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| JRPP No. | Item 2 (2009SYW 002) |
| DA No. | N0283/09 – 23B MacPherson Street, Warriewood (Lot 11 DP 5464) – Construct a retail facility comprising a 3,200 supermarket, 750 sqm speciality shops and café, parking for 150 vehicles, a 2 bedroom caretakers unit, and associated landscaping and creekline |
| Applicant: | WARRIEWOOD PROPERTIES PTY LTD (Own) |
| Report By: | PRINCIPAL PLANNING OFFICER DEVELOPMENT- PITTWATER COUNCIL |

Assessment Report and Recommendation

SUMMARY OF RECOMMENDATION

REFUSAL

EXECUTIVE SUMMARY

This report assesses the proposal for a retail facility on the site at 23B Macpherson Street, Warriewood, against the provisions of state and local statutory and non-statutory policies, and various strategic planning documents. The consent authority for this proposed development is the Sydney East Joint Regional Planning Panel.

Submissions made by the public with respect to the proposal have been considered in accordance with the requirements of the EPA Act 1979. The provisions of the Act relating to Integrated Development are met by the application and the assessment.

The report finds that, notwithstanding the clear desire of Council for a retail use on the site, the current permissibility provisions of the LEP pertaining to the site do not permit retail uses. The proposal is also likely to be prohibited under the draft LEP amendment.

Furthermore, the proposal is found to be significantly inconsistent with the strategic direction set out for the area, and non-compliant with Pittwater 21 DCP, the provisions of which have been adopted by Council following extensive community consultation. The likely impacts of the proposed retail use within a residential neighbourhood are such that the extent of non-compliance proposed is not justified.

The Application is recommended for refusal.

1.0 DEVELOPMENT CONTROLS

The following local and state policies and strategic documents are relevant to the application:

- **State Environmental Planning Policy (SEPP)** – SEPP 64, SEPP BASIX, SEPP 55
- **Pittwater Local Environmental Plan 1993** - Clause 9 Zone 2(f) (Urban Purposes - Mixed Residential); Division 7A – Warriewood Valley Urban Land Release, Clauses 30A, 30B, 30C, 30E; Schedule 11, Part 2 – Zone Objectives for the Warriewood Valley Urban Land Release; Clause 46 – Provision of adequate water and sewerage services; Part III – Consents Clause 5(2)
- **Draft PLEP 1993 Amendment/Planning Proposal** - Amendment to Schedule 10 under Clause 44 to include “neighbourhood shop” and “restaurant” as permissible uses on the site.
- **Pittwater 21 DCP (Amendment 5)** – Incorporating the provisions of now repealed DCP 29 and including Appendix 3 – Warriewood Valley Urban Land Release Planning Context and Criteria
- **Warriewood Valley Urban Land Release Planning Framework** - The strategy document specifying the tasks to be carried out to achieve environmentally and economically sustainable development of the release area.
- **Warriewood Valley Urban Release Area Landscape Masterplan and Design Guidelines** – the basis upon which planning and design of streetscape, open space, and creekline improvements can be undertaken.

2.0 NOTIFICATION/ADVERTISING

The application was notified as integrated development for a period of 30 days in accordance with the requirements of Pittwater 21 DCP and the EPA Act 1979 by letter to 700 residents, (including a Warriewood community group, the nearby Flower Power retail plant nursery, and Centro Shopping Centre) and through the local newspaper. A sign was also placed on site in accordance with DCP requirements. The notification included a statement indicating that the **Joint Regional Planning Panel** is the Consent Authority for the application.

Council to date has received 70 submissions objecting to the proposal and 5 submissions in support. Signed petitions were also received both in support of and objecting to the proposal.

3.0 COMPLIANCE TABLE – Pittwater 21 DCP Controls

T - Can the proposal satisfy the technical requirements of the control?

O - Can the proposal achieve the control outcomes?

N - Is the control free from objection?

✓ = Yes ✗ = No - = not applicable

| Control | Standard | Proposal | T | O | N |
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| URBAN INFRASTRUCTURE | | | | | |
| B3.22 Flood Hazard - Flood Category 3 - All Development | Flood hazard report to be undertaken. Floor levels to be at or above the Flood Planning Level | Flood hazard analysis undertaken and considered acceptable including floor levels at the Flood Planning Level | ✓ | ✓ | ✓ |
| B5.4 Stormwater Harvesting | Requirements of the Warriewood Valley Water Management Specification (2001) for stormwater quantity management and in particular, stormwater reuse. | Water Management report provided in accordance with the specification | ✓ | ✓ | ✓ |
| B5.11 Stormwater Discharge into Waterways and Coastal Areas | | | ✓ | ✓ | ✓ |
| B6.2 Access Driveways and Works on the Public Road Reserve - All Development other than Dwelling Houses, Secondary Dwelling and Dual Occupancy | Separation of delivery vehicle access from access to public parking areas, and separation of delivery vehicle movement from pedestrian activity. Compliance with design requirements of AS 2890.1 and 2 | Submissions raise unsafe access, and conflict between delivery vehicles and customer vehicles/pedestrians. Conditions to remove carparking to facilitate safe manoeuvring, and restriction on delivery times are recommended. See discussion of issues | ✗ | Y | ✗ |
| B6.4 Internal Driveways - All Development other than Dwelling Houses, Secondary Dwelling and Dual Occ. | Driveways to meet AS 2890.1 and 2, and additional controls relating to widths, profiles, drainage, and finishes | Traffic assessment indicates circulation arrangements to be satisfactory and able to meet AS 2890.1 and 2. Conditions to remove some parking spaces to allow safer manoeuvring of delivery vehicles | ✓ | ✓ | ✓ |
| B6.6 Off-Street Vehicle Parking Requirements - All Development other than Dwelling Houses, | Provision of car parking at rate of 1 per 30sqm plus 2 spaces for the caretaker unit -134 spaces required; landscaping | Submissions raise concerns as to impacts on residential street parking, and lack of staff parking. 134 car spaces | Y | Y | ✗ |

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| Secondary Dwelling and Dual Occ. | to be 20% of car park area; provision of parking for bicycles, motor bikes, people with disabilities. | required, 150 provided; landscaping (including buffer area) meets 20% requirement; adequate parking for bicycles, motor bikes, people with disabilities provided. | | | |
| B6.10 Transport and Traffic Management - All Development other than Dwelling Houses, Secondary Dwelling and Dual Occ. | Road network is required to be upgraded to at least match the additional demands generated by the development. | Submissions raise concerns about excessive traffic generation beyond existing road capacity. Upgrade works proposed including roundabout and pedestrian refuges. | Y | Y | X |
| B8.1 Construction and Demolition - Excavation and Landfill | Filling proposed to max 1m across site. Excavation proposed in loading dock area and in creekline works | Geotechnical report not required due to scope of works proposed | ✓ | ✓ | ✓ |
| B8.2 Construction and Demolition - Erosion and Sediment Management | Erosion and sedimentation prevention measures installed in accordance with Managing Urban Stormwater: Soils and Construction (Landcom 2004) | Conditions of consent recommended should application be approved. | ✓ | ✓ | ✓ |
| B8.3 Construction and Demolition - Waste Minimisation | Waste materials to be minimised by reuse on-site, recycling, or disposal at an appropriate waste facility. | Conditions of consent recommended should application be approved. | ✓ | ✓ | ✓ |
| B8.4 Construction and Demolition - Site Fencing and Security | Where construction is adjacent to the public domain, pedestrian/vehicular facilities to be protected by a hoarding | Conditions of consent recommended should application be approved. | ✓ | ✓ | ✓ |
| B8.5 Construction and Demolition - Works in the Public Domain | Ensure pedestrian/vehicular safety, maintain pedestrian and traffic flow and make good any damage/disruption to public infrastructure. | Conditions of consent recommended should application be approved. | ✓ | ✓ | ✓ |
| B8.6 Construction and Demolition - Traffic Management Plan | Construction Traffic Management Plan indicating truck movements/routes to be approved by Council prior to the commencement of works | Conditions of consent recommended should application be approved | ✓ | ✓ | ✓ |
| C6.4 Flood Warriewood Valley Land Release Area Residential Sectors | -Minimum floor level requirements as set out in the Flood Hazard Controls of DCP for the specific development use | Council's Project Leader – Floodplain Management indicates outcome is satisfactory subject to conditions. | ✓ | ✓ | ✓ |
| C6.7 Water Management and Creekline Corridors Warriewood Valley Land Release Area | 50m wide multi-function corridor to contain creek, floodway, flora and fauna habitat, pedestrian path/cycleway, and designed to contain the 1% (AEP) flow. A 25m private buffer strip to contain flora and fauna | Multi function corridor provided in accordance with control. 25m private buffer area almost entirely taken up with carpark and loading dock area, and contains acoustic wall. Minimal flora and fauna habitat provided. | X | X | Y |

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| | habitat, water quality control ponds/treatment measures. Built structures must not be located within the private 25 metre buffer strip. | | | | |
| C6.8 The Road System - Warriewood Valley Land Release Area | Traffic analysis to be provided and roads to be in accordance with hierarchy and roads masterplan | Proposal is compliant. No new roads are proposed. | ✓ | ✓ | ✓ |
| C6.18 Utilities and services - Warriewood Valley Land Release Area | All telecommunications and cable television, are to be provided underground | Conditions of consent recommended should application be approved | ✓ | ✓ | ✓ |
| C6.20 Water Management for Development in Warriewood Valley | Specific controls relate to residential development. | Water Management is in accordance with Warriewood Valley requirements. | ✓ | ✓ | ✓ |
| C6.21 Provision of Infrastructure - Warriewood Valley Land Release Area | Provision of public and private -domain infrastructure including stormwater management, roads, footpaths, cycleways, kerb and gutter. | To be provided in accordance with Section 94 Contributions plan and in accordance with relevant Warriewood Valley Strategies. | ✓ | ✓ | ✓ |
| HERITAGE | | | | | |
| B1.3 Heritage Conservation - General | | No heritage items adjoin or are on the site | ✓ | ✓ | ✓ |
| C6.3 European Heritage - Warriewood Valley Land Release Area | | No heritage items adjoin or are on the site | ✓ | ✓ | ✓ |
| NATURAL RESOURCES AND LANDSCAPING | | | | | |
| B1.4 Aboriginal Heritage Significance | | | ✓ | ✓ | ✓ |
| B4.1 Flora and Fauna Conservation Category 1 Land | | | ✓ | ✓ | ✓ |
| B4.3 Flora and Fauna Habitat Enhancement Category 2 Land | | | ✓ | ✓ | ✓ |
| C6.2 Aboriginal Heritage - Warriewood Valley Land Release Area | | | ✓ | ✓ | ✓ |
| C6.6 Bushfire Protection - Warriewood Valley Land Release Area | | | ✓ | ✓ | ✓ |
| C6.11 Natural Environment - Warriewood Valley | Development designed to -maximise protection of natural features including indigenous | Retention and protection of two significant trees in riparian zone not sufficiently assessed. | ✗ | ✗ | ✓ |

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| Land Release Area | trees. | | | | |
| C6.22 Landscaping on Public Road Reserve | Requirements for street trees. | Proposed landscaping considered satisfactory. Councils landscape officer has provided recommended conditions | ✓ | ✓ | ✓ |
| PLANNING | | | | | |
| EPA Act Section 147 Disclosure of political donations and gifts | Application and public submissions made in accordance with S.147 of Act | Application and submissions accompanied by relevant statements. | ✓ | ✓ | ✓ |
| 3.1 Submission of a Development Application, payment of appropriate fee | | Application and fee in accordance with requirements received. | ✓ | ✓ | ✓ |
| 3.2 Submission of a Statement of Environmental Effects | | Statement of Effects in accordance with requirements received. | ✓ | ✓ | ✓ |
| 3.3 Submission of supporting documentation - Site Plan / Survey Plan / Development Drawings | | Plans and supporting documentation in accordance with requirements received. | ✓ | ✓ | ✓ |
| 3.4 Notification | | Undertaken In accordance with P21 DCP | ✓ | ✓ | ✓ |
| 3.5 Building Code of Australia | | Design Certification provided that proposal is capable of meeting BCA | ✓ | ✓ | ✓ |
| 4.1 Integrated Development: Water Supply, Water Management and Water Activity | Referral to NSW Department of Water and Energy | GTA received, and can be achieved through conditions of consent | ✓ | ✓ | ✓ |
| 4.2 Integrated Development: Fisheries Management | Referral to NSW Industry and Investment (Fisheries) | GTA received, and can be achieved through conditions of consent | ✓ | ✓ | ✓ |
| 4.7 Integrated Development - Roads | Referral to NSW Roads and Traffic Authority | Recommended conditions received | ✓ | ✓ | ✓ |
| 4.8 Integrated Development - Rivers, Streams and Foreshores | Referral to NSW Department of Water and Energy | GTA received, and can be achieved through conditions of consent | ✓ | ✓ | ✓ |
| 5.1 Referral to the Roads and Traffic Authority under SEPP (Infrastructure) 2007 | Referral to NSW Roads and Traffic Authority | Recommended conditions received | ✓ | ✓ | ✓ |
| 5.2 Referral to the NSW Police Service | Referral to Northern Beaches Local Area Command | Comments raise minor concerns to be addressed via conditions of consent. | ✓ | ✓ | ✓ |
| 6.6 Section 94 Contributions Warriewood Valley | Contributions, and dedication of land to be in accordance with Warriewood Valley S.94 | A contribution of \$1,146,316.95 for provision of public infrastructure. Dedication of | ✓ | ✓ | ✓ |

