

Confidential

23 December 2010

Our ref: WOL01310
Your ref:

The General Manager
Wollondilly Shire Council
PO Box 21
PICTON NSW 2571

Attention: Michael Kelly and Mark Ruddiman

Email

Dear Sir

Advice re Proposed Tahmoor Town Centre Extension

Introduction

1 I refer to your letter dated 22 November 2010.

Advice Required

- 2 You have asked for my advice in relation to a development application for the proposed extension to the Tahmoor Town Centre. In particular I am asked to advise:
- 2.1 whether the relevant part of the proposed development meets the definition of a General Store as defined in *Wollondilly Local Environmental Plan 1991 (WLEP)*?
 - 2.2 whether the extension of the commercial building over York Street is permissible under WLEP, given that the road is currently zoned 2(a) Residential "A"? In this regard is the operation of clause 37 of WLEP (development near boundary of adjacent zones) sufficient to permit this building extension?

Background

- 3 On 27 November 2009, development application No. 010.2009.765.001 (**DA**) was submitted to the Council for demolition of existing structures and construction of an extension to the existing Tahmoor Town Centre, undercover car parking and associated infrastructure including advertising signage together with façade changes for consistency with old and new buildings (**Proposal**).

- 4 The Proposal will be constructed on an entire residential block bordered by George Street, Larkin Street, Thirlmere Way and York Street. This land is zoned 2(a) Residential "A" Zone pursuant to the WLEP.
- 5 The Proposal consists of the following building extensions:
 - 5.1 Total Retail space area of 8129.66 m².
 - 5.2 General Store area of 6284.88 m².
 - 5.3 Storage and back of house, loading dock and mezzanine to the General Store on the Larkin Street frontage of 2189.31 m².
 - 5.4 Addition to the existing Woolworths over York Street of 1000.16 m².
 - 5.5 Mall and amenities of 5380 m².
 - 5.6 Additions to the existing shop known as "Retail 8" in the existing Town Centre.
- 6 York Street is zoned 2(a) Residential "A" Zone pursuant to WLEP.
- 7 The land on which the existing Tahmoor Town Centre is located is zoned 3(a) Business Zone pursuant to WLEP.
- 8 The Proposal has been characterised as a *General Store* for the purposes of the development application.
- 9 The Proposal, with a capital investment value in excess of \$10million, was reported to the Joint Regional Planning Panel (**JRPP**) for determination as required by the *Statement Environmental Planning Policy (Major Development) 2005*.
- 10 A report was prepared recommending approval of the Proposal subject to a deferred commencement condition regarding the closure of York Street.
- 11 That report also recommended conditions as follows:
 - 11.1 *This approval is only for use as a "general store" which is defined within the Environmental Planning and Assessment Model Provisions 1980*

.....
The use of the building for any other purpose outside the scope of the above definition would require separate development consent from Council.
 - 11.2 *The specific use of any proposed new food shops and retail shall be the subject of a further, separate development application to Council.*
- 12 I am instructed that the Proposal to be carried out on the land zoned 2(a) Residential "A" west of York Street will at this stage, contain a Big W store. The SEE does not contain any details of the nature of the goods or merchandise to be sold by the proposed Big W.
- 13 I have undertaken a review of the following documents submitted with the Proposal:
 - 13.1 Architectural Plans prepared by Algorry Zappia & Associates Project No. P1773 as follows:
 - 13.1.1 Plan A02 Issue E dated 24 August 2010,
 - 13.1.2 Plan A03 Issue D dated 24 August 2010,
 - 13.1.3 Plan A04 Issue F dated 26 August 2010,
 - 13.1.4 Plan A05 Issue B dated 24 August 2010,
 - 13.1.5 Plan A06 Issue B dated 24 August 2010, and

