



Lindsay Taylor lawyers

Confidential

11 November 2009

Our ref: BLA00909

Your ref: JRPP-09-1574; JRPP-09-2379

The General Manager
Blacktown City Council
PO Box 63
BLACKTOWN NSW 2148

Attention: Glenn Apps

Email

Dear Sir

Advice re Zone Objectives and Permissibility of Development

Introduction and background

- 1 I refer to the Council's letter dated 2 November 2009 and to my email to Glenn Apps dated 6 November 2009.
- 2 I understand that the Council is currently assessing two development applications that are described by Council as including a *small amount of commercial floor space and significant numbers of residential units (Developments)*.
- 3 The Developments are proposed to be carried out on land that is in *Zone No 3(b) - Special Business (3b Zone)* under the *Blacktown Local Environmental Plan 1988 (LEP)*.
- 4 Clause 9(3) of the LEP provides:
Except as otherwise provided by this plan, the consent authority shall not grant consent to the carrying out of development on land to which this plan applies unless the consent authority is of the opinion that the carrying out of development is generally consistent with one or more of the objectives of the plan and one or more of the objectives of the zone within which the development is proposed to be carried out.
- 5 I have reviewed a copy of architectural plans relating to the Developments, as enclosed in Council's letter dated 2 November 2009. However, I have not reviewed the development applications, supporting documents or any assessment reports that have been prepared by Council officers.

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Advice requested

- 6 The Council has requested my advice on the following issues:
- 6.1 whether a development application that does not satisfy the requirement in clause 9(3) of the LEP in relation to zone objectives must be refused notwithstanding that the proposed use is permissible in the zoning table in clause 9 of the LEP (**Issue 1**),
 - 6.2 in the context of paragraph 6.3 below, the approach taken by the Land and Environment Court of NSW in relation to whether development complies with relevant zone objectives (**Issue 2**), and
 - 6.3 whether the Development meets the requirement in clause 9(3) in relation to the particular zone objectives for the 3b zone (**Issue 3**).

Summary of advice

Issue 1

- 7 In my view, a development application that does not satisfy the requirement in clause 9(3) of the LEP that it be generally consistent with one or more of the zone objectives must be refused by the Council despite the fact that the proposed use is permissible in the zoning table in clause 9 of the LEP.

Issue 2

- 8 Whilst the matter is not free from doubt, I think that a particular development will satisfy the test in clause 9(3) that it be generally consistent *with one or more of the objectives of the plan and one or more of the objectives of the zone within which the development is proposed to be carried out* if it is generally not antipathetic to:
- 8.1 at least one of the zone objectives; and
 - 8.2 at least one of the objectives of the LEP.
- 9 There is authority that 'consistency' with objectives does not require that *the development promotes or is ancillary to those objectives, nor even that it is compatible with them*.
- 10 All that appears to be required in the context of cl.9(3) of the LEP is that the development not be contrary to all of the relevant zone objectives and all of the relevant objectives of the LEP.
- 11 However, in the light of some more recent decisions, it is possible that a Court might adopt a test of consistency as to whether the development is '*compatible*' with the objectives. This is usually a slightly more onerous test because it requires a positive finding of compatibility.
- 12 I discuss the competing considerations in relation to the two possible approaches to the test of '*consistency*' in the body of this advice.

Issue 3

- 13 There is a reasonable argument (subject to consideration of any planning advice to the contrary) that the Developments are generally consistent with objective (d) for the 3(b) Zone because the predominantly residential nature of them will support (or at least not be antipathetic to supporting) general retail and commercial development in Zone No 3(a) by providing housing for people that will potentially utilise those centres or be employed within them.

- 14 There may also be an argument that the Developments are generally consistent with objective (a) because they are *ancillary development* of the kind contemplated by that objective.
- 15 Ultimately, however, the test in clause 9(3) of the LEP is a matter on which the Council (or Court on appeal) must form its own reasonable opinion.