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| | Contributions Plan | creekline corridor required as conditions of consent | | | |
| A1.7 Considerations before consent is granted | Consistency with Pittwater LEP 1993; the desired character of the Locality; the development controls applicable to the development. Council to have regard to section 79C of the EPA Act 1979 | Objections to inconsistency with character of area, zoning, and P21DCP. Proposal is found to be inconsistent with PLEP 1993 and P21DCP, although generally compliant with the desired character statement. See discussion. | x | x | x |
| B2.8 Dwelling Density - Warriewood Valley Land Release Area | Sector 8 to provide not more than 159 Dwellings | 1 x 2 bedroom caretakers unit proposed. The dwelling yield for Sector 8 should the proposal be approved = 141 dwellings. | ✓ | ✓ | ✓ |
| B3.5 Acid Sulphate Soils | Class 4 & 5 area | No excavation >2m below ground surface and no lowering of water table proposed | ✓ | ✓ | ✓ |
| B3.6 Contaminated Land and Potentially Contaminated Land | SEPP 55, and Remediation of land in accordance with Contamination Land Management Act and Guidelines | Conditions of consent recommended should application be approved | ✓ | ✓ | ✓ |
| B3.23 Climate Change (Sea Level Rise and Increased Rainfall Volume) | A climate change assessment shall be provided and shall assess the impacts of climate change over the life of the development and the adaptive measures to be incorporated in the design of the project. The assessment shall consider: Scenario 1: Impacts of sea level rise only; Scenario 2: Impacts of sea level rise combined with increased rainfall volume | The required scenarios have been considered by the Worley Parsons Stormwater Management Report. Council's Project Leader - Floodplain Management has reviewed the report and concludes that assumptions and outcomes are considered reasonable. | ✓ | ✓ | ✓ |
| B5.1 Water Management Plan | | | ✓ | ✓ | ✓ |
| B5.2 Wastewater Disposal | Connection to Sydney Water | Connection to Sydney Water sewer is available. Conditions of consent recommended should application be approved | ✓ | ✓ | ✓ |
| B5.11 Stormwater Discharge into Waterways and Coastal Areas | Comply with the requirements of the DWE | GTA received, and can be achieved through conditions of consent | ✓ | ✓ | ✓ |
| C1.9 Adaptable Housing and Accessibility | Design to meet Class B under AS 4299-1995 | 2 bedroom unit cannot comply, however variation is considered reasonable given the proposed use as caretakers unit. | x | ✓ | ✓ |
| C1.13 Pollution Control | Compliance with the Protection of the Environment Operations Act, 1997, and other relevant legislation, | With conditions of consent, proposal can comply with POEO Act and Regulations, and Australian Standards with | x | x | x |

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| | including Water Act 2000, Industrial Noise Policy, and Noise Guide for Local Government. | respect to air quality. Conditions of consent regulating exhaust hoods for commercial kitchens are recommended should consent be issued. A review of the acoustic report indicates compliance with the INP is problematic. | | | |
| C1.15 Storage Facilities | A lockable storage area of minimum 8 cubic metres per dwelling shall be provided. This may form part of a carport or garage. | A storage room is located adjacent to the caretakers office which could accommodate storage requirements for the occupier of the caretakers unit. | ✓ | ✓ | ✓ |
| C5.2 Safety and Security | Development shall address the Crime Prevention through Environmental Design principles. Lighting to be designed and located so that it minimises possibility of vandalism or damage. Security lighting must meet AS4282 The control of the obtrusive effects of outdoor lighting. | Submissions received concerning crime risk, anti social behaviour, graffiti, and intrusive light spill. Crime Risk assessment provided, and found acceptable by NSW Police. Proposal non-compliant with lighting requirements. | ✗ | ✗ | ✗ |
| C5.4 View Sharing | A reasonable sharing of views is achieved | No likely impacts on views | ✓ | ✓ | ✓ |
| C5.5 Accessibility | An assessment from an accredited access consultant as to its compliance with P21 DCP and AS1428 Design for Access and mobility is required as the proposed building is publicly accessible. | No access report is provided. It is likely that the proposal is capable of complying with the design requirements given the single storey nature of the publicly accessible areas and the at grade car parking proposed. Validation from an accredited access consultant should be required prior to any approval. | ✗ | ✓ | ✓ |
| C5.7 Energy and Water Conservation | Ensuring more efficient use of resources. Ensuring the orientation, design and siting of buildings makes the best use of natural ventilation, daylight and solar energy. Ensuring water sensitive urban design | The caretakers unit meets the requirements for BASIX. A Sustainability Report has been submitted with respect to the proposed retail structure and uses which gives recommendations relating to energy consumption, water use/recycling, materials and construction, and space and footprint, with a view to achieving "Green Star" Certification. | ✓ | ✓ | ✓ |
| C5.8 Waste and Recycling Facilities | Waste enclosure to be appropriately designed, and located so as not to impact | Submission raising concerns regarding vermin and odour. Waste enclosure proposed and | ✓ | ✓ | ✗ |

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| | adversely on neighbourhood amenity | conditions of consent recommended to meet control. | | | |
| C5.9 Business Identification Signs | Any business identification sign erected within a residential or non-urban zone shall not be visually obtrusive or have dimensions greater than 0.75sqm in area (other than for a bed and breakfast establishment). | Objection to signage size and illumination received. The pylon sign is 7.7m high and located in the eastern corner of the site. The sign is to be illuminated. Given the residential area, signage of this size is not considered appropriate. A condition requiring deletion of the pylon sign is recommended should consent be issued. | ✓ | ✓ | ✗ |
| C5.10 Protection of Residential Amenity | A reasonable level of solar access and visual privacy is maintained to residential properties. | Shadows from the development are cast on the loading dock, turning area and carpark areas throughout the day, and not onto nearby residential properties. | ✓ | ✓ | ✓ |
| C5.11 Advertisements | Advertisements constitute signage OTHER THAN business identification signage. | No advertising signage is proposed. Advertising is incompatible with the amenity and visual character of the area. Advertising to be prohibited by condition | ✓ | ✓ | ✓ |
| C5.15 Undergrounding of Utility Services | All existing and proposed utility services to the site, or adjacent to the site within a public road reserve, are to be placed underground for the total frontage of the site to any public road at full cost to the developer. | The statement of effects states <i>all utility services on site</i> will be undergrounded. The control requires services within the road reserve also to be undergrounded and this should be a condition of any consent granted. | ✓ | ✓ | ✓ |
| C5.16 Building Facades | Service conduits to not be visible from the public place | Services contained in cupboard facing Lomandra Way | ✓ | ✓ | ✓ |
| C5.19 Food Premises Design Standards | Compliance with Food Act and relevant Aust standards for ventilation and fitout | Conditions of consent recommended should application be approved | ✓ | ✓ | ✓ |
| C5.20 Liquor Licensing Applications | | Objection received to any liquor licence for the café. No liquor licence proposed. | - | ✗ | ✗ |
| C5.21 Plant, Equipment Boxes and Lift Over-Run | Plant and equipment boxes be integrated internally into the built form of the building. Locate and design all noise generating equipment to protect the acoustic privacy of workers, residents and neighbours. | Objections received to acoustic and visual impacts of plant. A large mezzanine area for plant and utilities is integrated into the roof design. A condenser deck (air conditioning) with acoustic louvres is proposed on top of the roof. Instantaneous gas boosted hot water heating system to be mounted on the | ✗ | ✓ | ✗ |

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| | | roof. | | | |
| C6.9 Pedestrian and Cyclist Network - Warriewood Valley Land Release Area | Minimum width of pedestrian path/ cycleway located in public reserve is 2.5 metres. Adequate sightlines for cyclists, and to be sited above the 20% AEP flood level. | The proposed cycleway within the creekline/landscaped buffer is proposed at 2m wide. Should strict adherence with the control be required, it could be achieved via a condition of any consent granted. | x | ✓ | ✓ |
| C6.10 Ecologically Sustainable Development - Warriewood Valley Land Release Area - Residential Sectors | Development should be designed and located with consideration to orientation, topography, vegetation, microclimate, adjoining development and landscape. | Caretakers Unit meets BASIX requirements. A sustainability report has been provided detailing proposal is well designed with respect to ESD principles. | ✓ | ✓ | ✓ |
| C6.12 Public Recreation and Open Space - Warriewood Valley Land Release Area | The district park and/or the sportsfield should form part of the focal neighbourhood centre that may include community facilities on or adjacent to public open space. The district park is to be developed in a key location to meet increasing demand for such facilities. | Proposed district park is located approx. 500m west of the site and is linked by the cycleway/pedestrian pathway. Good proximity and connections to the district park and to the creekline corridor network allow the development to meet the outcomes sought by this control. | x | ✓ | ✓ |
| C6.13 Landscaped Amenity Buffer Strips - Warriewood Valley Land Release Area | Buffer zones of 5m width provided between residential and light industrial uses. No specific buffer width required for retail/commercial uses. Outcomes of this control include to mitigate impacts of differing land uses, and provide amenity buffers between incompatible land uses. | Objection to lack of buffer between proposal and dwellings. Proposal is unable to adequately mitigate impact of incompatible land use. See discussion. | x | x | x |
| C6.15 Warriewood Valley Land Release Area Focal Neighbourhood Centre | Retail floor space limited to between 855sqm and 2222sqm | A total of 3950sqm proposed. Proposal does not meet outcome to reduce car dependency. See discussion. | x | x | x |
| C6.17 Social Environment - Warriewood Valley Land Release | Social Impact Assessment undertaken. Controls relate to residential development however assessment undertaken against outcomes. | Submissions supporting the proposal as providing an identity for the area. Proposal expected to have positive impacts for the locality. See discussion. | ✓ | ✓ | ✓ |
| C6.23 Site Coverage, Sector Development - Warriewood Valley Land Release Area | Total site coverage of Sector shall not exceed 50% of Sector area | Site coverage of Sector including proposal is 47% (38,668sqm) | ✓ | ✓ | ✓ |
| D16.1 Character as viewed from a public place | Use of design elements (roof forms, textures, materials, windows, modulation, spatial separation, landscaping etc). | The proposal complies with this control on all frontages except the elevation presented to Lomandra Way (North western elevation). See discussion. | x | x | x |

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| | without windows shall not be permitted. Walls without articulation shall not have a length > 8m to any street frontage. | | | | |
| D16.2 Building colours and materials | Dark and earthy tones and low reflectivity colours are required. Large unbroken areas of roofs to be avoided and building facades to be modulated and/or contain shade elements. Large expanses of roof and wall areas are not acceptable. | Colours are generally compliant, except for "Cream Cake Quarters", which should be removed from the approved colour palette. Non-compliance with requirements to minimise large expanses of roof and walls. | x | ✓ | ✓ |
| D16.3 Front building lines | The controls specifically relate to residential development. It is appropriate that the setback achieved by the retail facility at least meets, and preferably exceeds the controls for residential development noting the much larger and concentrated building mass proposed. The proposal should meet the outcomes. | Setback of built form to Macpherson Street is 7m, (4.2m to awning. Setback of built form to Garden Street is 40m (36.5m to awning). Setback of built form to Lomandra Way is 3m. See discussion. | x | x | ✓ |
| D16.4 Side and rear building lines - Warriewood Valley Residential Sectors | The controls specifically relate to residential development. For a side or rear boundary that abuts an Avenue, sector street, accessway, shareway or access place, apply the front building line setbacks in D16.3 | The proposed development is set back 3m from Lomandra Way. See discussion. | x | x | ✓ |
| D16.5 Building Envelope - Warriewood Valley Residential Sectors | The control requirements relate to multi unit housing only. The control nonetheless is a guide to reasonable built form impacts in this locality. | Notwithstanding that the controls may not apply, the proposed built form complies with the building envelope control. | ✓ | ✓ | ✓ |
| D16.7 Fences - Warriewood Valley Residential Sectors | In all cases, vegetation is preferable over fencing to delineate the property boundary. Fencing of properties is restricted to side and rear boundaries only. No fencing is permitted forward of the building line of the dwelling. | No fencing is proposed. It is recommended that should consent be granted, that a low fence and landscaping be provided to the southern corner of the truck turning area to prevent shortcutting from the pedestrian pathway across the truck turning area where delivery trucks may be reversing. The fencing should be see through and provided with dense landscaping on its southern side. | ✓ | ✓ | ✓ |
| D16.8 Construction, Retaining walls, terracing and undercroft | | | ✓ | ✓ | ✓ |

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| areas | | | | | |
| D16.9 Utilities and Telecommunication Services | All utility services existing or otherwise, located on the perimeter of the subdivision lands within the road reserve or within adjacent public reserves (within a distance of 6m from the boundary) are to be relocated underground for the width of the development site frontage to the public reserve or public road reserve at the full cost to the developer | A condition of consent should be imposed on any consent granted requiring undergrounding of wires in accordance with the policy prior to issue of Occupation Certificate. | ✓ | ✓ | ✓ |
| D16.11 Location and design of carparking facilities - Warriewood Valley Residential Sectors | | | - | - | - |
| D16.12 Landscaping | Landscaping must meet key criteria including minimising visual impact of undesirable visual elements such as blank walls, service areas, loading docks. | Comments from Councils landscape officer with particular reference to Lomandra Way are provided within the discussion. No issues are raised. | ✓ | ✓ | ✓ |
| D16.14 Height | 8.5m above the FPL | The proposal is generally compliant with the 8.5m height limit. The condenser deck for the air conditioning plant will breach the 8.5m height limit, however as this is a relatively small area and located in the centre of the roof it will not be readily seen from the near public domain. | ✗ | ✓ | ✓ |
| SEPP 64 – Advertising and Signage | All signage is required to meet the aims of the SEPP and be considered against Schedule 1, both of which require signage to be compatible with the desired character of the area. | The illuminated pylon sign (at 7.7m high) is not considered appropriate given the desired character of the residential area and should be deleted by condition upon the grant of any consent. Subject to this, the application can comply with SEPP 64. | ✓ | ✓ | ✓ |
| SEPP BASIX | BASIX Certificate to be provided. | A BASIX Certificate for the caretakers unit has been submitted in accordance with SEPP BASIX. | ✓ | ✓ | ✓ |
| SEPP Infrastructure | Referral to the RTA is required under SEPP Infrastructure | A referral to the RTA has been undertaken in accordance with SEPP Infrastructure. Conditions of consent are recommended. | ✓ | ✓ | ✓ |

This compliance table documents in summary form the assessment of the proposal against the relevant controls of Pittwater 21 DCP. Where resident concerns require it, or where significant breach of policy is sought by the application, additional comments are provided in the discussion of issues section within this report.

4.0 SITE DETAILS

23B Macpherson Street Warriewood is a site of 1.43 hectares located on the south-western corner of the intersection of Macpherson and Garden Streets, Warriewood. The legal description of the land is Lot 11, Section C, DP 5464. The land is rectangular in shape, the length of which runs in a north-east to south west direction.

