]), when dealing with the proper identification of the development proposed in that case, observed:

> "Part of that identification should have included reference to the zoning criteria for the land on which the proposed development is to take place. That is because the particular zoning criteria are essential considerations in determining whether the development is permissible. It is clear that, had the erection of dwelling houses been proposed with respect to land on which such a development was not permitted, the decision would have been different. If the consolidation requirement were understood to be a part of the zoning of the land, on the same logic the result would have been different."

46 In the present case, what one is required to do is to identify the proposed development and then to determine whether it falls within the description of that which clause 41(3) makes permissible with consent. In performing this exercise it is necessary to identify which criteria are essential conditions in determining whether the particular development proposed is permissible. Thus as Giles JA observed in *Lowy* at [116], it is necessary to first address the LEP by reference not only to principle but also to its own structure and provisions. In so doing care is also to be taken to ensure that form does not govern substance: *Poynting* at [93].

47 What are those criteria in the present case? As a matter of language, in my view the criteria, which are the essential considerations for determining the permissibility of the proposed development of the appellants, are two-fold. First, the proposed development must be a fruit and vegetable store as defined. Second, it must have a maximum floor area (as defined) of 150m². That which is proposed satisfies the first criterion but not the second. It is therefore prohibited.

48 In oral argument it was suggested that given the definition of "*development standards*" in s 4 (1) of the EP&A Act, one is only concerned to determine what is the development in respect of which requirements are specified or standards are fixed regarding an aspect of that development. Given the definition of "*development*" in that section as including the erection of a building, it followed, so it was suggested, that the only building proposed to be erected in the present case was an extended fruit and vegetable store so that it followed that the words "*with a maximum floor area of 150m²*" in clause 41(3) were no more than a requirement specified in respect of an aspect of that building, namely, its floor area.

49 But such a contention overlooks the fact that the definition of "*development standards*" is referrable only to provisions of an environmental planning instrument "*in relation to the carrying out of development*". Thus the development in respect of which it is asserted that the relevant provision is a development standard must be one which may be carried out; that is, one which is permitted or permissible. One can only determine that question by reference to the terms of the planning instrument.

50 In my respectful view therefore, the approach referred to in [48] above is to put the cart

before the horse. Before one comes to the definition of "*development standards*" one is required to determine precisely what is the permissible or, as Giles JA described it in *Poynting* at [97], the "*non-prohibited*" development. For it is only when one determines what precisely is permissible that one can measure that which is proposed against it in order to determine whether it is permissible or prohibited: if you like, the first step described by Giles JA in *Poynting*.

51 Furthermore, controlling development by the imposition of development standards as contemplated by s 26(1)(b) in the EP&A Act is only relevant to a development that is otherwise permissible. It is an oxymoron to suggest that a development that is controlled by way of a prohibition (see the definition of "*control*" at [23] above) can also be controlled (regulated) by a development standard. Accordingly, it is only once one has determined what is permissible that one can then consider whether that which is proposed is permissible and, if it is, whether any other regulatory controls are development standards (as defined) for the purpose of applying SEPP No 1.

52 In effect, clause 41(3) is definitional in substance if not in form. True it is that the words "*with a maximum floor area of 150m²"* could have been inserted into the definition of a "*fruit and vegetable store*" in clause 41(2). But that was not the only method by which the draftsperson of clause 41 could achieve what I consider to be the result intended. Certainly, had the *Carr* approach been taken as it was with respect to clause 42, then no doubt the present litigation would not have been instituted. But the *Carr* approach is not the only way the draftsperson could set out the criteria that were to be the essential elements of that which was to be permissible.

53 Although for present purposes one can assume that the draftsperson of clause 42 had *Carr* in mind, it is to be noted, as the Council submitted, that that clause was inserted into the LEP after, and therefore with knowledge of, the decision in *Agostino No 1* that clause 41(3) prohibited the development to which it referred if its floor area (as defined) exceeded 150m². Thus the fact that clause 41(3) did not adopt the *Carr* approach whereas clause 42 did, does not mandate that the former should be construed as containing a development standard with respect to floor area. As the primary judge observed at [29], clause 42 simply reflected a different drafting approach taken to the LEP at a different time.

54 The point is further illustrated, as the Council submitted, by clause 41(4) which falls into a different category to the concluding words of clause 41(3). The provision in clause 41(4) with respect to the supply of water and disposal of effluent falls within sub-paragraph (m) of the definition of "*development standards*", namely, "*the provision of services, facilities and amenities demanded by development*". It is clearly a development standard as it is a requirement specified in respect of an aspect of the development which is otherwise permissible under clause 41(3). In my view, the separation of clause 41(4) from clause 41(3) supports the conclusion that I have reached.