- 13.1.6 Plan A07 Issue B dated 24 August 2010,
- 13.2 Statement of Environmental Effects prepared by Rein, Warry and Co (**SEE**), and
- 13.3 Report to the Sydney West Regional Planning Panel prepared by Michael Brown Planning Strategies.
- 14 On 16 December 2010 amended architectural plans were provided as follows:
 - 14.1.1 Plan A02 Issue F,
 - 14.1.2 Plan A04 Issue G, and
 - 14.1.3 Plan A05 Issue C.
- 15 The land currently zoned 2(a) and 3(a) is proposed to be rezoned to zone B2 Local Centre under the *Draft Wollondilly Local Environmental Plan 2009*.
- 16 Upon my review of the plans and documents submitted with the Proposal the following matters are apparent.
 - 16.1 The Proposal contained a restaurant on the corner of York Street and Larkin Street which has been removed in the plans dated 13 December 2010.
 - 16.2 That part of the Proposal which fronts onto Larkin Street has been nominated as *Storage*. However the roof plan A07 Issue B indicates that that part of the Proposal is to be used as *Commercial below*.
 - 16.3 The Proposal contained a *Pet Centre* which has been removed in the plans dated 13 December 2010.
 - 16.4 The Proposal is for *retail space* of 8129.66 m² as indicated on Plan A02 Issue E, yet the General Store area is nominated in the SEE as 6284.88 m². This indicates that there is retail space proposed other than the General Store retail space.

Summary

- 17 The SEE does not set out the range of items to be sold from the proposed Big W or the extension of Woolworths over York Street. It seems likely, however, that these aspects of the Proposal would be for the purpose of a *general store*, because they will involve *the sale by retail of general merchandise*. In order to reach a final conclusion on this point, the applicant should be asked to provide further specific information about the nature of the merchandise that will be sold.
- 18 Assuming those aspects of the Proposal are for a *general store*, I am of the view that the Proposal is nevertheless not solely for that purpose. The existence of a significant amount of additional retail space that is not proposed to be used for the purpose of the Big W or Woolworths' extension indicates that there must be another purpose of the development and that purpose appears to be a shop and/or commercial premises.
- 19 The Proposal is therefore prohibited.
- 20 It is not possible to cure that problem by the imposition of a condition which specifies that consent is granted only to that part of the Proposal that will be used as a *general store*.
- 21 In order to ensure that the Proposal is permissible, the plans and SEE must be amended so that the Proposal, in its entirety, is permissible. The amendments will need to show any areas of the proposed building that will not currently be used (including amendments to the development data shown on the plans).

- 22 Those unused areas can be made the subject of a further development application when the planning controls change in a way which makes the proposed other retail and commercial uses permissible.
- 23 Clause 37 of the WLEP may provide an alternative source of permission for the extension to the Woolworths commercial building provided that:
- 23.1 the extent of the building extension remains within 20 metres of the boundary between the 2(a) and 3(a) zones, and
- 23.2 the consent authority is satisfied that the proposed Woolworths extension *is necessary, ... due to planning, design, servicing or similar requirements relating to the optimum development of land.*
- 24 There has been no assessment of the Proposal against the provisions of clause 37 of the WLEP in the SEE. Such analysis must be undertaken, and the requisite opinion formed by the Council, prior to reliance on clause 37 to permit the extension to the Woolworths. The SEE should be amended in this regard.

Planning Controls

- 25 Clause 7 of WLEP adopts the *Environmental Planning and Assessment Model Provisions (Model Provisions)*.
- 26 The zoning table for Zone No 2(a) (Residential "A" Zone) in Clause 10 of WLEP states:

1 Objectives of zone

The objectives of this zone are to provide an environment primarily for detached housing and to ensure that the range of other development permitted in a residential area is compatible with the residential environment.

2 Without development consent

Nil.

3 Only with development consent

Any purpose other than a purpose included in Item 2 or 4.

4 Prohibited

Abattoirs; advertising structures; agriculture; amusement centres; bulk stores; car repair stations; caravan parks; clubs; commercial premises; earth moving establishments; extractive industries; generating works; hotels; industries; junk yards; liquid fuel depots; mines; motels; motor showrooms; plant and equipment hire; refreshment rooms; retail plant nurseries; roadside stalls; sawmills; service stations; shops; stables; stock and sale yards; taverns; timber yards; tourist facilities; transport terminals; turf farming; warehouses.

- 27 Clause 4 of the Model Provisions provides:

shop means 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, a building or place used for a purpose elsewhere specifically defined in this clause.

general store means a shop used for the sale by retail of general merchandise and which may include the facilities of a post office.