The south western boundary of the site is an irregular boundary contained generally within the embankments of Fern Creek (but not precisely the centreline of the creek itself, which appears to have changed over time). The north western boundary adjoins residential streets known as Lomandra Way and Callistemon Way, being access points for residential development further to the north west. There is a fall of between 1-2m across the width of the site from northwest to south east, however from the surrounding streets the land appears flat.

Surrounding development consists of a mix of single dwellings, dual occupancies and attached dwellings, together with villa style and townhouse development. Diagonally opposite the site to the east is a commercial operation known as Flower Power, being predominantly a retail plant nursery together with ancillary retail and cafe uses. To the south west, on the opposite side of Fern Creek is land previously used for market gardens.

The land has previously been occupied by structures, which are now demolished. Little vegetation of significance is evident on the site aside from some native and exotic canopy trees in the southern corner of the site and along the creekline. Road reserves adjoining Garden and Macpherson Streets carry underground services including water, sewer, and communications. Overhead electricity/communication cable runs the length of the Garden street frontage, and 75% of the Macpherson Street Frontage.

5.0 PROPOSAL IN DETAIL

The application is primarily for the construction of a retail facility on the site, with associated carparking and landscaping. The retail facility proposes a total of 3950sqm floor space comprising the following:

- 3200sqm for the purposes of a main line Supermarket; and,
- 630sqm for the purposes of specialty shops (7 tenancies); and,
- 120sqm for the purposes of a café.

The retail facility is provided with 150 at grade car spaces. A 2 bedroom caretakers unit is also proposed at an upper level. The application does not provide an internal floor layout for the supermarket, cafe or specialty shops, but does provide some indicative details relating to back of house area for the supermarket, loading dock areas, waste and other storage areas, and amenities for the development as a whole. A detailed layout for the caretakers unit is provided.

The proposed development also includes streetscape works, being primarily footpaths, landscaping, and pedestrian refuges to Garden and Macpherson Streets, and includes the upgrade of the Garden/Macpherson Street intersection to provide a roundabout.

In accordance with the requirements established by the Warriewood Valley Urban Land Release Planning Framework, the application is also for works to be carried out to re-establish and

rehabilitate that part of Fern Creek that traverses the site, being the land within 25m of the centre line of Fern Creek. The application also includes subdivision of the land such that the creekline corridor may be dedicated to Council. Works within the land to be dedicated to Council include bulk earthworks to the creek embankments, revegetation, and provision of a pedestrian path/cycleway.

6.0 BACKGROUND

Sector 8 and its Masterplan

The site forms the south-eastern most end of the area known as Sector 8 of the Warriewood Valley Urban Land Release Area, and is the last parcel in Sector 8 to be developed. Land within Sector 8 to the west consists almost entirely of residential development, the exception being an area adjoining the creekline corridor that is planned for the purposes of a district park.

Sector 8 was rezoned to 2(f) – (Urban Purposes – Mixed Residential) in May 2004. In accordance with the requirements of the *Warriewood Valley Urban Land Release Planning Framework*, (hereafter referred to as the Planning Framework) the rezoning process occurred following the development of a Masterplan for the entire Sector. The Masterplan document indicates approximately one third of the subject site (Lot 11) being set aside for a “Neighbourhood Centre”, and the remaining land within the parcel being residential development.

As stated elsewhere in this report DCP 21 indicates that a “focal neighbourhood centre” is to be located at the junction of Macpherson and Garden streets. The only developer/owner of Sectors 3, 8 and 11 (located at the junction of Macpherson and Garden Streets) who presented to Council for adoption a masterplan with a “Focal Neighbourhood Centre” as part of the overall development, is the original developer of Sector 8 (containing 23B Macpherson Street). Consistent with the adopted Masterplan for Sector 8, the majority of the rezoned land in Sector 8 has been developed as medium density residential with the exception of the subject site. Sector 11 to the east of Sector 8 is wholly developed for residential purposes, consistent with its masterplan, and Sector 3 to the North is rezoned for Residential 2(f) with a masterplan showing total residential development.

PLEP 1993 Amendment – R0002/09

Prior to the lodgement of the subject DA, a question arose as to the permissibility of a retail use within the 2(f) – (Urban Purposes Mixed Residential) zone. Council Officers sought legal advice as to the permissibility issues, and subsequently prepared an amending LEP/ planning proposal to amend the LEP to include “**neighbourhood shop**” and “**restaurant**” as permissible uses on this site, via Clause 44 and Schedule 10 of PLEP.

The Council, in deciding to amend the LEP to overcome the issue of permissibility, and also by introducing the definition of a “Neighbourhood shop” (a “Standard Template” definition) sought to provide a clearer description of the anticipated and planned for extent of retailing, i.e. “*for the purposes of selling small daily convenience goods.*”.

The planning proposal to amend the LEP has successfully completed the NSW Department of Planning “Gateway” process, and has been placed the amendment on public exhibition. The exhibition of the amendment has been completed, the results of which will shortly be reported to Council.

7.0 STRATEGIC CONTEXT

Metropolitan and Subregional Strategies and Draft Centres Policy

The Sydney Metropolitan Strategy (2005) and the Draft North-East Sub-Regional Strategy (2007) promotes the location of a local centre within a residential area. The Metro Strategy, as carried through to the Sub-Regional Strategy, establishes a hierarchy of retail centres. The concept of a “Focal Neighbourhood Centre” in Warriewood Valley, (when considered in response to the pre-planning of the area as described below) could be classified as either a “village” or “Neighbourhood centre” under this hierarchy.

A “**village**” is defined as:-

“A village is a strip of shops for daily shopping and typically includes a small supermarket, butcher, hairdresser, restaurants and takeaway food shops.....The extent of a village centre is approximately 400-600 metre radius.”

A “**neighbourhood centre**” is defined as:-

“..a small group of shops that you can walk to and buy milk and the newspaper ..should have child care centres, schools and other compatible activities located close together and have some form of medium density housing...in the immediate vicinity...The extent of a neighbourhood centre is approximately a 200 metre radius.”

The planning of the Warriewood Valley Release Area is based on the premise of a liveable and walkable community, with provision of a safe pedestrian and cycle network through the release area with connections to employment/ recreation areas and the proposed Warriewood Valley “focal neighbourhood centre”.

Under the Draft Centres’ Policy hierarchy the concept of a ‘focal neighbourhood centre’ may take the form of a “small village” or “neighbourhood centre” aimed at servicing the daily shopping needs and offering convenience to residents of the release area. The site of the proposed centre is centrally located within the release area, and fronts Macpherson Street, which is the primary vehicular and public transport route through the Release Area. A pedestrian/ cycleway network exists and is able to connect to the subject site.

SHOROC Employment Study (March 2008)

The SHOROC Employment Study (March 2008), prepared by HillPDA, examined the existing and future employment needs for the Region (being the LGAs of Mosman, Manly, Warringah and Pittwater). That Study highlighted the existing under-supply of industrial, retail and office floorspace in the Pittwater LGA, and considered the likely future floorspace requirements in association with population growth and expenditure patterns.

The Study highlighted the growth in retail expenditure and population resulting in future growth in the demand for retail floorspace in the years 2016 and 2031 across the Region and particularly in the Pittwater LGA. In Pittwater, an additional 105,160m² of retail floorspace is forecast for 2031. and is in addition to the current shortfall of 34,285m². The study projects that the growth in retail floorspace demand equates to 4 to 17 supermarkets (with floorspace of 1,200m² to 4,000m²) being provided within the Pittwater LGA.

The SHOROC Employment Study is a relevant matter for consideration as a tool for future policy formulation. Its weight however in the assessment of development applications is limited as it has not been adopted by Council following a formal consultation process as a document to guide development assessment. The recent review, exhibition and adoption of Pittwater 21 DCP (Amendment 5) did not include any changes to controls relating to the Neighbourhood Focal Centre as a result of the study.

Warriewood Valley Urban Land Release Planning Framework

A suite of studies undertaken in 1994 formed the basis of Warriewood Valley Urban Land Release Draft Planning Framework (1997), upon which the Warriewood Valley Release Area was planned and developed:

The supporting Ingleside/Warriewood Urban Land Release Area Demographic and Facility/Service Needs Studies identified the potential need for retailing to be provided (at a limited scale) that provides retail convenience for the incoming population. At page 155 of the study it states (inter alia):

“Considering these observations, it is our opinion that only limited opportunities may be available within the Ingleside-Warriewood release area to plan for the establishment of small local centres (up to 2000 square metres retail floor space), and only under the highest potential development scenario, and only if each such centre could be considered as a real community focal point.”

The 1997 Planning Framework reiterated the findings of the Demographic study and identified the need for a retail centre that caters for and meets the needs of the incoming residential population of the Warriewood Valley release area.

DCP 29 – Warriewood Valley Urban Release Area

The original DCP 29 relating to development in Warriewood (adopted 16 July 2001) states at page 28:-

“A focal neighbourhood centre is to be established.....in the vicinity of the Macpherson street and garden street intersection....The focal neighbourhood centre is to incorporate a retail space between 855m²-2,222m² to meet the retail ‘convenience’ needs of the incoming population (such as a small general store, post office shop, ATM, internet coffee shop, etc)...The focal neighbourhood centre must be linked to public transport nodes and the pedestrian and cyclist network, and if possible, to the district park and/or community facilities. This will enable the majority of residents and people employed in the Valley to walk or cycle to the local shops, public transport, and services. This will enhance the viability of the neighbourhood centre as a focal point of the Valley...”

Pittwater 21 DCP (Amendment No.5)

Pittwater 21 Development Control Plan (DCP) (incorporating the controls within the now repealed DCP 29) at control C6.15 states:

“A focal neighbourhood centre is to be established in Warriewood Valley, in the vicinity of the Macpherson and Garden Streets intersection (within Sector 3, 8 or 11). This location is spatially central to the incoming residential population, industrial/commercial areas, and school located in the Valley, and within reasonable walking and cycling distance of most

residents and employees in Warriewood Valley. Macpherson Street is also the primary vehicular and public transport route through the Valley along which medium density residential development is concentrated.

The focal neighbourhood centre is to incorporate a retail floor space area between 855m - 2,222m to meet the retail convenience needs of the incoming population (such as a small general store, post office shop, ATM, internet coffee shop, etc). The retail potential in Warriewood is limited to this size given nearby established retail/commercial centres at Mona Vale and Warriewood Square. (Refer to Ingleside/Warriewood Urban Land Release Area Demographic and Facility/Service Needs Studies (December, 1994)."

Review of the need for a "Focal Neighbourhood Centre"

Given the period elapsed since the initial studies, Council commissioned HillPDA in 2006 to provide an updated and independent assessment to determine whether there is demand for a neighbourhood shopping centre in the release area, and in particular whether locating it on the subject site was sustainable.

The 2006 HillPDA assessment, based on the 2001 Census, indicated there is current demand for a supermarket (of 800m² floorspace) and 371m² floorspace for specialty retailing. The specialty retailing cited includes a bakery, restaurant/café, delicatessen and possibly a clothing outlet that would appeal to the local market and be able to sustain a high level of turnover.

As a result of the 2006 updated confirmation of the "neighbourhood focal centre" Pittwater DCP 21 continues to encourage a facility of between 855 and 2200m² of retail floorspace.

8.0 DISCUSSION OF ISSUES

8.1 Any Environmental Planning Instrument

State Environmental Planning Policies (SEPPS)

Compliance is achieved with SEPP 64 – Advertising and Signage; SEPP 55 –Remediation of land; and SEPP BASIX subject to conditions of consent being imposed. Further details are provided in the compliance table at Section 3.0 of this report.

Pittwater Local Environmental Plan 1993 (PLEP 1993) and Permissibility.

Clause 9 – Zone No. 2(f) (Urban Purposes - Mixed Residential)

Clause 9 and the zoning table for the 2(f) zone indicate that there is no development permissible in the zone **without consent**. The table lists the following uses as being permissible **only with development consent**:

Residential buildings; associated community and urban infrastructure

Any other purpose, other than *Residential buildings; associated community and urban infrastructure* is **prohibited**.

Neither “*Residential buildings*” or “*associated community and urban infrastructure*” are defined terms within PLEP 1993. PLEP 1993 does however adopt a definition of “*shop*” which has the following meaning:

“shop” means a building or place used for the purposes of selling, exposing or offering for sale by retail, goods merchandise or materials, but does not include a building or place elsewhere specifically defined in this clause

The term “shop”, as defined, is not listed as being permitted either with or without consent, and is therefore prohibited development.

The Development Application is made on the basis that the proposed retail facility fits within the definition of *associated community and urban infrastructure* and therefore is permitted within the 2(f) zone. The question arises as to whether the development is more appropriately defined as *associated community and urban infrastructure* (as opposed to *shop*) and would therefore be permitted. In answering that question, the following should be considered:

- Weight should be given to the natural meaning of a word where that meaning leads to a reasonably practical result.

The ordinary meaning of a word may be less relevant where a specific definition is provided within the LEP, however it is worth noting that the ordinary meaning of the word shop (defined in the Macquarie Dictionary as “a building where goods are sold retail”) and the definition of “shop” within the LEP are consistent. It seems logical and reasonable having regard to what is physically proposed to refer to the development as a “shop”. There is no contrary argument put by the applicant in this regard.

- The meaning of *associated community and urban infrastructure* is not clear. There is no LEP definition and the term brings together broad descriptors that have multiple natural meanings, even within a specific context.

Notwithstanding the punctuation used in the zoning table and given the stated objective, it may be argued that the *community and urban infrastructure* permitted is that which is *associated* with residential development ie, works that contribute to the land being made suitable for a residential purpose.

It is agreed that the reference to *infrastructure* could mean more than the provision of power, water, sewer and roads (although this in itself covers a significant range of works required for residential development).

In the context of a land release area it is reasonable to interpret *associated community and urban infrastructure* to mean works required to make the land suitable for residential development, and this might include footpaths and cycleways, telecommunications, stormwater works, street lighting, in addition to power, water, sewer, and roads. Works required by the Section 94 Contributions Plan including for example the rehabilitation of the creekline corridors, landscape buffer areas, and open space areas, could also be included.

To abandon the clear and obviously applicable definition of “shop” for a broader and less certain interpretation does not appear reasonable in this circumstance. At best, the conclusion that the proposed development could constitute *associated community and urban infrastructure* relies on an interpretation of the LEP of considerable complexity.