55 Finally, as Basten JA observed in *Lawrence Browning* at [81], it does not follow that only those elements that are included in the zoning table of a planning instrument are to be included as the essential elements of a development. There may be other elements in a particular instrument that should properly be treated in the same way as the zoning table.

56 The present, in my opinion, is such a case. As clause 41 was intended to apply only to the land, it was inappropriate to amend the zoning table in the manner exemplified at [41(f)] above. But the same effect was achieved by the structure and wording of clause 41(3). Although not in the zoning table, the relevant permissible development was described and, in substance, defined in a manner essentially identical to the example referred to by Clarke JA in *Mayoh*, which I have extracted at [36] above. There is no relevant difference in my view between a permissible use defined as a residential flat building with no more than two storeys and a fruit and vegetable

store with a maximum floor area of 150m². Neither contains a development standard.

57 It follows that no part of clause 41(3) is a separate and independent provision intended to control an aspect of that which is otherwise made permissible. It is, in substance, a form of zoning provision. Taken as a whole, it describes or defines that which is permissible as an exception to the general prohibition in the Table to the subject zone of a fruit and vegetable store on land within that zone.

Conclusion

58 For the foregoing reasons in my opinion the primary judge was correct in concluding that the development the subject of the appellants' development application was prohibited as it proposed a fruit and vegetable store with a floor area which exceeded the maximum of 150m².

59 I would therefore propose the following orders:

(a) Extend the time for the filing by the appellants of their summons for leave to appeal up to and including 30 July 2009;

(b) Grant leave to appeal;

(c) Dismiss the appeal with costs.

60 **McCLELLAN CJ at CL**: I have had the benefit of reading the judgment of Tobias JA in draft. I regret that I cannot agree with his Honour's decision.

61 I agree for the reasons his Honour gives that leave to appeal should be granted. However, I would uphold the appeal.

62 The saga of litigation in relation to SEPP 1 is well known to environmental planners and legal practitioners. Ipp JA's acerbic remarks in *Blue Mountains City Council v Laurence Browning Pty Ltd* (2006) 67 NSWLR 672 identified the logical quagmire into which the law has descended. The wastage of public and private money debating these issues is a blight upon our planning system which should be resolved, preferably by legislative intervention or amendment to individual planning instruments.

63 The problems started with the decision of this Court in *Woollahra Municipal Council v Carr* (1987) 62 LGRA 263, although not because of the decision itself but rather the manner of its later interpretation and application. The planning instrument in *Carr* was in the conventional form of Planning Scheme Ordinance made under the *Local Government Act* 1919. Under an ordinance all land was zoned (or reserved). When land was included in a particular zone development of the land was made permissible for identified purposes, either with or without development consent or was prohibited. In the zone with which Carr was concerned the use of land for the purpose of "professional/consulting rooms" was permissible. However, "professional consulting rooms" was defined by the ordinance to mean a number of rooms, inter alia, "used or intended for use … by not more than three dentists … and who employ not more than three employees." The developer sought to use the relevant building for a dental surgery with not three but seven employees. The consequence was that the proposed use was not as "professional consulting rooms" as defined – there would be too many employees. Because the use was not for "professional consulting rooms" there was no purpose for which the land could be lawfully used and the proposed development was prohibited. As McHugh JA said (at 269) "the respondent's submission requires the rewriting not of a 'development standard' but of the

definition of a permitted use – 'professional consulting rooms'."

64 It is important to appreciate that the problem in *Carr* was not approached by asking the question "is the relevant provision a development standard or a prohibition", the question which has often been asked in later cases. As McHugh JA indicated a relaxation of the control over the number of employees had the consequence that the proposed use would change to a purpose which was prohibited. The outcome in *Carr* was not arrived at because the provision was not a development standard but rather because the proposed development was for a prohibited purpose.

65 The emphasis in later cases has tended to be on the judgment of McHugh JA. The judgment of Priestley JA is equally instructive. His Honour was prepared to accept, at least for the sake of argument, that the numerical limit on the number of employees in the definition of "professional consulting rooms" was a development standard. Being a "requirement" it obviously was. The problem was that because the relaxation of the number of employees altered the purpose for which the premises were proposed to be used "it was not accurate to say that development could but for the development standard contained in the definition of professional consulting rooms be carried out under the Act" (p 267).

66 As with the application of any statutory or regulatory provision the question of whether or not a particular control on development is a development standard will depend upon whether that control falls within the definition of "development standard" in the *Environmental Planning & Assessment Act* 1979. That definition is in the following terms:

> ***"development standards*** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:
>
> (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
> (b) the proportion or percentage of the area of a site which a building or work may occupy,
> (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
> (d) the cubic content or floor space of a building,
> (e) the intensity or density of the use of any land, building or work,
> (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
> (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
> (h) the volume, nature and type of traffic generated by the development,
> (i) road patterns,
> (j) drainage,
> (k) the carrying out of earthworks,
> (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
> (m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and
(o) such other matters as may be prescribed."