Advice

Issue 1

- 16 The requirement that the Council be satisfied that a particular development satisfies cl.9(3) of the LEP, including in relation to zone objectives, is independent of the requirement that development be a permissible use in the relevant zone in accordance with the zoning table in cl.9 of the LEP.
- 17 In the recent decision of *Conservation of North Ocean Shores Inc v Byron Shire Council & Ors* [2009] NSWLEC 69, Preston CJ considered the effect of a similar clause in *Byron Local Environmental Plan 1988* which required that the consent authority be satisfied that the proposed development was consistent with the objectives of the zone within which the development was proposed to be carried out.
- 18 His Honour said in relation to the relevant instrument:

[79] *Clause 9(3) requires separate consideration and satisfaction from the merit considerations of the development, which only come into play if cl 9(3) is satisfied. Clause 9(3) requires positive attention and the making of particular findings and inferences, having regard to the particular wording of cl 9(3) and of the objectives of the relevant 7(k) Habitat Zone.*

...

[84] *... The requirement of consistency with zone objectives is a separate and posterior step to the requirement that the proposed development be for a permissible purpose. Even if a proposed development is for a permissible purpose, that does not lead necessarily to a conclusion that the development is consistent with the zone objectives. Separate consideration and formation of a positive opinion of consistency with the zone objectives is required. The counter argument involves misdirection in law.*
- 19 It follows that a development application that does not satisfy the requirement in clause 9(3) of the LEP of being generally consistent with one or more of the zone objectives and one or more of the objectives of the LEP must be refused by the Council despite the fact that the proposed use is permissible in the zone in accordance with the zoning table in clause 9 of the LEP.

Issue 2

- 20 There is a significant amount of case law dealing with whether development is 'consistent' with zone objectives contained in an environmental planning instrument.
- 21 However, there are two lines of authority in the Land and Environment Court.
- 22 The first line of authority was discussed in *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 in which Pearlman CJ held (at 27):

The guiding principle, then, is that a development will be generally consistent with the objectives if it is not antipathetic to them. It is not necessary to show

that the development promotes or is ancillary to those objectives, nor even that it is compatible. (Schaffer test).

23 See also:

23.1 *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 at 192.

23.2 *Bodyline Spa and Sauna (Sydney) Pty Limited v Sydney City Council* (1992) 27 LGRA 432 at 439, in which the Court held that there will be an absence of consistency where a proposal is incompatible, inconsistent or antipathetic to the relevant objectives.

23.3 *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGRA 190;

23.4 *Katoomba Gospel Trust v Blue Mountains City Council* (1993) 130 LGRA 266 at 272 in which Talbot J said:

It is now well established that consistency with objectives does not require a positive finding of compatibility or that the development must conform to or promote the objectives.

24 'Antipathetic' is defined in the Macquarie Dictionary, 3rd edition to mean: *having a natural antipathy, contrariety, or constitutional aversion.*

25 'Antipathy' is defined to mean: 1. *a natural or settled dislike; repugnance; aversion.* 2. *an instinctive contrariety or opposition in feeling.* 3. *an object of natural aversion or settled dislike: see.*

26 It follows that all that is required to satisfy the Schaffer test in the context of cl.9(3) of the LEP is that the Developments not be contrary to all of the relevant zone objectives and all of the relevant objectives of the LEP.

27 The **second approach** was described in *Gillespies v Warringah Council* (2002) 124 LGRA 147 in which Bignold J rejected the Schaffer test and held that the appropriate approach is as follows:

[70]... I would for myself, conclude that the word 'consistent' assumes its ordinary and natural meaning. That meaning in my respectful opinion is not confined to the notion of the proposed development 'not being anti-pathetic'... Clearly there can be an 'inconsistency' with a stated object which does not involve any element of antipathy to that object... It has its ordinary and natural meaning (eg as in the Macquarie Dictionary: 1. Agreeing or accordant; compatible; not self opposed or self contradictory (at 165-166).