28 The zone table to Zone No 3(a) (Business Zone) in Clause 10 of WLEP states

1 Objectives of zone

The objectives of this zone are:

- (a) *to focus and consolidate retail and business development in accessible locations, and*
- (b) *to promote the amenity and efficiency of business commercial centres, and*
- (c) *to ensure that there is adequate provision for car parking facilities in the vicinity of commercial centres.*

2 Without development consent

Nil.

3 Only with development consent

Any purpose other than a purpose included in Item 4.

4 Prohibited

Abattoirs; agriculture; amusement centres; caravan parks; dwellings or multiple dwellings (other than dwellings or multiple dwellings erected in conjunction with shops or commercial premises); extractive industries; generating works; hospitals; industries referred to in Schedule 2; institutions; junk yards; liquid fuel depots; mines; roadside stalls; sawmills; stables; stock and sale yards; timber yards; transport terminals; turf farming.

29 Clause 37 of the WLEP provides:

- (1) *Subject to subclause (2), development which is permitted within a zone may, with the consent of the council, be carried out on land in an adjacent zone other than Zone No 6 (a), 6 (b), 7 (a), 7 (b), 8 (a) or 9 (d) within 20 metres of the boundary between the zones.*
- (2) *The council may grant consent under the Act to the carrying out of development pursuant to subclause (1) only where the carrying out of the development is necessary, in the opinion of the council, due to planning, design, servicing or similar requirements relating to the optimum development of land to which this plan applies.*

Advice

30 In determining whether the Proposal meets the definition of a general store in WLEP, the proposed use of the land must be characterised.

31 As stated above, the SEE describes the Proposal as a General Store. Nevertheless, the way in which the Proposal is described in the DA and the accompanying documentation is not conclusive or determinative: see *Westpoint Corporation Pty Limited v Rockdale City Council* (2000) 109 LGERA 298.

32 The proposed use must be characterised as permissible having regard to the WLEP.

33 In determining the appropriate characterisation of a use it is necessary to look at the entirety of the Proposal.

- 34 Where permissible development is defined by reference to its purpose (as in the 2(a) zone under the WLEP), the task requires a consideration of matters similar to those that arise in relation to existing uses. In *Woolworths Ltd v Pallas Newco Pty Limited & Anor* 136 LGERA 288, the Court of Appeal cited with approval the following relevant comments by McHugh JA in *Royal Agricultural Society (NSW) v Sydney City Council* (1987) 61 LGRA 305:

Accordingly, a test has been devised which requires the purpose of the use of the land to be described only at that level of generality which is necessary and sufficient to cover individual activities, transactions and processes carried on at the relevant date. Thus the test is not so narrow that it requires characterisation of the purpose in detailed activities, transactions or processes which have taken place. But it is not so general that a characterisation can embrace activities, transactions and processes which differ in kind from the use which the activities, transactions or processes as a class have made of the land.

- 35 It is well accepted that land may be used for more than one purpose and the purposes are to be individually characterised. The leading authority is *Foodbarn Pty Limited v Solicitor General* (1975) 32 LGRA 157 where the Court of Appeal held that:

- 35.1 where part of premises is used for a purpose subordinate to the purpose inspiring the use of another part, it is legitimate to disregard the former and treat the dominant purpose as that for which the whole project is being used;
- 35.2 however, if any one purpose operates in an independent way, it is immaterial that it may be overshadowed by others in terms of income generated, space occupied, or ratio of staff engaged.

- 36 In *Baulkham Hills Shire Council v O'Donnell* 1990 69 LGERA 404 the Court of Appeal considered *Foodbarn* and identified the following exception:

Notwithstanding the principles laid down in Foodbarn, it does not follow that a use which can be said to be ancillary to another use is thereby automatically precluded from being an independent use of the land. It is question of fact and degree in all the circumstances of the case whether such a result ensues or not... But when one use of the land is by reason of its nature and extent capable of being an independent use it is not deprived of that quality because it is "ancillary to", or related to, or interdependent with, another use.

- 37 Characterisation of the purpose of development must be done in a common sense and practical way: see *Chamwell Pty Limited v Strathfield Council* [2007] NSWLEC 114 at 45.