67 Accordingly, to be a development standard a provision of a planning instrument must be one "in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development."

68 To my mind a provision in a planning instrument which specifies any numerical control of a proposed development almost certainly will be a "development standard" as defined. It will at the least be a provision fixing a requirement in respect of the identified aspect of that development. Accordingly, where a planning instrument permits the erection of a building but imposes a height control, provided the proposal is to erect a building to be used for a purpose permissible within the relevant zone, the height control will be amenable to variation under SEPP 1. If it happens that the purpose is defined by reference to a maximum height (which is possible but would be unusual) then SEPP 1 may not be utilised to relax the provision.

69 Much of the discussion of SEPP 1 in recent cases has turned upon a search to discern whether a particular provision is a "zoning requirement", sometimes referred to as a "zoning function", or is a "development standard" see *Blue Mountains City Council v Laurence Browning Pty Ltd* (2006) 67 NSWLR 672 and the discussion by Basten JA of the decisions in *Lowy v Land and Environment Court of New south Wales* (2002) 123 LGERA 179, *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319. At [79] of *Browning* Basten JA accepts the proposition that if a LEP prohibits a particular form of development in a particular zone, that provision will not generally be considered a development standard, whereas if a particular form of development is permitted with consent in the specified zone, but further and separately identified controls are imposed on such developments, the further controls may constitute development standards. His Honour said: "Self evidently, the drafter of a LEP may be able to achieve the desired result by a zoning provision, or by a development standard, the way in which it is done will be important, because of the need to distinguish a development standard from other forms of prohibition."

70 With respect to his Honour and others who have reasoned in this manner I believe that greater clarity in the language is required. Use of the word "form" masks the real object of the provision. If the use of land or building for a particular purpose is prohibited in a zone then, although a particular requirement or standard may be amenable to SEPP 1 if it makes the development one for a use which is prohibited, resort to SEPP 1 will be of no avail. But that does not mean that the relevant provision is not a development standard.

71 Basten JA criticised the two stage process of analysis discussed by Giles JA in *Poynting* and, in my opinion, he was correct to do so. The only question which must be answered is whether the relevant provision comes within the definition of a development standard, which requires consideration of the definition and the particular provision. It will not be answered by seeking to describe the provision as either a development standard or a zoning provision. That approach as, with respect, the majority decision in the present case illustrates is productive of error. By asking first whether the control operates as a prohibition is to ask the wrong question. Every requirement or standard amenable to SEPP 1 will be a prohibition.

72 The relevant concepts were usefully discussed by this Court in another of the earlier decisions: *North Sydney Municipal Council v Mayoh Pty Ltd [No 2]* (1990) & LGRA 222 particularly by Clarke JA. In that case the court held, by majority, that clause 14A(1)(a) of the North Sydney LEP 1989 which provided that a residential flat building shall not be erected on land in the relevant zone if any principal building on adjoining land was less than three stories was not a development standard. It was not a provision which specified a requirement or fixed a

standard in respect of an aspect of the proposed development. Rather it prohibited development of any residential flat building on land which adjoined land on which the principal building was less than three stories. There was no relevant aspect of the proposed development which could be relieved by the application of SEPP 1.

73 The difficulties of which Ipp JA spoke in *Browning* have led to endeavours in some cases to categorise a provision by asking whether it relates to an "essential element" of the development. If it is concluded that it does then it has been suggested that it will not be a development standard and compliance may not be relieved by SEPP 1 (*Poynting* [36]).

74 With respect every numerical control on development proposed under a LEP is capable of being described as "an essential element." A height control which confines the maximum height of a building on a particular parcel of land to three stories is an essential element but without question a development standard (see that aspect of the decision in *Mayoh* discussed in [22] and [23] below). If however, the purposes permissible on the land incorporate a numerical control and a variation of that control will change the proposed purpose to one which is prohibited then the proposed development is not capable of being given consent – not because the numerical control is not a development standard but rather because the development of the land for the proposed purpose is prohibited.

75 In the present case the relevant land has been included within Zone No (1)(a) (Rural "A" Zone – General) under Penrith Local Environmental Plan No 201. Within that zone the use of land for the purpose of a fruit and vegetable store is prohibited. All shops (which of course includes a fruit and vegetable store) are prohibited, other than convenience stores, general stores and produce stores (clause 9(2)(c) and clause 4 of the table referred to in clause 9(1) of the LEP).