[77] ...I am quite unable to accept the Applicant's argument that the word "consistent in its context in cl12(3)(b) means "not antipathetic". Rather I would hold that it has its ordinary and natural meaning (eg as in the Macquarie Dictionary: "1. agreeing or accordant; compatible; not self-opposed or self-contradictory; 2. consistently adhering to the same principles, course etc").

(Gillespies test)

28 The clause considered in *Gillespies* was cl.12(3)(b) of the *Warringah Local Environmental Plan 2000* which is a requirement that the consent authority must be satisfied that the development is consistent with the desired future character described in the relevant Locality Statement.

29 Some subsequent decisions of the Court that have applied the *Gillespies* test include:

29.1 *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190, in which Biscoe J expressly stated at [45] that he preferred the *Gillespies* test.

- 29.2 *Drake v Minister for Planning* [2003] NSWLEC 270 per Bignold J; and
- 29.3 *Residential Lifestyles Pty Ltd v Warringah Council* [2005] NSWLEC 250, per Commissioner Nott at [29] – [30].
- 30 Nevertheless, one of the cases that Pearlman CJ relied on in *Schaffer* was *Challister Ltd v Blacktown City Council* (1992) 76 LGRA 10. This is significant because *Challister* specifically involved interpretation of cl 9(3) of the Council's LEP.
- 31 The proposed development in *Challister* involved the construction and operation of a service station incorporating a convenience store, car wash and liquefied petroleum gas outlet.
- 32 The subject land was in Zone No 4(c) under the LEP. Two of the objectives in that zone were:
- (b) *to encourage development of, and accommodate innovation in, the sources of economic growth,*
- ...
- (d) *to enable development for the purposes of retailing only where it is associated with, and ancillary to, light industrial purposes on the same land or where it serves the daily convenience needs of the local workforce, or is for the purposes of bulky goods retail establishments*
- 33 In relation to those two objectives, Talbot J held (at 14 -15):
- I find it difficult to understand how the proposed development would be inconsistent with zone objective (b)... Although the development may not achieve that objective in itself I do not accept that allowing the development to proceed at this site will be counter productive in that respect.*
- ...
- Although the whole of the purpose of a service station and convenience store falls under the general description of retailing it is my opinion that although it may not meet the first part of zone objective (d) it will incidentally service the needs of the local work force. The result will be that some needs of the local work force will be satisfied and that consequently it is possible that no further development for the purpose of meeting those needs may be required in this locality. Rather than highlighting a potential inconsistency with achieving the aims and objectives of the zone such a conclusion goes to show that the proposed use will be generally consistent with the objectives of the zone.*
- 34 Consequently, His Honour found that the requirement of cl 9(3) of the LEP in relation to zone objectives was satisfied.
- 35 In *New Century Developments Pty Limited v Baulkham Hills Shire Council* [2003] NSWLEC 154, Lloyd J also applied the *Schaffer* test at [25] but said:
- [29] *In the event that I am wrong in my construction of the phrase "consistent with" in its context in cl 9(2) of the LEP, my conclusions are unchanged. The more discerning [Gillespies test] produces the same result in this case... In applying the [Gillespies test] to the present matter, it is clear that the proposed development is accordant with and not contradictory to the objectives in cl. 9(2) of the LEP, and is therefore consistent with them.*
- 36 In *Qur'Anic Society v Camden Council* [2009] NSWLEC 1171, Commissioner Brown preferred to not express a preference and held that the proposed development was inconsistent with the relevant zone objectives under both the *Schaffer* and *Gillespies* tests.