- The zone objectives should be considered and are as follows:
 - (a) to identify land within the Warriewood Valley Urban Land Release which suitable for residential development and which will be provided with adequate physical and social infrastructure in accordance with a planning strategy for the area, and*
 - (b) to provide opportunities for more varied forms of housing and wider housing choice, and*
 - (c) to provide opportunities for a mixture of residential buildings which can be in the form of detached dwellings, integrated development, cluster housing, group buildings and the like*

When read as a whole, including consideration of the title Urban Purposes – Mixed Residential), the essence of the objective is the provision of housing in a variety of forms ie, “Mixed Residential”. Of particular relevance is part (a) of the objectives which seeks to identify land “which is suitable for residential development”. Such land must also be provided with adequate physical and social infrastructure in accordance with a planning strategy for the area.

A contradiction to the permissibility issue arises when considering Council’s strategic planning documents which envisage a retail facility of limited scale being provided specifically on land adjoining the Garden and Macpherson Street intersections. (See Section 8 Strategic Context). There is no doubt as to Councils intentions to provide for such a facility having regard to the strategic planning documents, however the intentions are not adequately provided for within the statutory provisions of the LEP.

The permissibility of a retail uses on this site should be addressed through a site specific amendment to the LEP that makes clear Council’s intention(Section 10.2)

Division 7A – Warriewood Valley Urban Land Release

The objectives of this Division are to:

- (a) permit development for urban purposes on land within the Warriewood Valley Urban Land Release in accordance with a planning strategy for the release area, and*
- (b) permit staged development for urban purposes in the various sectors of the Warriewood Valley Urban Land Release that has regard to a development control plan applying to the release area, and*
- (c) permit greater housing diversity and wider housing choice in areas provided with adequate physical and social infrastructure in accordance with a planning strategy for the release area.*

These objectives relate specifically to the considerations of Division 7A and are not a mechanism for creating additional or alternative permissibility within the 2(f) Zone. PLEP 1993 has a separate mechanism for this purpose at Clause 44. A development proposal must demonstrate that it meets the requirements of this Division in addition to being permissible.

The *planning strategy* for the area comprises a number of documents including the Warriewood Valley Urban Land Release Planning Framework (the Planning Framework); the Masterplan for Sector 8; and, Pittwater 21 DCP, including Appendix 3 known as the Warriewood Valley Urban Land Release Planning Context and Criteria. (See Section 8 Strategic Context).

Notwithstanding the permissibility issue, all of these documents limit the extent of the retail facility to be provided upon the land adjoining the Garden and Macpherson Street intersection. The

proposal is inconsistent with the planning strategy in that it does not reflect the scale of facility nominated in the strategy, and greatly exceeds the stated floor space provisions. To this extent, the aims of the Division are not achieved by the proposal.

Clause 30B(3) of the LEP contains a significant number and range of matters of which Council must be satisfied prior to the granting of consent. These include the consideration of slope and soil structure, hazards, significant flora and fauna, contamination, significant visual elements, significant heritage items or sites, stormwater, traffic, and bushfire. These matters have been considered through the detailed assessment of the DCP requirements.

The particular dwelling yields to be met within each Sector of the release area are the subject of a development standard in Clause 30C. Sector 8 is required to achieve in total not more than 159 dwellings. The caretakers unit will bring the total for Sector 8 to 141 dwellings, 18 short of the maximum. As no minimum dwelling yield is set for the Sector, the proposal complies with the development standard.

Summary of statutory matters

In summary, it is considered that the proposed development cannot meet the statutory provisions of PLEP 1993 in the following way:

- The current provisions of PLEP 1993 as they relate to permissible uses within the 2(f) Zone do not permit development of retail uses on the subject land; and,
- The objectives of Division 7A are not met by the proposal as it is clearly inconsistent with the planning strategy for the area by way of its size.

8.2 Any Draft Environmental Planning Instrument placed on public exhibition

Should the proposed development be found to be permissible under the current zoning, consideration should also be given to whether the proposed development would be consistent with any draft environmental planning instrument currently before Council.

Council is considering a proposed amendment to PLEP 1993 to include permissible uses of “neighbourhood shop” and “restaurant” on the land via inclusion of these definitions within Schedule 10 to the LEP which pursuant to Clause 44 permits development for certain additional purposes. This amending LEP/Planning proposal is certified and exhibited under the Act .

The amending LEP/planning proposal sets out to communicate Council’s Strategy and intention for the development of the site, and is consistent with the concept of “**neighbourhood centre**” described in the Metropolitan Strategy, and the Subregional Strategy. The proposal is consistent with the form of development envisaged by the 1994 demographic study the Warriewood Valley Planning framework, the original 2001 DCP 29 and current DCP 21.

The definitions (consistent with the Standard template requirements) proposed to be added as permissible uses on the site under the amending LEP/Planning proposal are as follows:

“neighbourhood shop” means retail premises used for the purposes of selling small daily convenience goods such as food stuff, personal care products, newspapers and the like to provide for the day to day needs of people who live or work in the local area and may include ancillary services such as a post office, bank or dry cleaning but does not include restricted premises”

“restaurant” means a building or place the principal purpose of which is the provision of food or beverages to people for consumption on the premises and that may also provide takeaway meals and beverages.

The applicant argues that, in addition to being a permissible use under the existing zoning table provisions, the proposed development will also be permissible should the amending LEP/Planning proposal be gazetted. (The meaning of “**restaurant**” and its applicability to the proposed café within the development is not disputed.)

Notwithstanding the arguments put by the applicant that conclude that the proposed development fits the definition of “**neighbourhood shop**”, a definition within the suite of definitions in the ‘Standard template’ LEP documentation, it is considered that given the nature of the proposal, the definition of “shop” within the LEP (and as discussed in previous section of this report) is more appropriate.

A “**neighbourhood shop**” has a specific purpose that is to sell small daily convenience goods, and to provide for day to day needs of people who live or work in the local area. Noting the range and diverse type and size of goods commonly offered by supermarkets, it is reasonable to conclude that the proposal has a different purpose, ie to provide for the weekly or monthly grocery requirements for households, rather than day to day convenience goods. It would not be reasonable to expect that a mainline supermarket would be limited to people who live or work in the local area.

Giving some weight to this view (although not determinative of the issue) is the framework provided within the North East Draft Subregional Strategy which uses language that reinforces the arguments above. In understanding retail hierarchies, the strategy describes a “**neighbourhood centre**” as “*a small group of shops that you can walk to and buy items such as milk and the newspaper*”, and “*a cluster of shops and services supplying daily needs*” and with an approximate radius of up to 200m.”

Should PLEP1993 be amended as set out in the planning proposal, the proposed development would remain a “**shop**” and would therefore be prohibited. To take the alternative view would be to make ineffective the distinction between “**shop**” and “**neighbourhood shop**”. Both definitions that would both be adopted under the provisions of the amended PLEP1993.

8.3 Any Development Control Plan

Pittwater 21 Development Control Plan – Amendment No. 5

An assessment of each relevant DCP matter is contained within the compliance table at Section 3.0 of this report. Where detailed discussion due to policy variation and/or public submissions is required, these matters are addressed below:

- **A1.7 Considerations before consent is granted**

Prior to the granting of development consent under this provision of the DCP, Council must be satisfied that development is consistent with PLEP 1993, the applicable controls within P21DCP, and the desired character of the locality. PLEP 1993 and P21DCP are dealt with exhaustively elsewhere within this document and the development is found to be inconsistent with both the LEP and DCP provisions.

Submissions have outlined arguments against the permissibility of the proposal under the current zoning provisions, and also with respect to its permissibility as a “neighbourhood shop”. The applicant has provided two legal opinions supporting the view that the proposal is permitted. These submissions have been considered within and have informed the assessment of the permissibility of the proposal.

The desired character of the area is outlined within A4.16 of P21DCP. Reference is made within the statement to some built form issues which challenge the proposed development, and these matters are dealt with in detail within the assessment of DCP controls. The proposed development however is generally consistent with the character statement insofar as it focuses on matters of water quality management, vegetation and canopy, infrastructure provision, road networks, and pedestrian and cycle path networks.

- **B4.1 Flora and Fauna Conservation Category 1 Land; B4.3 Flora and Fauna Habitat Enhancement Category 2 Land**

Council's Natural Resources and Landscape Officer provides the following comments:

The property consists of a large paddock containing mainly grasses and weeds with a creek along the southern boundary which contains vegetation which has been degraded with high weed abundance.

A Flora and Fauna Assessment (Banksia Ecology January 2008) has been submitted which provides an extensive summary of all components of the flora and fauna surveyed onsite. The site is considered to have little ecological significance, as a high level of disturbance has resulted in the site not supporting a diverse range of species or significant habitat. A total of 53 flora species (much of which is exotic and/or weeds) and 13 common faunal species were observed or detected within the site. The surveys did not result in the recording of any threatened species or endangered populations as listed in any of the relevant Acts.

The proposed works are unlikely to have a significant effect on the remnant vegetation or fauna in the area. However, a wildlife corridor exists along Fern Creek and potential exists to restore the creekline and enhance the habitat along this corridor by removing noxious and environmental weeds and creating a riparian buffer zone using locally native species. This has been discussed in the recommendations section of the report and it is suggested that a Vegetation Management Plan (VMP) is created which will be the leading document used which outlines actions to restore and enhance the creekline corridor in order to provide some ecological value to the site as a whole. This is required to be addressed and is conditioned below.

- **C6.11 Natural Environment - Warriewood Valley Land Release Area; D16.12 Landscaping; C6.22 Landscaping on Public Road Reserve**

Council's Natural Resources and Landscape Officer has provided the following comments:

Two existing Swamp Mahogany (Eucalyptus robusta) occur away from the creekline area, and these are to be removed as part of the works, along with a few Coral Trees near Fern Creek. The Landscape Plan (Umbaco Landscape Architects Drawing No. L01 G May 2009) provides a large number of locally native canopy trees along the streetfront and proposed cycleway areas. They are currently proposed in 75 litre container sizes, which is considered to be quite minimal considering the bulk and scale of the proposal. It is more appropriate to have all canopy trees provided in 200 litre containers from the outset so as to give an instant landscaped effect and provide better immediate softening and screening.

An interesting feature of the landscaping is the selection of evergreen and trellised fruit trees/vines provided to screen the wall on the western boundary of the site. The use of fruit trees is encouraged however they can present management issues with fruit drop, and the management of these trees are to be incorporated into the ongoing strata management plan.

The list of plants provided is considered appropriate and in accordance with the Warriewood Valley Landscape Masterplan.

The proposed fruit trees are suitable for the Lomandra Way elevation on the basis that they will grow to 4 to 5 metres in height and as they have dense foliage at the right height they would provide better screening in this case than the likes of tall Eucalypts which in time would only have bare trunks in front of the wall and all the foliage above it. The fruit trees are also quite a unique idea and align well with Council's sustainability/community garden visions. The proposed 3 metre setback is enough to support canopy trees.

This is actually quite a generous setback given that in most street-planting scenarios (e.g Newport) the planting space is usually a lot less.

The plants within the Fern Creek Corridor are 100% locally native and should be planted at a density of 4 plants per square metre throughout the corridor area. As mentioned, a Vegetation Management Plan is required for the Fern Creek Corridor, to be implemented within the first two years before the area is handed over to Council for future management. This VMP could be required to be provided before the release of the Construction Certificate should the application be approved.

The above comments indicate that the proposed development is consistent with various landscaping, vegetation management, and natural resource management requirements. There is no discussion within the application documentation however as to whether the creekline works will impact upon significant native canopy trees within the riparian zone (*Angophora Costata* and *Eucalyptus Robusta*). None are nominated on the plan as being proposed to be removed, however the application has not been supported by an arboriculture assessment of impacts upon these trees or what measures are required for their protection. This matter remains outstanding.

- **B6.2 Access driveways and works on the public road reserve**

Conflict between delivery vehicles and pedestrians/customer vehicles

Submissions raise concern with potential conflict between pedestrians and customer vehicles, and delivery vehicles, as access to the development is provided by one access point to be used by all vehicles. The outcomes sought by this control include *Safe and Convenient access* and *Pedestrian Safety*. Control B6.2 requires that:

Access Driveways providing access for service vehicles to loading docks must be separated from access used by the general public for access to public parking areas;

The proposal clearly cannot comply with the requirements of this control. The report entitled "Assessment of Traffic and Parking Implications" provided by the applicant does not address the requirements of Control B6.2. Notwithstanding, the report states that "*Given the relatively small nature of the centre and the road frontage circumstances it is apparent that this single access point will be both satisfactory and appropriate*" and concludes that "*the provision for delivery and service vehicles will be adequate and appropriate without any adverse impact on pedestrian and other vehicle movements*".

Council's Traffic and Streetscape Officer has indicated that deliveries by large vehicles should not be permitted between the peak times of 7.30am to 9 am and 4.30pm to 6 pm.

The recommendations of the independent review of the applicants acoustic report recommends deliveries be restricted to daytime (7.00am – 6.00pm), with possibly one or two deliveries in the evening (6.00pm – 10.00pm).

These considerations result in a window of time available for deliveries from 9.00am to 4.30pm, with arguably 1 delivery possible between 7.00am and 7.30am, and 1-2 deliveries after 6.00pm.

This scenario is contrary to the recommendations of the RTA which require that a loading dock management plan be required to be prepared, which should consider, amongst other things, *having deliveries occurring outside store trading hours to minimise any conflicts with customers.*

Councils Urban Infrastructure Unit raises no objection to the proposal subject to the restriction of large delivery vehicles outside the hours of 7.30am – 9.00am and 4.30pm – 6.00pm, and subject to a Loading Dock Management Plan being provided prior to the issue of a Construction Certificate. In addition, to facilitate safer manoeuvring of delivery vehicles, eleven car spaces are recommended to be removed as follows:

- Three spaces between the loading dock and specialty loading dock; and,
- Five spaces opposite the loading dock, south side; and,
- Three spaces on the southern side of the entry

A further issue is identified with respect to pedestrian safety in the vicinity of the loading dock area. The compliance table at D16.7 indicates that fencing should be provided to the southern edge of the loading dock area to prevent shortcutting from the pedestrian pathway across the truck turning area where delivery trucks may be reversing.