- 38 In *Warriewood Properties Pty Ltd v Pittwater Council* [2010] NSWLEC 215 Sheahan J held:

The characterisation of the use of land should reflect its purpose or purposes. The purpose may comprise different uses that may serve the same purpose. In determining the purpose, it is necessary to adopt a level of generality, common sense, and a practical approach that takes into account the different components of the development.

- 39 Having regard to the above principles, the Big W component of the Proposal may well be properly characterised as a general store subject to my comments. I accept that components of the Proposal such as carparking, storage, loading docks and 'BOH' can all be considered to serve the same purpose as the store itself: see *Chamwell*.

- 40 However, adopting the requisite level of generality, common sense, and practical approach that takes into account all of the different components of the development, I do not think that the Proposal is solely for the purpose of a general store.

- 41 I say this having particular regard to the additional 1844 m² of retail space nominated in the plans and the area nominated for *Commercial Below* on Plan A07 Issue B. In my view the nature and extent of the additional retail space is such that the Proposal is also properly characterised as including shops or commercial premises.
- 42 If so, the Proposal is prohibited.
- 43 The plans and SEE would need to be amended in order for the Proposal in its entirety to be characterised for the purpose of a permissible *general store*.
- 44 In order to meet the definition of a *general store*, the Proposal must be properly said to be for the purpose of *sale by retail of general merchandise*.
- 45 The term *general merchandise* is not defined in WLEP and would therefore have its ordinary meaning having regard to the context.
- 46 The Macquarie Dictionary, 3rd edition defines *general* as '*not limited in detail of application: not special or specific*'.
- 47 Likewise, *merchandise* is defined as '*the stock of a store*'. Accordingly the nature of the goods to be sold is required to be general merchandise and not specific or specialty merchandise.
- 48 The definition of *general store* is not limited in any way by reference to the size of the shop or the range of goods which must be sold. The only requirement is that it be used for sale by retail of general merchandise.
- 49 In *Maryland Development Co Pty Limited v Penrith City Council & Anor* (2001) 115 LGERA 75, Sheahan J gave detailed consideration to the distinction between a *shop* and *general store* in the context of a proposed supermarket. The Penrith planning instrument also adopted the Model Provisions and Sheahan J held as follows:

Where a large general store sells a general range of merchandise, including foodstuffs and homewares, it may be referred to colloquially as a supermarket. Supermarket is not a planning term; labeling the proposed development as a supermarket is irrelevant, a supermarket is a shop, it may be a general store. A department store is probably also a general store. It is irrelevant also that a store's approval may have impacts. The merit question is different from the permissibility question.

There are no specifications as to what constitutes general merchandise and product lines change over time.

....

Whatever the term general store may or may not be commonly understood to encompass, it is defined in the Model Provisions, and the applicants submissions focus on factors which are not included in, or referred to in, those statutory definitions (ie floor space limitations, proportion of food and drink, etc)

That statutory definition does not now stipulate any size – a general store in a small town, or a general store in a large town; the definition does not deal with the balance or mix of merchandise, which does not need to be balanced in terms of floor space or turnover

....

The operative element of the statutory definition is the retailing of general merchandise.

It is that concept which distinguishes general store from shop.

However, the definition does not stipulate the width or range of general merchandise. ... A general store must have a greater range and variety of product lines than a specialty shop. The range and variety depends upon the needs of those the store exists to serve and the modern methods adopted for retailing. It is not, therefore surprising that a general store in an urban area will have a predominance of a variety of food related product lines presented in large open aisles with a checkout.

The definition 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.

- 50 Sheahan J referred to the earlier decision by Perrignon J in *Penrith City Council v Horizon Pacific Limited* where the learned Judge had held:

The question remains whether it could be said to be a shop for the sale of general merchandise. Whether a particular shop can be said to be for the sale of general merchandise is a question of fact and degree. It does not matter that the sale is not over a conventional counter but is at a checkout stand. The range and variety of goods proposed to be sold are the determining matters.

- 51 In *Snowside Pty Limited v Holroyd City Council* (2003) 126 LGERA 279, Bignold J held that a proposed Bunnings store was not a *general store* but agreed with the Sheahan J as to the applicable principle:

In particular, I would respectfully agree with his Honour's statement at 103 that the key element of the statutory definition of a "general store" which qualifies it as a species of the genus "shop" is that it sells by retail "general merchandise" whereas a shop sells by retail "goods, merchandise or materials".

