

18 November 2024

Our ref: EKWS/AJWS/3801735

Tammi Chau
Woolworths Ltd
1 Woolworths Way
BELLA VISTA NSW 2153

All correspondence to:
PO Box H316
Australia Square NSW 1215

Contact
Emma Whitney +61 2 9121 9019
Email: ewhitney@millsOakley.com.au

By Email: tchau@woolworths.com.au

Partner
Anthony Whealy +61 2 8035 7848
Email: awhealy@millsOakley.com.au

Dear Tammi,

Woolworths advice in relation to the Development Application for shopping centre development and construction of a new local road at 231 and 233 Argyle Street Moss Vale NSW 2577

We refer to your request for legal advice relating to Development Application No. 24/0212 ('DA'), which seeks consent for a neighbourhood shopping centre development, associated subdivision and the construction of a road to provide access to the proposed development at 231 and 233 Argyle Street, Moss Vale, NSW 2577 ('Site').

Specifically, you have asked for our legal advice on the following matters:

- a) Is the development proposal inconsistent with the E3 zone objectives as a result of the DA 'competing' with Moss Vale Town Centre.
- b) Whether the proposed development would satisfy clause 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

Summary advice

Based on the facts set out below and the reviewed material, we advise as follows:

Inconsistency with E3 zone objectives

Generally, an assessment of a development proposal against the relevant zone objectives has been held by the Land and Environment Court to require a development proposal which is 'not antipathetic' to the zone objectives (*Moskovich v Waverley Council* [2016] NSWLEC 1015). For the reasons set out below (including those set out in the advice from Corrs Chambers Westgarth, dated 28 November 2023) we consider that the proposed development is consistent with the relevant zone E3 objectives.

Section 4.15(1)(b) of the Environmental Planning and Assessment Act

Section 4.15(1)(b) of the EP&A Act requires a consent authority to also consider the social and economic impacts of a development proposal on the locality. Council has indicated that it has formed the view that the development cannot be supported as the proposed development would have adverse economic impacts on the Moss Vale Town Centre. For the reasons set out in more detail below we are of the opinion that the proposed development satisfies s4.15(1)(b).

Background

In preparing this advice, we have considered and understood the relevant facts to be as follows:

- On 19 September 2023, the Development Application No. 24/0212 was lodged at the Wingecarribee Shire Council ('Council').

- On 13 November 2023, Council issued a Request for Additional Information ('**RFI 1**') regarding to Permissibility, E3 Productivity Support Zone, Land Acquisition and Transport for NSW.
- On 28 November 2023, the Applicant issued a response to RFI 1 addressing Permissibility, E3 Productivity Support Zone, Land Acquisition and acknowledging that the Respondent's traffic consultant will issue a response in relation to the matter relating to Transport for NSW.
- On 20 December 2023, Council issued a further Request for Information ('**RFI 2**') relating to the following matters: Signage, Landscaping, Parenting Facilities, Development on Proposed Lot 2, Natural Ground Level, Kiosk, Future use, DSI and RAP, urban design Consultant and Transport for NSW.
- On 29 February 2024, the Applicant issued a detailed response to the RFI 2 by submitting a table addressing each matter and amended architectural plans and Design report prepared by Nettleton tribe Architects and amended landscape plans prepared by Ground Ink Landscape Architects.
- On 6 March 2024, Council issued another Request for Information ('**RFI 3**') relating to the submissions received by the Council in respect of the DA, in particular two submissions relating to zone and site suitability, inconsistency with the Moss Vale DCP and traffic.
- On 19 April 2024, the Applicant issued a response to RFI 3 referring to already submitted documents within RFI 1, in particular the advice obtained by the Applicant in relation to the permissibility of the development in E3 Productivity Support Zone and Economic Impact Analysis prepared by LocationIQ dated May 2023 that address the issues raised in the submission (GYDE). In relation to the Traffic matter, the Applicant referred to the accompanying Response to TMA Submission document prepared by CBRK dated 18 April 2024.

Further, the Applicant indicated that the proposal has been amended to exclude Hoskins Street as a route for delivery vehicles servicing the Centre. All delivery vehicles will now access and exit the Centre via the new intersection on Argyle Street.

- A report prepared by Urbis (as requested by Council in March 2024) was included in a report to the Local Planning Panel on 28 June 2024, entitled 'Bowral South New Living Area – Retail Needs Assessment' (Urbis Report). Urbis were commissioned by Council to carry out a retail needs assessment to assist Council in its strategic planning for the Bowral South New Living Area. The Urbis Report, in summary, confirms that there is a demand for retail facilities within the region.
- On 12 August 2024, the Council issued a letter stating that the Development Application in its current form cannot be supported because of its economic impact on the Moss Vale Town Centre. The letter invited a response within 21 days as the matter was being progressed to determination by the Regional Planning Panel.