Safety of turning into and out of proposed entrance from Garden Street

Submissions received also raise concern with the safety of the location of the vehicular access proposed with respect to sight distances for vehicles turning into and out of the development.

The report submitted by the applicant concludes that the access design complies with relevant Australian Standards and that satisfactory sight distances are available. Councils Urban Infrastructure Unit raises no concern in relation to this issue.

Safety of pedestrians using the pedestrian path/cycleway crossing Garden Street

Concerns are raised in submissions regarding pedestrian safety crossing Garden Street when using the cycle path. Pedestrian refuges will be provided at the roundabout and at locations 150m both east and west of Garden Street. The Warriewood Valley Roads Masterplan does not provide for a pedestrian refuge over Garden Street at the point where the cycleway/pedestrian paths connect.

• B6.6 Off Street vehicle parking requirements

Concerns are raised in submissions to a lack of parking available for staff for the supermarket and a resultant impact being that staff will use the surrounding residential streets for

unrestricted parking. It is understood anecdotally that parking in nearby streets is becoming increasingly difficult as residents park cars on the street and use garaging areas for storage.

The traffic report submitted indicates that the 1 in 30 ratio relied upon is the correct ratio upon which to provide parking for the proposal. Even after removing 11 spaces for safer manoeuvring, the proposed development exceeds carparking requirements of the DCP by 5 spaces. Council's Urban Infrastructure Unit raises no objection.

Should the application be approved, a condition of consent could nominate specific parking areas to be made available and signposted for staff. Alternatively, Council could consider applying parking restrictions to nearby residential streets for other than resident permit holders.

- **C1.13 Pollution Control – Noise impacts**

Noise impacts of the proposed supermarket use have been a primary source of resident objections. The application is supported by an acoustic report prepared by Bridges Acoustics. The Bridges Acoustics report assumes operating hours for the Supermarket of 7.00am until midnight, 7 days.

An independent review of the report has been sought by Council noting the close proximity of the development to dwellings and the extent of submissions relating to noise impacts. In summary, the review finds the following:

- The approach taken by Bridges Acoustics to apply intrusive criteria of 5dBA above the background levels is considered appropriate.
- Background noise level results differed markedly due in part to the monitoring period including the easter weekend. Background noise levels of 37dBA rather than 38dBA for daytime, 37dBA rather than 39dBA for evening, and 33dBA rather than 34dBA should be used to establish noise criteria.
- As a result of the above, the intrusive criteria to be met is slightly lower for daytime, evening and night time periods, requiring increased attenuation of enclosures for mechanical plant and to noise barrier for loading dock.
- The criteria for assessing road traffic noise should utilise the more conservative "collector road" category, although the end result may also be compliant with the Environmental Criteria for Road Traffic Noise. An appropriate assessment under ECRTN would require additional traffic movements to be estimated with appropriate justification.
- The Bridges Acoustics report measures noise impacts from heavy vehicles in the same manner as car and mechanical plant noise (ie, an averaging exercise), which is inconsistent with the INP.
- The effectiveness of the 4m acoustic barrier will be reduced at the upper level (bedrooms) of No. 51 Callistemon Way, and it is not clear whether predicted noise levels have accounted for this, or what additional height would be required.
- The typical daily noise sources do not include those from waste collection activities.

- The Bridges Acoustics report acknowledges noise from the car park would exceed criteria at residential receivers in Macpherson and Garden Street. Justification on the basis of these receivers already experiencing higher noise levels and are therefore less sensitive, is an inappropriate comparison of noise sources ie, engines starting, car doors/boots being closed etc.
- Justification for exceedance of sleep disturbance criteria (by 7dBA) is that the noise of a delivery truck would be muffled or indistinct. This is not accepted given the anticipated activities associated with deliveries (pallet movement, doors opening closing, trucks idling, reversing and manoeuvring etc).
- Background noise levels after construction will be marginally lower due to acoustic shielding of Lomandra Way residents from traffic noise by the building itself. Noise impacts from deliveries may exceed a lower background level and hence be more impacting under this scenario.
- Overall the proposal should be limited on acoustic grounds to operating hours of between 7.00am and 10.00pm, with deliveries generally restricted to between 7.00am and 6.00pm, with exception of 1-2 deliveries in the evening.

It is noted in addition that the Bridges Acoustic report has not considered whether noise carried on prevailing winds would have any additional impacts, and has not included in the typical daily activities the emptying of skip bins, which known as a troublesome noise source in the experience of other supermarket operators in the area.

Notwithstanding the final recommendations of the independent acoustic review, it is recommended that any approval of a supermarket proposal should only be given following a more thorough assessment of the issues raised above.

- **C5.2 Safety and Security**

The proposed retail development can comply with most of the requirements of this control. The application is supported by a Crime Risk Assessment Report which has been reviewed by NSW Police and found to be generally acceptable subject to some additional conditions of consent being imposed.

Crime and graffiti are concerns raised in public submissions. The application, and review by NSW Police adequately address these risks through use of anti graffiti finishes and maximising natural surveillance. Strategies suggested by NSW Police to overcome a lack of natural surveillance in the loading dock area include installation of a roller door on the loading dock, or installation of cc tv and the required sensor lighting.

The application is considered deficient however in that there is insufficient information provided relating to the proposed lighting of the development, including the carpark areas. Intrusive lighting impacts have been raised within resident objections.

The crime risk assessment (by the applicant) and review (by NSW Police) indicate that high levels of external lighting (flood lighting) are required, including sensor lighting. The lighting of the development will impact upon adjoining and nearby residential uses.

Lighting for the development should be in accordance with both ANZS 1158.3.1:1999 for pedestrian areas and AS4282 for the control of the obtrusive effects of outdoor lighting. The

Crime Risk report supplied by the applicant also recommends that lux levels be compliant with AS 1158 outside the development and at the entrance to the carpark. There is some risk that the requirements of these standards may be in conflict.

The sustainability report proposes the use of "high output metal halide lights for security lighting". There is no documentation within the application indicating what lighting is proposed and where or whether the relevant standards can be met. Should hours of operation in to the evening period be considered (ie, after 5pm), it is likely that nearby and adjacent residents will experience considerable impact from high level lighting required to meet the security needs of the proposed development.

The levels of lighting and subsequent impact associated with this type of development are questionable within a predominantly residential neighbourhood. The likely impacts should be known and demonstrated to be reasonable prior to the issue of consent.

- **C5.21 Plant, Equipment Boxes and Lift Over-Run**

Pittwater 21 DCP requires that plant and equipment be integrated into the built form of the design. A variations clause is available where, subject to achievement of the outcomes of this control, consideration may be given to the location of plant on the roof of a building where it can comply with built form controls, and can be adequately screened from adjoining properties and the public domain.

The proposed plant room (floor area of 300sqm) is located within a mezzanine roof space 5m from the northwestern boundary. The nearest residence (Lomandra Way) is 13m away from the plant room. The room is completely enclosed aside from an access door located on the south western elevation, and has a skillion roof form the highest point of which complies with the height limit of 8.5m. It is no higher than the rooves of nearby dwellings (although it is of considerably larger expanse). The roof form enclosure is able to be insulated such that noise impacts can be appropriately mitigated.

The proposed condenser deck is located further to the east, almost centrally located on the roof of the building. The condenser deck must remain unenclosed in order to achieve appropriate ventilation. The sustainability report supporting the application indicates that "air conditioning units will be positioned 1m above roof to draw air through from underneath (using vertical fins or equivalent). Where applicable acoustic baffling will be used to reduce noise to required standards".

The plans submitted are not consistent with this requirement. If placed 1m above the roof, the condenser unit will breach the 8.5m height limit, which will prevent application of the variations clause of the policy.

Notwithstanding this, the minor breach will not result in adverse impact, noting that the deck is centrally located on the roof form away from boundaries, meaning that near view pedestrian and neighbour vantage points in the area are unlikely to be impacted.

The site and especially the roof form of the development will be viewed from many dwellings and public areas in the more elevated areas of the valley, including from Mater Maria secondary school. Subject to appropriate visual and acoustic screening being provided however, the impact of the roof top plant is considered to be acceptable.

- **C6.7 Water Management and Creekline Corridors**

This control incorporates details contained within the *Landscape Masterplan and Design Guidelines* for Warriewood Valley, and refers to Council's *Water Management Specification for Warriewood Valley*.

50m wide multi function corridor

The proposed development of the site largely achieves the desired outcome of this part of the control providing its share (25m) of the 50m wide multi function creekline corridor to be established for Fern Creek. The outcomes sought by this control are achieved, with the exception of the following issue.

As discussed in previous sections of the report, there is some question as to whether the creekline bulk earthworks will impact upon an existing mature *Angophora Costata* and *Eucalyptus Robusta* within the riparian zone. The policy requires the following outcome to be achieved:

Remnant native vegetation along creeklines, escarpment vegetation, and the Warriewood Wetlands, including stands of Swamp Mahogany, Forest and Swamp Oaks, and Angophora woodlands are conserved and restored to provide linkages and stepping stones for wildlife movement.

Noting this outcome, it is appropriate that the retention and protection of the trees be established by condition of consent following an assessment of potential impacts upon them from the bulk earthworks proposed.

25m private buffer area

The second part of the control relates to the provision of a 25m wide landscaped buffer area and requires as follows:

*A 25 metre private buffer strip is to be provided on each side of the multi-function corridor and may be in private ownership, **which will contain flora and fauna habitat**. Water quality control ponds must be substantially contained within this private buffer, which might also contain other water quality and quality treatment measures... Dwellings, garages and **other built structures must not be located within the private 25 metre buffer strip**.*

Other development within Sector 8 has reasonably achieved the control requirements, as evidenced both in the Masterplan document, and on the ground. The control allows for *the 25 metre buffer strip may be varied in width within the sectors in some instances to provide wider pockets, subject to the average width being at least 25 metres*, and the location of a large area to contain a future district park assists the overall achievement of this control within Sector 8.

A 25m wide buffer area is provided by the development and the required pedestrian cycle path is provided in accordance with the requirements. The effectiveness of the area as a buffer to the riparian zone is however highly questionable given that it is almost entirely taken up by the carpark and loading dock area.

Carparking spaces along the southern edge of the carpark are proposed to be constructed using a permeable surface to offset the impact on the drainage system. The issue is assisted

by the required reduction in carparking spaces (for safe manoeuvring), including five spaces within the buffer area, which could then return to landscaping.

Even considering these matters, it is difficult to conclude that the buffer area will provide anything in the way of flora and fauna habitat. In addition, the acoustic wall of some 3.5 to 4 metres in height, required to assist in protecting the residential amenity extends nearly 15m into the buffer area, breaching the requirement for no built structures within the 25m strip. This breach is unacceptable.

Notwithstanding this significant non-compliance with policy, Council's Urban Infrastructure Unit raises no objection with respect to stormwater outcomes. Also, Council's Landscape Architect has confirmed that the proposed development is in accordance with the document known as Warriewood Valley Urban Release Area Landscape Masterplan and Design Guidelines.

It is noted that the Landscape Masterplan and Design Guidelines provides a concept that the District Park within Sector 8 is to be provided with a carparking area on the subject site accommodating approximately 50 spaces. The envisaged carparking, which under the current proposal will be forgone (see comments at C6.12 below), breaches both the 25m private buffer area and the riparian zone.

On the basis that the control forms part of the recently adopted Pittwater 21 DCP Amendment 5, and the carparking area for the District Park remains a concept only, there is a justifiable expectation that the requirements of the control be upheld.

- **C6.12 Public Recreation and Open Space - Warriewood Valley Land Release Area**

The "Warriewood Valley Urban Release Area Landscape Masterplan and Design Guidelines" indicates that public parking is desired (as an indicative concept only) on the subject site to support the nearby District Park. Carparking for the Park is not proposed in the D.A. Council's Landscape Architect provides the following comments with respect to the requirements of the masterplan:

A carpark was indicated on the edge of the Sector 8 site in relation to a preferred design direction for any intended development of that site. Given the adopted direction for a neighbourhood centre on the subject site, the location of a carpark opposite the creekline corridor that could service both the proposed development and possibly provide informal parking for public facilities in off-peak times, would seem a desirable outcome for the land release generally.

The carparking area as proposed in the current application for 23B Macpherson Street complies with the desired outcome of the landscape masterplan.

The comments are not accepted as dual use of the carpark that is proposed within the DA, would conflict with Control C6.7 (25 metre private buffer), Control B6.2 in relation to safety concerns regarding delivery trucks and service trucks and Control B6.6 with respect to the excessive reduction in carparking available to the supermarket users, in the event that dual use of the carparking area in relation to the District Park is allowed. Dual use is also not proposed by the applicant.

- **C6.13 Landscaped Amenity Buffer Strips - Warriewood Valley Land Release Area**

Concerns have been raised by objectors that insufficient buffer zones are provided between residential uses adjoining Lomandra Way and the proposed development. Building setbacks

are discussed in subsequent sections of this report, however setback controls apply primarily to and between residential development and are insufficient to adequately deal with the spatial separation needs between incompatible land uses. In the absence of controls relating specifically to retail/commercial uses, controls to address impacts between incompatible land uses generally have been examined.

This control relates to the subject land and is applicable to all Warriewood Valley Sector Development. The aims of this control include the following:

- *Landscaped zones provide amenity buffers between incompatible land uses, such as the Warriewood Wetlands and residential areas, and between light industrial and residential areas; and,*
- *Any adverse impact on environmentally sensitive areas or impacts of differing land uses are mitigated*

The transition between residential and light industrial uses is given as an example within the control, however the concept of providing amenity buffers applies to any incompatible land uses. The buffer areas are suggested to be provided, in addition to built form setbacks, between 5-15m wide and extensively landscaped.

The retail use proposed is incompatible with neighbouring residential uses, particularly in Lomandra Way and Callistemon Way. Insufficient spatial separation is provided as a buffer to the acoustic impacts from the loading dock, and to the adverse visual impact of the acoustic wall, loading dock and parking lot beyond. A landscaped buffer of between 5-10m in this area would significantly improve the visual outlook for residents facing Callistemon Way, and provide a continuation of the bushland setting they currently enjoy. Additional spatial separation in this area would assist in mitigating the acoustic impacts of the loading area and screening any required acoustic wall.