- 52 Having regard to the above authorities and the fact that each case must be decided on its on facts, in determining whether the Proposal is a general store, it is necessary to consider:

52.1 the range of items to be sold, and

52.2 the purpose for which the additional 1844 m² of retail space and the *Commercial below* areas are intended.

- 53 Although the SEE does not set out the range of items to be sold from the proposed Big W, it seems likely that it would satisfy the requirement of *the sale by retail of general merchandise*. However, in order to reach a final conclusion on this point, the applicant should be asked to provide further specific information.

Proposed conditions

- 54 As noted at paragraph 11 above, the report to the JRPP proposes conditions of consent which effectively seek to approve only that part of the Proposal that will be used as a general store.
- 55 It is not possible to cure that issue by the imposition of a condition which specifies that consent is granted only to that part of the Proposal that will be used as a general store.
- 56 This is because the condition making power in s80 of the *Environmental Planning and Assessment Act 1997 (EPA Act)*, and indeed the whole of the machinery for making a development application in Division 2 of Part of the EPA Act, does not apply to prohibited development.
- 57 Section 77 of the EPA Act provides:

This Division:

- (a) *applies to development that may not be carried out except with development consent, but*
- (b) *does not apply to complying development.*

58 It follows that the permissibility of the Proposal must be addressed before the JRPP can consider issuing development consent.

Woolworths extension

59 I have also been asked to advise whether clause 37 of WLEP permits the extension of the commercial building over York Street. I have understood this extension to comprise only that part of the Proposal that is nominated as the *Woolworths Addition 1000.16 m²* on the architectural plans.

60 Again, it is necessary to characterise the purpose of the Woolworths extension. In this regard I refer to my comments earlier in this advice. It seems to me that it would, subject to appropriate information about what is to be sold in that store, also be possible to characterise the Woolworths extension as a general store for the purposes of WLEP.

61 However as stated above, each case turns on its own facts and a consideration of the range of products will need to be undertaken to determine whether the Woolworths will be selling general merchandise by retail.

62 In the alternative, if the Woolworths extension is characterised as a shop, then clause 37 of the WLEP will permit the Woolworths extension in the limited circumstances provided in clause 37. That is, prior to granting consent the consent authority must be satisfied that the Woolworths extension *is necessary, in the opinion of the council, due to planning, design, servicing or similar requirements relating to the optimum development of land.*

63 In this regard I note the neither the SEE nor the report to the JRPP address the matters raised in clause 37 of the WLEP. Careful consideration needs to be given to those matters before relying on clause 37 of the WLEP.

64 The Applicant should amend the SEE to include an analysis of the Proposal against the provisions of clause 37 of the WLEP to enable Council to form an opinion as to whether the Woolworths extension *is necessary, due to planning, design, servicing or similar requirements relating to the optimum development of land.*

65 I also note that this clause only permits the Woolworths extension (subject to merit assessment) to the extent that the Woolworths extension is within 20 metres of the boundary between the 2(a) and 3(a) zones, which runs along York Street.

Way forward

66 Having regard to my comments and conclusions, the Proposal does not meet the definition of a *general store* in WLEP.

67 The existence of a significant amount of additional retail space that is not proposed to be used for the purpose of the general store indicates that there must be another purpose of the development and that purpose appears to be a shop and/or commercial premises.

68 The Proposal is therefore prohibited.

69 In order to ensure that the Proposal meets the definition of *general store* for the purposes of the WLEP, the plans and SEE must be amended.

- 70 The Plans must be amended to show that the Proposal, in its entirety, will be permissible. The SEE must also be amended to ensure that it is consistent with any amended plans and it should include details of the range of items to be sold in the proposed Big W and Woolworths extension sufficient for the purpose of characterisation. The amendments will need to show any areas of the proposed building that will not currently be used (including amendments to the development data shown on the plans).
- 71 If the DA is not amended then the application must be refused because some of the proposed uses are prohibited.
- 72 I trust the above advice assists.
- 73 Please call me or John Paul Merlino of my office on 8235 9707 if you have any further queries.

Yours sincerely,



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