

4 September 2024

Muswellbrook Shire Council

Attention: Alexandra Hathway

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Our reference

JMG:494810

Dear Alex,

CONFIDENTIAL LEGAL ADVICE- MUSWELLBROOK SHIRE COUNCIL

Consideration of what is the correct characterisation of the proposed Coal Road Project for the purpose of determining whether all or any part of the proposed project may be assessed under Part 5 of the Environmental Planning and Assessment Act 1979 ("Act") or requires development consent under Part 4 of the Act.

Background.

- 1.1. Council owns the site at Coad Road adjoining an existing Council waste management facility, being the property comprised in Lot 1 DP 819014 ("Property"). Council wishes to use the Property for the construction and use of a project described as "public administration centre and works depot" ("Project"). The Property lies within the SP2 – Infrastructure zone under the Muswellbrook Local Environmental Plan 2009 ("MLEP").
- 1.2. The Project is proposed to include several components and different uses with those components being used by staff from different areas in Council. It is our understanding that approximately 103 Council staff working in at least water and wastewater, property and roads and drainage will be located in the new building

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while staff from those divisions of the Council will be working in the “depot” areas of the Project both within and outside the proposed administration building .

1.3. In preparing this advice we have relied primarily on the instructed material provided via digital links by Council staff and instructions received at our Teams meeting in August 2024.

1.4. Relying on the document produced by Council’s external town planner (Blueprint Planning Consultants) entitled “Detailed Consideration of Permissibility” dated 21 June 2024, we understand the individual components of the Project will be:

1.4.1. Public administration building and parking facilities for administration building staff vehicles.

1.4.2. Permanent road maintenance depot and associated infrastructure.

1.4.3. Parks maintenance depot.

1.4.4. Sewerage system depot ;and

1.4.5. Water supply system depot .

1.5. Over several months, discussions have continued between Council staff and Council’s external planner in relation to the correct planning pathway required to bring the Project to fruition.

2. **Relevant Provisions of the Act and Planning Instruments**

2.1 **Nature of the Project.** The construction and use of the components of the proposed Project will constitute “development” under the Act. “Development “ is defined in section 1.5 of the Act to include , among other things, construction of a building and the carrying out of a work.

2.2 **Part 4 of the Act.** Section 4.1 of the Act provides that if an environmental planning instrument (“EPI”) allows that specified development may be carried out without the need for development consent, a person may carry the development out in accordance with the instrument, on land to which the provision applies.

Section 4.2 of the Act relevantly provides:

(1) If an environmental planning instrument provides that specific development may not be carried out except with development consent, a person must not carry the development out on land to which the provisions apply unless:

(a) such consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument.'

2.3 The interplay between sections 4.1 and 4.2 means that the answer as to whether development consent is required under Part 4 for a particular proposed use will depend on the terms of relevant EPIs.

2.4 Part 5 of the Act applies for development activities which are not any of those for which development consent is required under Part 4 of the Act (refer to subsection 5.1(1)(g) of the Act).

2.5 The first relevant EPI for consideration is the MLEP .

2.6 The Dictionary to the MLEP defines a “public administration buildings” as “*a building used as offices or for administrative or other like purposes by the Crown, a statutory body, a council or an organisation established for public purposes, and includes a courthouse or a police station.*”

The land use table for the SP2 zone does not allow construction and use of “public administration buildings “ within the SP2 zone.

2.7 The MLEP land use table does not currently include any land use that would allow the uses proposed for the Property (being depot(s) and public administration building) and , absent any other provision of an EPI or an amendment to the MLEP, those uses would be prohibited in the relevant zone.

2.8 Although probably not relevant in the following discussion and conclusions, we note that the issue of one or more of the proposed uses being “ancillary “ to other proposed uses has been raised in previous correspondence by and to Council staff.

We see that it is unlikely that the proposed uses other public administration building and car parking for the workers occupying the administration building would be seen as ancillary to the public administration building use, or that the proposed use as a public administration building would be seen as ancillary to any proposed depot use, within the principles established in cases such as *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGERA 157 and *Botany Bay City Council v Pet Carriers International Pty Limited* (2013) 201 LGERA 116; [2013] NSWLEC 147.

- 2.9 In *Foodbarn* the Court was required to consider a ‘subserving’ part of the development, as follows:

[160] ‘It may be deduced that where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used. Doubtless the same principle would apply where the dominant and serving purposes both relate to the whole and not to separate parts ... Where the whole of the premises is used for two or more purposes none of which subserves the others, it is, in my opinion, irrelevant to inquire which of the multiple purposes is dominant. If any one purpose operating in a way which is independent and not merely incidental to other purposes is prohibited, it is immaterial that it may be overshadowed by the others whether in terms of income generated, space occupied or ratio of staff engaged.

Although the architectural plans provided suggest that there is a significance “mixture” of physical areas to be used by each of the proposed uses, particularly within the bounds of the proposed building, each proposed use retains a “dominant” character and it cannot fairly be said that any one use will be ancillary to any other in the *Foodbarn* sense.

- 2.8 Clause 1.9 of the MLEP expresses the whole of the instrument to be subject to the provisions of any State Environmental Planning Policy (**SEPP**) that prevails over the Plan.
- 2.9 The key SEPP for consideration in this case is SEPP (Transport and Infrastructure), 2021 (**Transport SEPP**). Council's status as a public authority allows it to benefit from several consent concessions allowed by the Transport SEPP.

A number of the provisions of the Transport SEPP appear to have application to the proposed components of the Project.

2.10 The Transport SEPP applies to all land within NSW. Section 2.7 of the Transport SEPP as relevant re-enforces the primacy of the SEPP over any other EPI, including the MLEP.

2.11 Considering the terms of the Transport SEPP in light of proposed uses of different parts of the Property we have prepared the following table to indicate the permissibility of each proposed use under the Transport SEPP.

Proposed Use	Permissible with or without Part 4 consent	Relevant Provision of Transport SEPP
Public Administration Building and ancillary staff car parking	Permitted with consent.	Clause 2.88(1) and (2)
Permanent road maintenance depot and associated infrastructure	Permitted with or without consent.	Clause 2.109(2)(b) (without consent if carried out by a public authority) Clause 2.112 (2) (c) (without consent if carried out by any person)
Parks maintenance depot	Permitted without consent as a stand-alone use.	Clause 2.73(3)(viii)
Sewerage system depot	Permitted without consent as a stand-alone use.	Clause 2.126(10)(j)
Water supply system depot	Permitted without consent as a stand-alone use.	Clause 2.159

As the aspect of the proposed building that will be used for a Council administration building will require development consent under Part 4 of the Act and the Transport SEPP, and the areas of the proposed building and the wider Property used for each of the other proposed uses are mixed, cannot easily be physically delineated from each other, and cannot easily be seen as ancillary to any of the other uses, we see that the preferred course for Council should be for the Project to be addressed as a consolidated project requiring development consent.

A development application under Part 4 of the Act should be prepared by Council's external planner in respect of the whole of the Project and submitted in the usual way. .

Please do not hesitate to contact Jim Griffiths if you wish to discuss any of the above.

Yours faithfully
MORAY & AGNEW