The vista presented to the public as they walk, cycle, or drive east along Callistemon Way could be significantly improved, and an important visual connection through to the creekline corridor could be established. This would be the logical continuation of the high quality visual character and amenity of the creekline corridor and landscaped setbacks already provided within Sector 8.

• **C6.15 Warriewood Valley Land Release Area Focal Neighbourhood**

This control represents the primary mechanism for achieving the desired outcome of the Focal Neighbourhood Centre (FNC). The outcomes sought are as follows:

- *The local convenience retail needs of the incoming population are met.*
- *A focal point in the Valley that links local services and facilities, including local retailing, public open space, public transport and community facilities.*
- *Car dependency is reduced and other modes of transport encouraged.*
- *A sense of community and place.*

The control outlines seven criteria that need to be met. Each criteria and the extent to which the proposal complies are dealt with in turn, as follows:

- **The FNC is to be established in the vicinity of the Macpherson Street and Garden Street intersection, within Sector 3, 8, or 11.**

The proposal complies. The location is central and meets the DCP requirements.

- **The FNC is to incorporate a retail floor space area between 855-2222sqm to meet the retail convenience needs of the incoming population (such as a small general store, post office shop, ATM, internet coffee shop, etc).**

With a retail floor space of 3950sqm, the proposal is clearly and significantly non-compliant with the numeric floor space control. The proposed supermarket floor space is also inconsistent with the control by virtue of its size, and the nature of the retailing activity. A supermarket of floor space 3200sqm is to be occupied by a main line supermarket and is of intensity well beyond that anticipated from a “small general store”.

Justification for additional floorspace

The applicant argues that an increase in the anticipated demand for retail floor space in the time since the limitations were established by the DCP and the lack of adverse impact on the viability of retail centres at Warriewood Centro and Mona Vale justifies a variation to the DCP requirement.

The floor space requirement contained in the DCP (855sqm – 2222sqm) was confirmed as **a sustainable estimate given the underlying retail demand** by a study undertaken by HillPDA on behalf of Council in 2006. Following a review of Pittwater 21 DCP, amendments to the policy were the subject of extensive consultation with the community in June 2009, the results of which did not bring about any change to the floor space requirement in the DCP.

The analysis provided most recently by HillPDA in support of the subject development application sought to establish **whether there would be sufficient demand for a commercially viable larger centre** (ie, one 3950sqm of floor space), and what impacts this may have on surrounding centres.

A direct comparison between the amount of floor space considered by the two studies is not a relevant exercise for the assessment of the proposal given that the brief for the studies were quite different.

The study that supports the Development Application represents the extent to which the proposed floor space will be commercially viable. The viability of a proposal (which to a large extent also represents its profitability) is a logical step in feasibility considerations for any property developer, and takes into account a range of commercial factors (including the purchase price of the land). The commercial viability of a development however is not a matter upon which significant weight should be placed in the context of the overall matters required to be considered by Section 79C of the Act. It would not of itself be sufficient justification to discard the floor space requirements of the DCP, the limits to which represent more than an economically sustainable solution for the site.

Notwithstanding that the extent of retail demand is disputed by neighbouring retailer Warriewood Centro, it is considered that the amount of retail demand is not itself a justification for a certain amount of floor space on a site. Other locations in the area are available for expansion to accommodate additional demand that is unable to be accommodated on the Warriewood site. Some of these locations are more likely to accommodate the required floor space without associated impacts upon residential amenity.

Impacts upon nearby retail centres

Consideration of impacts upon other retailers is undertaken on the basis of impacts to turnover of the centre as a whole, and not with respect to individual retailers within a centre. The

limitation on size within the DCP gives specific consideration to potential impacts upon established retail/commercial centres at Warriewood Square (Centro), and Mona Vale Commercial Area.

Warriewood Centro have objected to the proposal including on the basis of economic impact upon average trading levels of all supermarkets in the local area, but particularly upon Centro itself given its location within the Primary Trade Area. Further discussion of this issue is provided under the heading of economic impacts at Section 10.8 below, however the applicant contends that the likely impact is not considered significant (loss of turnover <10%), and will be adequately ameliorated by the anticipated growth in demand for retail floor space within Warriewood Valley.

- **The FNC must be linked to public transport nodes and the pedestrian and cyclist network, and to the district park and community facilities**

The site is central to bus stops along the State Transit Bus Routes of L85 and 185, providing regular services between Mona Vale and the City (including a limited stops service), and route 182 between Mona Vale and Narrabeen. These services are available as of 2nd August 2009. The continuation of the pedestrian and cyclist network is provided for within the creekline corridor, and a good connection for cyclists and pedestrians to the future District Park is facilitated. The location of any future community facilities in the Warriewood locality has not been outlined in any detail within the overall planning strategy, and no community facilities (eg, community centre or hall) are provided by the development.

- **Reduced dependence on the car is encouraged**

The extent to which customers will be encouraged by the proposal to utilise alternative forms of transport (bus, cycle, walk) is questionable. The supermarket is a form of retail development which relies heavily on customers travelling by car. The nature of the use is such that weekly and monthly shopping needs are most often required to be transported by car, even for those who may live close by. The parking provided exceeds the amount required by the DCP.

- **Safety and security are to be considered in the design of the centre**

The safety and security of the proposal is well covered under Control C5.2 of this report. The design is found to be generally compliant except for insufficient information relating to lighting.

- **Carparking for the centre is to be in accordance with the DCP**

The outcomes of the DCP as they relate to off street parking for this development are to provide parking to meet the demand generated. This requirement, together with retail activities commonly associated with supermarkets, is in direct conflict with the objective to reduce car dependency and encourage the use of other forms of transport. Notwithstanding this, the proposed development meets the requirement.

- **Requirements of the Disability Discriminations Act and this DCP must be considered in the design of the centre**

The application has not demonstrated compliance with the DDA and the access requirements of P21DCP. The provisions of these documents have more complex and far reaching considerations of access issues than the BCA. The appropriate access assessment should be provided prior to issue of any approval.

- **C6.17 Social Environment – Warriewood Valley Land Release**

The application is supported by a Social Impact Assessment. The Manager – Community, Library, and Economic Development provides the following comment:

The current P21 DCP (C6.15) suggests a focal neighbourhood centre of approx. 855m² – 2,222m² and doesn't envisage a supermarket as part of the Centre. The P21 DCP (C6.17) also describes the desired Social Environment to be achieved in Warriewood Valley. In part this control describes the social environment in the following manner:

"Liveable communities which foster a strong sense of community and facilitate social interaction among residents"

"Provision of opportunities for residents to meet informally".

The applicants proposal is significantly larger than that proposed in C6.15 (2,222m²) being in total some 3,950m². However most of this additional floor space is as a result of the applicant including the provision of floorspace for a supermarket in the proposal.

On balance, the inclusion of a supermarket is seen as a positive element for the focal neighbourhood centre as it is more likely to assist in facilitating opportunities for social interaction between residents. In addition the proposal to include a supermarket will potentially create a greater sense of place and be a stronger focal point for the Warriewood Valley Community.

For the reasons outlined above the proposal is supported on the basis that it is likely to have a significantly beneficial social impact for the Warriewood Valley Community.

- **D16.1 Character as viewed from a public place**

Lomandra Way is a pedestrian and vehicular thoroughfare, being the only vehicular access available to the garages/rear entrances of 33 dwellings. Whilst dwellings in Lomandra Way have their primary address and orientation to Callistemon Way and Macpherson Street, the pedestrian environment on Lomandra Way has a significant depth of landscaping both in the public domain and within the 2.6-2.9m setbacks of the dwellings to the boundary. Dwellings are separated from garages such that built form is broken up, fencing is minimised, and landscaping is utilised to transition between the private and public domain.

The north western elevation of the development presenting to Lomandra Way fails to comply with the character considerations of the DCP. The proposal presents a wall with a total length of 99m to Lomandra Way, most of which encloses the back of house area of the supermarket and is a height of 5m above finished ground level. At its south western end, the wall steps down to 4m where it encloses the loading dock, and then to a height of 3.5m as it extends to partly shield the truck turning area. The wall functions here as an acoustic barrier to the use of the loading dock and truck turning area.

The entire length of the wall has a setback of 3m from the boundary to Lomandra Way within which fruit trees are proposed to be planted at 6m centres. Trellis to support espaliered fruiting plants will be used to visually break up the wall, and visual interest through the use of coloured projecting panels is proposed.

The impact of the wall comes from its continuous and unmodulated length of 99m. At a height of 5m and setback 3m from the boundary, the wall is not excessively bulky, but is of a scale by way of its uninterrupted length that is uncharacteristic of the residential area. The length of the wall represents 72% of the length of the site boundary. The design has attempted to address this impact in a cosmetic treatment of the wall, and through landscape solutions, however over a length of 99m these measures are an inadequate substitute for spatial separation and building modulation.

When driving along Callistemon Way, the vista looking east will terminate at the acoustic wall.

This result is inconsistent with the open streetscapes and vistas provided to streets within the residential precinct, and reduces the ability for natural surveillance of both the public domain areas, and the loading dock/turning area on the subject site. The crime risk assessment review by NSW Police highlights the loading dock as a particular area of risk for crime and graffiti.

The proposal should be amended to provide a significantly greater landscaped setback to the building/wall for a distance of at least 20m measured from its south western end. The consequence of this would be significant for the overall design, with a likely need to reduce the floor space of the development. This is not considered unreasonable however in light of the amount of floor space anticipated on this site by the DCP (ie, 855sqm – 2222sqm).

- **D16.2 – Building Colours and Finishes.**

The proposed retail use requires larger floor plates, roof forms, and wall lengths than would be anticipated for residential development. A variation to the control in this respect could be tolerated given the stated desire in the DCP to provide between 800-2200sqm of retail floor space, which is likely to result in non-compliance with these matters. The proposal however is significantly larger than the DCP requirement, and to that extent a reduced floor space would reduce the visual impacts of the roof and walls, resulting in a more compliant and less impacting development.

- **D16.3 – Front Building Lines; D16.4 Side and Rear Building Lines**

The setback to the built form in Macpherson Street is consistent with the setback of adjacent residential development and provides good opportunities for landscaping. Large street trees (*Eucalyptus botryoides* and *Angophora Costata*) are proposed within this setback which is appropriate for a primary frontage, and necessary given the 32m length of unbroken wall at between 4-5m in height that presents to Macpherson Street at the northern corner of the site. The 7m setback provides an opportunity for additional depth of planting to facilitate an enhanced pedestrian environment and presentation to Macpherson Street. The landscape plan should be amended to include some smaller trees/shrubs in this area (groundcovers only are proposed in the plan) to soften the long unarticulated wall proposed, and to exclude cabbage tree palms which do not provide adequate canopy.

The setback to the built form in Garden Street is 36m. Within that setback is the open at grade carpark for the facility which is separated from the Garden Street boundary by a 3m landscape strip. The landscape strip will contain trees up to 10m high and understorey of native grasses. Although it would be desirable for a greater landscaped setback in this area noting the residential uses opposite, the result is not considered unreasonable should a retail facility of this size be considered appropriate on the site. Clearly a reduced floor space would require less parking, and allow a greater depth of planting to this boundary, which would more sensitively respond to the transition between residential and retail uses.

The extent to which the proposed setback to Lomandra Way can meet the outcomes of the control is questionable. In particular, the outcomes require that new development responds to, reinforces and sensitively relates to the spatial characteristics of the existing urban environment.

Where that existing environment is predominantly residential it is considered that a greater setback for at least part of the 99m length of wall should be provided. As discussed previously, the application makes some effort to cosmetically improve the appearance of the wall, and provides landscaping to the extent that the 3m strip can provide. However these mechanisms are insufficient for a commercial design to adequately integrate with its residential context. Greater spatial separation is required to bring about a stepping in the length of wall and an increased depth of planting.

8.4 Any planning agreement

No planning agreements are to be entered into.

8.5 The Regulations

No issues relating to the regulations are raised.

8.6 The likely impacts of the development

The likely impacts are largely addressed through the assessment of the proposal against the Pittwater 21 DCP requirements. Further impacts raised in submissions are addressed in this section

Economic Impacts

Council's Principal Officer Land Release provides the following comments relating to economic impacts:

One of the central issues of this proposal relates to the consideration of the economic and social effect of the development, as required under Section 79C(1)(b) of the Act. To best understand whether the proposal would have an adverse economic impact on existing centres, there firstly needs to be an understanding of the retail catchment to ascertain the current floorspace demand and whether there is an undersupply or otherwise.

The Primary Trade Area catchment (PTA) for this proposal is bounded by Mona Vale Road-Warriewood Road (as its north and north-eastern boundary), Pittwater Road to the east, Jacksons Road-Katoa Close as its southern boundary, and the Escarpment to the west. Centro Warriewood Square (designated as a 'Stand Alone Centre' under the Metropolitan Strategy and has a total retail floorspace of 22,130m²) is located along the southern boundary of the PTA. The secondary catchment area extends north of Warriewood Road up to Mona Vale Road however, does not include the Mona Vale Town Centre.

The SHOROC Employment Study (March 2008) already highlighted the existing undersupply of retail floorspace in the Pittwater LGA. Additionally, the applicant's Economic Impact Assessment identified that the PTA and secondary trade area already has demand (as of 2007) to support 15,500m² of retail floorspace including a supermarket of 2,391m², whilst a 98% growth is forecast for 2016 comprising 30,764m² retail floorspace demand in the catchment area (with 4,646m² supermarket floorspace). The proposal will certainly capture the current supermarket floorspace need (up to 2012) in this catchment, and will not create in an oversupply of retail floorspace.

In terms of social and economic impact, it needs to be determined if the economic viability of stores are threatened, and whether the viability of 'any other centre in the locality' as a whole is threatened such that there is a real chance or possibility that the proposal will disadvantage or detrimentally affect the life or existing of existing commercial centres (based on a decision made by Chief Justice Pearlman in Almona Pty Ltd v Newcastle City Council, 5 April 1995).

In this regard, Hill PDA advised that Warriewood Square (being within the primary trade area) will have an immediate adverse impact of \$18.4m turnover, as a result if the product base of Warriewood Square and this proposal, being groceries. By 2012 however, Hill PDA states the impact on Warriewood Square as a percentage shift in turnover will be -9.6%. Notwithstanding, such impact can be minimised by meeting the existing demand for retail floorspace.