76 However, clause 41 makes special provision for the subject land. The clause contains its own definition of "floor space" and of "fruit and vegetable store." It then provides that the land may be developed for a "fruit and vegetable store" ie a building may be erected and used for that purpose, and provides that the maximum floor area of such a building is 150 sq m.

77 The provision is as follows:

> "(1) This clause applies to land situated adjacent to Third Avenue, Llandilo, being Lot 2, DP 221473, shown edged heavy black on the map marked "Penrith Local Environmental Plan No. 201 (Rural Lands) (Amendment No. 1)".
> (2) For the purpose of this clause:
> **'floor area'** means the whole of the area used for the display and storage of goods and merchandise within a fruit and vegetable store, but does not include an area used for the bulk storage of produce (whether in a cool room or otherwise) pending display or sale;
> **'fruit and vegetable store'** means a building or place used primarily for selling or exposing for sale by retail, fruit and vegetables and, as an ancillary use only, the selling or exposing or offering for sale by retail of bread, milk, cigarettes, confectionary, soft drinks, fruit juice, flowers, potted plants, pasta, eggs and honey only.
> (3) Notwithstanding any other provision of this plan, a person may, with the consent of the council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store

> with a maximum floor area of 150 sq.m.
> (4) The council shall not grant consent to the carrying out of development as referred to in subclause (3) unless arrangements satisfactory to the council have been made with the council with regard to the supply of water and disposal of effluent."

78 To my mind it is plain that the 150 sq m maximum is a requirement fixed in respect of an aspect of the development – ie its floor space. As such it is a provision within the meaning of development standard as defined. As subclause 3 itself makes plain the purpose for which the land may be used with consent is a fruit and vegetable store. Allowing a variation of the floor area so that it exceeds 150 sq m is not to permit a change in the purpose for which the land is to be used. A larger building will remain a fruit and vegetable store.

79 Clause 41 was inserted after the decision in *Carr*. If the draftsman had intended to put sub clause (3) beyond the reach of SEPP 1 all that was necessary was to include in the definition of fruit and vegetable store a floor space requirement. As Tobias JA points out that approach was taken to the drafting of clause 42 but not to clause 41.

80 To my mind the result of the analysis favoured by the majority in the present case cannot be reconciled with the decisions in *Carr* or *Mayoh*. I have already discussed clause 14A(1)(a) of the North Sydney LEP 1989 which the court said in *Mayoh* was not a development standard. However, clause 14A(2) was in the following terms:

> "(2) A residential flat building should not be erected on land in Zone No 2(c) if the building has more than 3 storeys measured vertically above any point at natural ground level."

81 The court held that this was a development standard (Mahoney JA at 234; Clarke JA at 238). Their Honours reached this conclusion by asking the question whether the provision provided that on the relevant "land development may be carried out in a particular way or to a particular extent" (Mahoney JA) and whether it provided a "standard" (Clarke JA).

82 I mean no disrespect to Tobias JA's reasoning but the approach which his Honour adopts to the description of a permissible use seems to be novel. In my experience planning instruments do not describe a use of land by reference to floor space. In any event in the present case the draftsperson has gone to the trouble of defining the use which, by exception to the general prohibition, may be permitted on the land. He or she did not define that use by reference to a numerical limit on the floor space. Quite the contrary. Under clause 41(3) the permissible use is that which has been defined by clause 41(2) as a "fruit and vegetable store" on which a "requirement" or "standard" with respect to floor area is imposed.

83 Tobias JA suggests that the analysis I prefer puts the cart before the horse. With respect to both his Honour and Giles JA the approach which they have taken and which follows the two stage test suggested in *Poynting* confirms the wisdom in Basten JA doubting that approach. The relevant question is not to ask firstly what is permissible. It is as McHugh JA emphasised in *Carr* to identify the proposed development. One then asks is the relevant provision a "requirement" or "standard" in relation to an aspect of that development. If it is it will be a development standard. Only if, for a reason other than the necessity to vary the requirement or standard the development is prohibited, must development consent be refused.

Orders

84 I would make the following orders:

1. Grant leave to appeal from the decision of the Land & Environment Court given on 4 June 2009.

2. Allow the appeal and set aside the judgment below.

3. Answer the separate question as follows:

> "Whether the provision in Clause 41(3) of Penrith Local Environmental Plan No 201 (rural Lands) of a maximum floor area of 150 square metres for a fruit and vegetable store permitted by that clause, comprises a development standard or a prohibition upon development for the purposes of a fruit and vegetable store having an area greater than 150 square metres.
> Answer: Yes"

4. Order the Council to pay the costs of the applicant of the proceedings in this Court.

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