- 37 In the recent decision of *GHD Pty Ltd v Palerang Council* [2009] NSWLEC 1342, Commissioners Brown and Pearson noted in their joint judgment that the Land and Environment Court has *generally adopted* the *Schaffer* test but that the *Gillespies* test *has also been used by the Court* at [30].
- 38 On balance, I am of the view that a Court will adopt the *Schaffer* test in relation to cl.9(3) of the LEP, particularly in light of the approach adopted by the Courts specifically in relation to clauses that use the term 'generally consistent' instead of merely 'consistent': see *Challister* and *Coffs Harbour Environment Centre*.
- 39 However, particularly in light of recent decisions, I cannot exclude the possibility that a judge of the Court (such as Biscoe J) will follow *Gillespies*.
- 40 Consequently, the Council may wish to approach in its assessment of development applications by an evaluation of compliance with the relevant zone objectives applying both the *Schaffer* and the more onerous *Gillespies* test.
- 41 If for a particular development the Council forms the view that the *Schaffer* test is satisfied, but the *Gillespies* test is not, I think that the Council would be justified in finding that clause 9(3) is nevertheless satisfied based on the *Schaffer* test. However, in such circumstances, it would be appropriate for the Council to obtain legal advice on the specific facts.
- 42 Finally, the following are some examples of circumstances in which the Courts have held that proposed development does not satisfy the relevant consistency test:
- 42.1 temporary exclusion of public from land zoned for the purposes of public recreation and associated uses during construction of an ocean outfall a sewage treatment plant: *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185,
 - 42.2 development involving the construction and operation a waste transfer terminal in a zone where one of the objectives was to recognize the special character of Parramatta Rd frontages and surrounding areas: *Drake v Minister for Planning* [2003] NSWLEC 270, and
 - 42.3 development involving an Islamic primary and secondary school in a rural zone where the relevant zone objectives included providing suitable land for agricultural use and ensuring that development did not detract from the existing rural character of the area: *Qur'Anic Society v Camden Council* [2009] NSWLEC 1171.

Issue 3

- 43 Clause 9(3) of the LEP requires the Developments to be *generally consistent* with one or more of the following zone objectives for the 3b Zone:
- (a) *to ensure that identified centres are encouraged to grow to a level commensurate with the preferred hierarchy of centres for the City of Blacktown by providing sufficient land to cater for required commercial expansion and ancillary development,*
 - (b) *to support general retail development of land within Zone No 3 (a) in identified centres by providing land adjoining the centres for the purposes of bulky goods retail establishments,*
 - (c) *to support general retail and commercial development of land within Zone No 3 (a) in identified centres by providing land for additional commercial office development in proximity to those centres, and*



- (d) to support general retail and commercial development of land within Zone No 3 (a) in identified centres by providing land for uses which service the needs of activities carried on in those centres.

- 44 In my view, there is a reasonable argument (subject to planning advice to the contrary) that the Developments are generally consistent with objective (d) because, the predominantly residential nature of the developments will support (or at least not be antipathetic to supporting) general retail and commercial development in Zone No 3(a) by providing housing for people that will potentially utilise those centres or be employed within them.
- 45 There may also be an argument that the Developments are generally consistent with objective (a) because they are *ancillary development* of the kind contemplated by that objective.
- 46 It follows that, subject to contrary planning advice, I think that as a matter of law, the Developments are likely capable of being characterised as generally consistent with one or more of the zone objectives for the 3b Zone, and in particular objective (d).
- 47 I think that the Developments probably satisfy both the *Schaffer* test and the *Gillespies* test.
- 48 Ultimately, however, the test in clause 9(3) of the LEP is a matter on which the Council (or Court on appeal) must form its own reasonable opinion.
- 49 Please note that the fact that the Developments involve uses that are permissible in the 3b Zone in the zoning table in clause 9 of the LEP must not influence the Council's separate determination of whether the Developments satisfy the requirement in cl.9 (3) in relation to zone objectives: see *Addenbrooke Pty Ltd v Woollahra Municipal Council (No 2)* [2009] NSWLEC 134 per Biscoe J at [51]; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237.
- 50 I trust this advice is of assistance.

Yours sincerely,

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