Intrinsic to considering the future viability of existing centres within the locality is whether the adverse economic consequences of a development may, in turn, result in a social disbenefit to the community. The proposal meets current demand and will certainly assist, partly, in reducing the current undersupply of retail floorspace in the Pittwater LGA. The economic impact from the proposal is not likely to adversely impact the level of services typically provided in these centres (within the primary trade area) to the extent that it is likely to result on balance in a detriment to the Warriewood Valley Release Area community.

At present, Pittwater has a total retail floorspace of 111,025m². Based on the 2006 population, Pittwater has a demand of 145,310m² of retail floorspace resulting in a shortfall of 34,285m². This shortfall in retail floorspace results in retail expenditure escaping from the Pittwater LGA to Warringah Mall (which is designated as a "Major centre" under the Metropolitan Strategy).

If the existing and future growth in demand for retail floorspace is not met, this will result in:

- a growth in expenditure escaping the Region to the detriment of the local economy;*
- missed opportunities for local employment;*
- a reduced level of convenience and range of goods for the Region's consumers;*
- a greater degree of travel, particularly by private transport, thereby increasing strain on roads within and in/out of the Region; and*
- a greater degree of travel thereby placing further strain on the wider natural environment.*

In planning the Warriewood Valley Urban Land Release, a retail centre was identified as being one of the facilities required for the new community. This retail offering would take the form of a "focal neighbourhood centre", providing dual-purpose of serving the daily retail convenience and becoming a community/social hub for the residents of and employees in the release area. At that time (1994), the estimated range for retail floorspace was from 855m² to 2,222m².

The above comments provide a broad understanding of the pressures in the local area for increase to retail floorspace, and the consequences should those pressures not be responded to. Whilst acknowledging the overall importance of economic development to the area, economic development pressures are not of themselves a sufficient justification for Council to discard its adopted policies.

8.5 The suitability of the site for the development

The subject site has long been identified as being appropriately located to accommodate a retail facility of a neighbourhood scale. The site however, through the assessment of the LEP and DCP requirements and noting the extent of likely impacts and subsequent resident objection, is not considered suitable for the extent of floor space proposed.

An objection to the locating of the retail facility on the subject site has been received by a planning consultant on behalf of the landowner at Lot 1 DP 52091, being the owner and operator of the Warriewood Flower Power Garden Centre located diagonally opposite the site on Garden Street.

The submission notes a considerable history of the landowner desiring and working towards the location of the retail centre on the Flower Power site. Flower Power consider that their site has the same or better attributes than the land at 23B Macpherson Street, and that the existing retail plant nursery on the site provides opportunities that will compliment additional retail uses. It is argued that an integrated scheme together with existing uses and infrastructure on the site represents sound planning principles.

At a general level, the potential for retail development on the Flower Power site is not disputed. A refusal of the subject application however on grounds that a more suitable location exists could not alone be sustained. The responsibility remains with the landowner to demonstrate the suitability of its own site through the appropriate masterplanning and Development Application process. Notwithstanding the significant history of discussions and noting that the planning strategy has always included the Flower Power site as a potential location for the neighbourhood focal centre, it is not clear that Flower Power has been prejudiced in any way by the planning process.

8.6 Any submissions made in accordance with the Act or Regulations

Submissions received objecting to the proposal have been extensive and have covered a range of potential impacts and considerations. The overwhelming general objection from adjacent and nearby residents has been to the size of the proposal, and the additional impacts anticipated from a facility of that scale.

The most materially affected residents are those in adjoining Lomandra Way, Callistemon Way and fronting Macpherson Street on its southern side. Other residents whose properties have an outlook to the site in both Garden and Macpherson Streets will also be materially and immediately impacted. The impacts of increased traffic and to a lesser extent noise will reach more distant properties.

Many submissions refer to an expectation created through the policy of a limitation on the floor space to be accommodated on the site. It is reasonably clear that a retail facility of a size envisaged by the DCP is supported by most submissions. A few submissions indicate that there are enough supermarkets in the area, and a further such facility regardless of the size is not required.

Importantly, there have been some individual submissions in support of the proposal. One such submission was supported by a petition signed by 24 residents, mostly from within the Sector 11 Shearwater Estate. The submissions in support identify a need for a good sized supermarket with a full range of goods in the area, and the desirability of being able to walk to the facility. Job opportunities and the convenience of local supermarkets are identified as positive consequences of the development.

8.7 The Public Interest

The economic benefits of the proposal to the community by way of potential employment and increased social interaction do represent a positive impact to the community as a whole, however it

should be the objective of the planning process to achieve these and other social and economic benefits without compromising environmental and amenity considerations.

To the extent that an approval of the proposal would be inconsistent with the stated (and recently reconfirmed) policy position of the Council (a position with the considerable weight of a public consultation process behind it), it is considered that such a decision would not be in the public interest.

9.0 CONCLUSION

Notwithstanding the clear intention within the planning strategy for a Focal Neighbourhood Centre of limited scale, the statutory issues arising as a result of this Development Application raise doubt as to the ability of the consent authority to approve the proposal under Pittwater LEP 1993. Further, if found permissible under the existing LEP provisions, the development does not fit within the proposed new definition of “neighbourhood shop”, which has been expressly chosen to most clearly reflect the intentions of the Council to facilitate a small retail use on this site.

The proposed development has failed to demonstrate compliance with the adopted Pittwater 21 DCP requirements for the design of the buffer area to the creekline corridor, the preservation of locally indigenous canopy trees within the riparian zone, and the design of the built form to sensitively relate to the adjoining residential uses. The impacts of a large supermarket on the site, with particular reference to noise and lighting impacts are considered inappropriate in the residential area.

The size of the proposal, (as opposed to the use itself) forms the basis of most of the resident objections to it. In addition, resident objections request that Council uphold the controls that have been adopted as a result of the public consultation process, and by virtue of that process provide for the carrying out of an orderly planning process for development in the Warriewood Valley area.

In summary, the inconsistencies with statutory and non-statutory provisions, together with built form impacts and the need to uphold the planning processes expected by the community, outweigh the broader but limited benefits of meeting retail demand/employment in the area. The application is unable for these reasons to be supported.

RECOMMENDATION OF DEVELOPMENT OFFICER / PLANNER

That the Review Unit forward to the Joint Regional Planning Panel a recommendation that Development Application N0283/09 for a Focal Neighbourhood Centre at 23B Macpherson Street Warriewood, be refused for the reasons outlined in the attached draft Notice of Determination.

Report prepared by

Anna Williams
PRINCIPAL PLANNER

DETERMINATION

Business Hours:
8.00am to 5.30pm, Monday to Thursday
8.00am to 5.00pm, Friday

DA No: N0283/09

DATE

WARRIEWOOD PROPERTIES PTY LTD
4 PONDEROSA PARADE
WARRIEWOOD NSW 2102

Dear Sir/Madam

Development Application to construct a retail facility comprising a 3,200sqm supermarket, 750sqm specialty shops and café, parking for 150 vehicles, a 2 bedroom caretakers unit, and associated landscaping and creekline rehabilitation works; Subdivision of the land such that the creekline corridor is dedicated to Council

23B MACPHERSON STREET WARRIEWOOD NSW 2102.

I regret to advise that after due consideration, it has been decided to refuse this application.

The Notice of Refusal is attached. If there is any aspect of the decision that you are uncertain or unclear about, you should contact me.

Yours faithfully

Anna Williams
PRINCIPAL PLANNER

Encl

REFUSAL

ENVIRONMENTAL PLANNING & ASSESSMENT ACT, 1979

NOTICE TO APPLICANT OF DETERMINATION OF A DEVELOPMENT APPLICATION

Applicant's Name and Address:

**WARRIEWOOD PROPERTIES PTY LTD
4 PONDEROSA PARADE WARRIEWOOD NSW 2102**

Being the applicant in respect of Development Application No N0283/09.

Pursuant to section 80(1) of the Act, notice is hereby given of the determination by the Joint Regional Planning Panel, as the consent authority, of the Development Application for:

Construct a retail facility comprising a 3,200sqm supermarket, 750sqm specialty shops and café, parking for 150 vehicles, a 2 bedroom caretakers unit, and associated landscaping and creekline rehabilitation works; Subdivision of the land such that the creekline corridor is dedicated to Council

At:

Lot 11 Sec C DP 5464
23B MACPHERSON STREET WARRIEWOOD NSW 2102

Decision:

The Development Application has been refused for the following reasons:

1. The proposed development is correctly defined as a "shop" and is a prohibited use within the 2(f) Urban Purposes – Mixed Residential Zone under Clause 9 of Pittwater Local Environmental Plan 1993, and does not meet the objectives of the Zone as outlined in Schedule 11 of the LEP.
2. That part of the development proposed for supermarket floor space does not fall within the definition of "neighbourhood shop" which is proposed to be included as permissible development under Clause 44 and Schedule 10 of PLEP 1993 as Development for certain additional purposes through a Draft Amendment to PLEP1993/Planning Proposal. The Draft Amendment/Planning proposal has been certified and exhibited under the EPA Act 1979 and is therefore a relevant matter for consideration under Section 79C of that Act.
3. The Development Application has not been supported by an arboricultural assessment and has not therefore identified likely impacts to significant locally native vegetation within the creekline corridor from the works required to be undertaken to modify Fern Creek. The development has not demonstrated compliance with C6.11 of Pittwater 21DCP which requires the restoration, retention, and preservation of indigenous trees.
4. The acoustic report has not adequately and appropriately considered all noise impacts associated with the operation of the proposed supermarket on adjoining and nearby residential receivers and has not therefore demonstrated that the proposed development can comply with C1.13 of Pittwater 21 DCP, which requires compliance with the NSW Industrial Noise Policy. The hours of operation proposed are not considered to be appropriate for a residential area noting the likely acoustic impacts.

5. The Development Application has not adequately considered the likely impact of required security lighting of the proposed supermarket and carpark use on adjoining and nearby residents as required by C5.2 of Pittwater 21 DCP.
6. The proposed development does not comply with the requirements of C6.7 of Pittwater 21 DCP in that the 25m private buffer area provided does not contain sufficient flora and fauna habitat, and the design results in a 3.5-4.5m acoustic wall being located within the 25m buffer area.
7. The proposed development does not meet the outcomes of C6.13 of Pittwater 21DCP in that an adequate landscape zone/amenity buffer is not provided between incompatible land uses, ie, between the proposed supermarket use and nearby adjoining residential uses.
8. The proposed development does not meet the requirements of C6.15 of Pittwater 21DCP in that the proposed retail floor space of 3950sqm is significantly in excess of the maximum of 2222sqm allowed by the control. The extent to which the proposal meets the outcomes of the control are questionable noting that the type of development proposed does not reduced car dependency, and has not properly addressed the DDA and the access provisions of the DCP.
9. The proposed development does not meet the requirements of D16.1 of Pittwater 21 DCP in that walls to the proposed supermarket building are greater than 8m to any street frontage (99m proposed to Lomandra Way) resulting in a built form impact that is inconsistent with the residential character of the area.
10. The proposed development is inconsistent with the outcomes sought by D16.3 of Pittwater 21DCP in that the setback of the proposed built form to the boundary with Lomandra Way (including the acoustic wall and the proximity of the loading dock area) does not adequately respond or sensitively relate to the neighbouring residential uses.
11. Approval of the proposed development is not considered in the public interest given the extent of inconsistency with publicly exhibited policies and noting that economic and social benefits of a proposed development should not come at the expense of environmental and residential amenity values of the locality.

NOTES:

- (1) This determination was taken under delegated authority on behalf of the elected Council pursuant to Section 377 of the Local Government Act 1993.
- (2) Section 97 of the Act confers on the applicant who is dissatisfied with the determination of a consent authority a right of appeal to the Land & Environment Court exercisable within 12 months after receipt of this notice.
- (3) Any person who contravenes this notice of determination of the abovementioned development application shall be guilty of a breach of the Environmental Planning & Assessment Act, 1979, and shall be liable to a monetary penalty and for a restraining order which may be imposed by the Land and Environment Court.

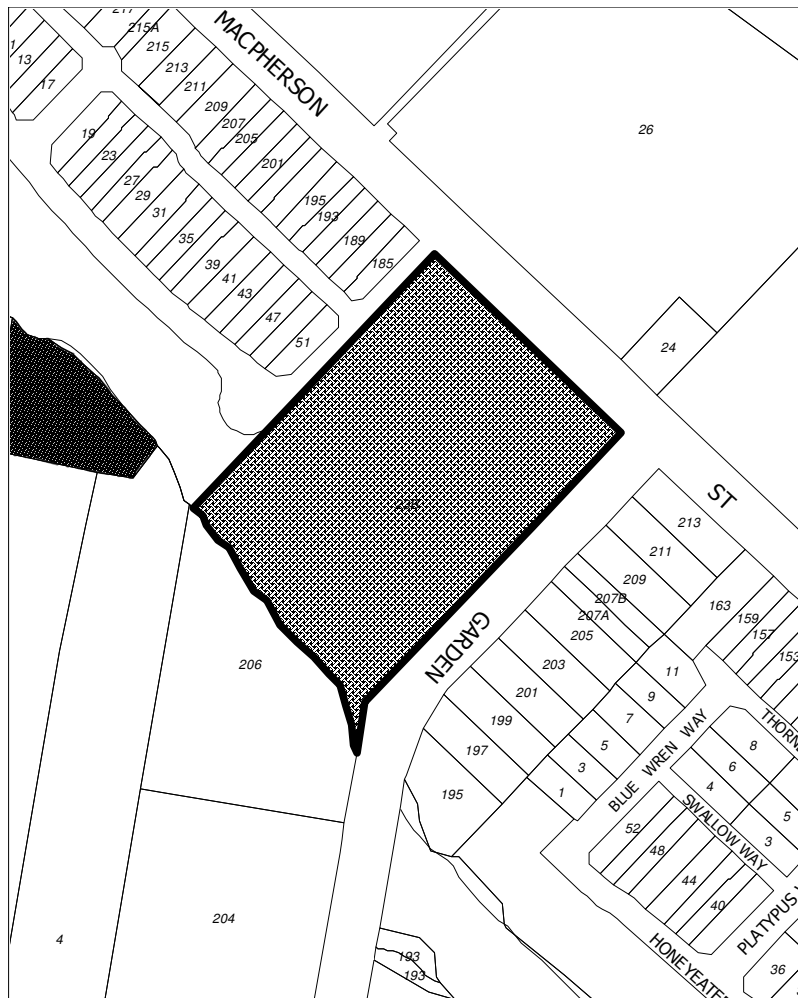
Mark Ferguson
GENERAL MANAGER

per:

R

Date

LOCALITY MAP



SITE PLAN
SCALE 1:500

CAFE PERSPECTIVE

MACPHERSON STREET

| | | | |
|---|------------|--------------------------------------|-----|
| DATE | 2020/09/01 | DA 2020/09/01 | 4/8 |
| <p>during the</p> <p>NOTIFICATION PLAN FOR PROPOSED WARREWOOD FOCAL NEIGHBOURHOOD CENTRE ON MACPHERSON STREET + GARDEN STREET LOT 1, DP 3464</p> | | | |
| <p>1:500, 1:500</p> <p>NGB-021</p> | | <p>4/8</p> <p>DA10</p> | |

1/20-100/00-07 Warrewood Focal Neighbourhood Centre

MALLESONS STEPHEN JAQUES

Attention: Anna Williams

21 October 2009

The General Manager
Pittwater Council
DX 9018 MONA VALE

Dear Sir

Advice in respect of the permissibility of the proposed Focal Neighbourhood Centre - 23B MacPherson Street, Warriewood

We refer to your request for advice in respect of whether:

- 1 The argument put forward by Malcolm Craig QC is sufficient to entitle the consent authority to rely upon his advice if the consent authority were to form a conclusion that the proposed supermarket and specialty store development is permissible with consent under the current zoning provisions of the Pittwater Local Environmental Plan 1993 ("LEP 1993").
- 2 The proposed definition of "neighbourhood shop" in the amendment to the Pittwater ("LEP 1993") is sufficient to ensure that the supermarket the subject of the current development application is permissible within the 2(f) zone following the making of that amendment; and
- 3 The commercial viability of a proposal is a relevant matter for consideration in the determination of a development application and, if so, how much weight should be given to it?

1 Summary

In our opinion:

- It would be reasonable for the consent authority to rely upon Mr Craig's reasoning and determine that the proposed development is permissible.
- Subject to further detail being provided in relation to the proposed supermarket and specialty stores, there is a real risk that the term 'neighbourhood shop' may not include the proposed development.
- Whether the commercial viability of a development is a relevant matter is unclear. Recent case law suggests that in, in the absence of particular circumstances, is not a relevant matter to be taken into account. Earlier decisions of the Court suggest that it may be taken into account as a matter of public interest but that this will depend on the facts of the case. Arguably it is a matter which can be taken into account but which may be of limited weight.

2 Is the argument put forward by Malcolm Craig QC sufficient to entitle Council to rely upon his advice if Council were to form a conclusion that the proposed supermarket and specialty store use is permissible with consent under the current zoning provisions of the LEP?

2.1 Malcolm Craig QC has provided an advice to the Applicant which has been forwarded to the Council dealing with the permissibility of the proposed Neighbourhood Focal Centre (consisting of the uses set out in paragraph 4.1).

2.2 In summary, he agrees with Mr Robson SC in finding that the development proposed by the Applicant is permissible with the Council's consent, although he accepts that there is some ambiguity in relation to the issue.

2.3 In forming this view he relies on the fact that the provisions of LEP 1993 need to be interpreted having regard to the planning context. Taking into account the Urban Release Framework and Appendix 3 of DCP 21, Mr Craig forms the opinion that the context is such as to enable the Court to find that the "Neighbourhood Focal Centre" falls within the definition of "community and associated urban infrastructure".

2.4 Mr Craig's advice is persuasive. In relation to his advice, we make the following comments:

- In forming his opinion, Mr Craig has regard to the heading contained in the Zoning Table 2(f) zone Urban Purposes - Mixed Residential as expressed in clause 9. He concludes that 'mixed residential' means residential and other types of non-residential development. Further, Mr Craig states that the reference to physical and social infrastructure clearly "intends more than the provision of power, water, sewer and roads".

While it may be that the heading of a provision is a legitimate matter to which regard can be had in interpreting a legislative provision, the phrase "mixed residential", having regard to the planning context, in our opinion means a variety of residential uses, not the meaning ascribed to it by Mr Craig.

We agree that physical and social infrastructure referred to in clause 30A(c) of LEP 1993 can include more than the provision of power, water, sewer and roads.

However, given the other types of infrastructure which could be community infrastructure (other than utilities), in the absence of a definition and given the definition of the term "shop" currently within the LEP it is also open for the Court to find that the proposed development is not permissible.

- In reaching his conclusion, Mr Craig also relies on the proviso in the introduction to clause 9 - "*Except as otherwise provided by this plan, in relation to land within a zone specified in the table to this clause the purposes (if any) for which development may be carried out...are specified under the heading...*". This proviso, it is argued, entitles regard to be had to Division 7A and the provisions set out in clause 30B of the LEP.



We have some difficulty in accepting this analysis and it is not clear that the Court would agree with it. The objectives identified in clause 30A and the provisions of clause 30B do not create exceptions to the 2(f) zoning table. Rather they are enabling and explain why the uses identified are permissible and why the Council has imposed the particular development control standards in Division 7A. In any event, if one accepts that "community and associated infrastructure" includes the neighbourhood focal centre, the proviso in clause 9 has no work to do in the current instance.

- In relation to the size of the supermarket, Mr Craig is of the view that given that LEP 1993 does not place any limitation upon size, this issue is a planning merits issue. As such it would need to be taken into account at the merit assessment stage of the process and would not be relevant to the issue of permissibility under the current LEP provisions. Although not beyond argument, we are of the opinion that this is correct in relation to the current LEP.
- 2.5 Despite the above comments, we are nevertheless of the opinion that it would be reasonable for the consent authority to rely upon Mr Craig's advice in determining the issue of permissibility of the proposed development.
- 3 **Does the proposed amendment to LEP 1993 to include a definition of "neighbourhood shop" ensure that the proposed supermarket is permissible?**
 - 3.1 Before answering this question, we note that in determining permissibility, the Council/JRPP will need to have regard to the current provisions of the LEP 1993. Unless the amending LEP is in force at the time the decision to refuse or grant consent is made, it will only become relevant to the merits assessment once the issue of permissibility has been determined.
 - 3.2 Council proposes to amend LEP 1993 by inserting a definition of "neighbourhood shop" taken from the Standard Instrument.
 - 3.3 "Neighbourhood shop" is defined in the Standard Instrument to mean:
"Retail premises used for the purposes of selling small daily convenience goods such as food stuff, personal care products, newspapers and the like to provide for the day to day needs of people who live or work in the local area and may include ancillary services such as a post office, bank or dry-cleaning but does not include restricted premises." [our emphasis]
 - 3.4 LEP 1993 does not include a definition of "general store" but it does adopt the definition of "shop" from the Model Provisions 1980. Under the Model Provisions, "shop" is defined as *"a building or place used for the purpose of selling, exposing or offering for sale by retail, goods, merchandise or materials but does not include a building or place elsewhere specifically defined in this clause"*.



- 4 **Is the neighbourhood focal centre a “neighbourhood shop” or a “shop”?**
- 4.1 The application for development consent describes the development as:
- the subdivision of land into two lots;
 - the erection of a Focal Neighbourhood Centre comprising a supermarket, speciality shops, café and caretaker’s residence with associated parking, landscaping and signage on proposed Lot 2; and
 - proposal for surrounding infrastructure including road works, landscaping and drainage works.
- 4.2 The proposed Neighbourhood Focal Centre building relevantly comprises a supermarket (3200m²), 7 speciality shops (630m²) and café (1200m²).
- 4.3 The Macquarie Dictionary defines a “supermarket” as a “*large, usually self-service, retail store or market selling food and other domestic goods*”. In our opinion, the supermarket is capable of being a shop. It will only be a “neighbourhood shop” if it sells goods which are:
- “small daily convenience goods”.
 - for the “day-to-day needs of people who live or work in the local area”;
- 4.4 It will be these two elements which distinguish a general supermarket (i.e. shop) from a neighbourhood shop. Whether the speciality shops are “neighbourhood shops” will be subject to the same qualifications.
- 4.5 In interpreting what a particular use may include, the regard must be had to the relevant definitions contained in the planning controls. See *Hastings Co-operative Pty Limited v Port Macquarie Hastings Council* [2009] NSWLEC 99, where the Court held that a supermarket was not a shop because the definition of shop contained in the relevant local environmental plan excluded places elsewhere defined in that plan. “General store” was defined to mean a *shop used for the sale by retail of general merchandise and which may include the facilities of a post office*. The Court held that the supermarket fell within the definition of “general store”. It was therefore not a “shop” as defined by the LEP and was therefore permissible. The Court also considered, although obiter, whether the supermarket would fall within the definition of “neighbourhood centre” as defined by LEP and found that it did not. However, the definition of “neighbourhood centre” was very different to the proposed definition of “neighbourhood shop” and did not contain the two qualifications identified in paragraph 4.3 above.
- 4.6 In reaching the decision in the *Hastings* case, Lloyd J had regard to the decision in *Maryland Development Co Pty Limited v Penrith City Council* [2001] BC200103731 where Sheahan J said:

“Where a large “general store” sells a general range of merchandise, including foodstuff and homewares, it may be referred to colloquially as a supermarket.



MALLESON'S STEPHEN JAKES

"Supermarket" is not a planning term; labelling the proposed development as a supermarket is irrelevant. A supermarket is a shop and may be a "general store". A "department store" is probably also a "general store". It is irrelevant that a store's approval may have impact. The merit question is different from the permissibility question."[117]

"The definition [of a general store] does not distinguish between food and other merchandise, nor does it limit size, nor specify predominance or non-predominance of various product lines, such as food. The definition is satisfied where a range and variety of product lines are offered for sale by retail, and to analyse a proposal in terms of floorspace or turnover as Perrignon J did in 1986, is contrary to the current definition. I do not adopt that approach."[132]

- 4.7 By analogy therefore, a neighbourhood shop in the absence of a specific definition may be "a supermarket" and a supermarket may be a "shop". However, in the proposed LEP "neighbourhood shop" and "shop" are mutually exclusive. The distinguishing feature in the current circumstances will be whether the 2 qualifications identified in paragraph 4.3 are met.
- 4.8 The definition of "general store" in the *Hastings* case was wider than the definition of "neighbourhood shop" contained in the Standard Instrument. We are not aware of any judicial consideration of the phrase "small daily convenience goods" but in our opinion whether the proposed use qualifies will be a question of fact and degree. What would need to be demonstrated is that the range of goods sold are 'small daily convenience goods' which cater to the needs of the locality.
- 4.9 We do not have details as to the type of supermarket or specialty shops proposed. Based upon the information before us we consider it possible that the proposed development may not be held by a Court to be a neighbourhood shop. More details would be required from the applicant of the proposed use to address this issue and should be provided prior to the determination of the consent if the development is to be approved as a "neighbourhood shop". Alternatively, any consent on the basis of the new LEP provision could be conditioned to restrict the types of goods sold.
- 4.10 Mr Craig argues that "In principle, I have no doubt that a supermarket is capable of falling within the definition of a "neighbourhood shop"" and finds that size is not determinative. However, with respect, in our opinion, this is not the correct question. As a result of the above analysis it is not apparent that Mr Craig has given sufficient weight to the two qualifications we have identified and we do not agree with his conclusion.
- 4.11 Further, if the products sold by the specialty stores and the supermarket are not limited to small daily convenience goods or the goods cater for more than the needs of the locality then the proposed use may be properly characterised as "shop". Such a characterisation may well result in the use being prohibited since the amending LEP has not sought to include "shop" in the proposed amendments and shop is separately defined in LEP 1993.

- 5 **Is the commercial viability of a proposal a relevant matter for consideration in the determination of a development application and if so, how much weight should it be given?**
- 5.1 As part of the preparation of master planning for sector 8, Council requested advice from Hill PDA as to how much retail floor space was needed in order to serve the needs of the community, ie: the level of retail required in order to service the demands of the locality. As a consequence of that advice, Council inserted a provision in DCP 21 that 800m² - 2200m² was required.
- 5.2 As part of the application for development consent, the Applicant has submitted a report from Hill PDA to the effect that the proposed 3200m² is required in order to make the neighbourhood focal centre commercially viable.
- 5.3 Whether the economic viability of a development is a consideration which can be taken into account by a consent authority is unclear. Most recently, in *Hill v Blacktown City Council; Pluimers v Blacktown City Council* [2008] NSWLEC 203, Pain J held that due to the **absence of particular circumstances** in that case, the economic viability of a proposal was not a material consideration under s 79C. Further, the profitability of a particular business could not be relevant.
- 5.4 Pain J referred to the judgment of Basten JA (Giles and Santow JJA concurring) in *Randall Pty Limited v Willoughby City Council* [2005] NSWCA 205 (at [36]), where His Honour suggested that economic viability could **in particular circumstances** be considered as a planning consideration.
- 5.5 The issue was also considered in *Patra Holdings v Minister for Land & Water Conservation* (2001) 119 LGERA 231. Relying on an earlier High Court decision, Pearlman J in *Patra* stated that the "economic viability" of the use could only be relevant as a component of the public interest, in the sense of the economic interests of the State and the orderly and economic use of land (i.e. having regard to the objects of the EP&A Act). Thus the "economic viability" of the proposed use of the site might be able to be taken into account as a matter of the public interest, but the profitability of the applicant's personal business of growing olives was not a relevant consideration. However, Pearlman J further noted that whether economic viability was indeed a relevant consideration at all (i.e. even in this general sense) would depend on the evidence adduced at hearing.
- 5.6 The *Patra* case law does not discuss what circumstances must exist to permit the economic viability of a development to be a relevant consideration.

MALLESONS STEPHEN JAQUES

Pittwater Council

21 October 2009

- 5.7 Having regard to the above authorities, it is our opinion, that the 'economic viability' of a development may, depending on the circumstances of a particular matter, be taken into account but that the weight to be given to it is limited.

Yours sincerely



Debra Townsend

Partner

Direct line +61 2 9296 2341

Email debra.townsend@mallesons.com