Substantive advice

E3 Zone

Section 4.15(1) of the EP&A Act provides that in determining a development application a consent authority is to take into consideration any matters of relevance to the development the subject of the development application, including:

- (a) *the provisions of—*
 - (i) *any **environmental planning instrument**, and*
 - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning*

Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

- (iii) any development control plan, and*
- (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
- (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*
- (v) (Repealed)*

that apply to the land to which the development application relates,

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, **and social and economic impacts in the locality,***
- (c) the suitability of the site for the development,*
- (d) any submissions made in accordance with this Act or the regulations,*
- (e) the public interest. (our emphasis)*

The Site is zoned E3 Productivity Support of the *Wingecarribee Local Environment Plan 2010* ('WLEP') and the objectives of the zone are as follows:

- To provide a range of facilities and services, light industries, warehouses and offices.
- To provide for land uses **that are compatible with, but do not compete with**, land uses in surrounding local and commercial centres.
- To maintain the **economic viability** of local and commercial centres by limiting certain retail and commercial activity.
- To provide for land uses that meet the needs of the community, businesses and industries but that are not suited to locations in other employment zones.
- To provide opportunities for new and emerging light industries.
- To enable other land uses that provide facilities and services to meet the day to day needs of workers, to sell goods of a large size, weight or quantity or to sell goods manufactured on-site.
- To ensure new development has regard to the character and amenity of adjacent and nearby residential areas.

The Council, in its letter of 12 August 2024, has indicated that following receipt of advice from Hill PDA and Marsdens Law Group that Council cannot be satisfied that the proposed development would not have an unacceptable economic impact on the Moss Vale Town Centre (a mandatory consideration under section 4.15(1)(b) of the EP&A Act). The letter also notes that previously (on 13 February 2024) the Southern Regional Planning Panel noted the objective of the E3 zone to provide for land uses that are compatible with, but do not compete with, land uses in surrounding local and commercial centres and that this objective "*reinforced the need for the applicant to fully demonstrate how the development would satisfy this objective.*"

It has been widely held by the Court that strict compliance with the objectives of a zone is not required of a development application (and the Council acknowledges this in its letter of 12 August 2024). In *Moskovich v Waverley Council* [2016] NSWLEC 1015, Tuor C provided a summary of the relevant test for assessing consistency with zone objectives. The term "consistent" has been interpreted to mean "compatible" or "able to exist together harmoniously, or "not antagonistic" (*Schaffer Corporation v Hawkesbury City Council* [1992] 77 LGRA 21). Regardless of the interpretation used, the standard of "consistency" is considered less stringent than the standard of "achievement."

Moreover, in the case *Codling v Central Coast Council* [2019] NSWLEC 1158 at [84] the Court stated that there is no obligation for development within a zone to meet or fulfill every single objective of that zone, but the consent authority must “have regard to” those objectives when determining consistency of the development within the zone.

“It is clear from the terms of cl 2.3(2) that there is no requirement for development within the zone to comply with, or to achieve, each of the objectives of the zone. Nevertheless, the clause requires that the consent authority “have regard to” those objectives. They are therefore a mandatory consideration in the assessment process and a proposed development ought not be antipathetic to those objectives.”

It follows that any development proposal, including the proposal for the Site, must not be antipathetic to the zone objectives. Similar to the conclusions held in the letter of advice from Corrs Chambers Westgarth, dated 28 November 2023, we consider that the proposed development would be considered to be ‘consistent’ with the relevant E3 zone objectives.

Further to the consideration of the zone objectives, the Council (or the Court on appeal) is to consider the social and economic impacts of the development as required under section 4.15(1)(b) of the EP&A Act.

In the case of *Hayden Theatres v Penrith County Council & Ors* (Unreported, 12 February 1997) the Court ruled that economic competition between businesses should be regulated by market forces and fair trading laws, not by development consent authorities and further the High Court in *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675 (**Kentucky Fried Chicken**) stated that the social and economic impact in the locality must have an impact on the overall community rather than competitive pressure alone:

“I desire to say that it is my opinion that economic competition feared or expected from a proposed use is not a planning consideration within the terms of the planning ordinance governing this matter.”

As per Stephen J, with whom Mason and Aicken JJ agreed, in *Kentucky Fried Chicken* case, the important factor to consider in determining consistency with the objectives of the zone is **whether the development threatens to reduce the availability or quality of shopping options for the community**, rather than the competitiveness of the proposed development market on existing businesses.

*“If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, **whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself**, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However, the mere threat of competition to existing businesses if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration.”*

Akin to the *Kentucky Fried Chicken* case, the Court in *Fabcot Pty Ltd v Hawkesbury City Council* [1997] NSWLEC 27 (**Fabcot**) analysed the economic impact of the proposed supermarket on the local community and found that the potential decline in non-supermarket trading affecting the community's access to trading facilities was a valid concern. According to Lloyd J [at p378]:

“Similarly, economic competition between individual trade competitors is not an environmental or planning consideration to which the economic effect described in s 90(1)(d) is directed. The Trade Practices Act 1974 (Cth) and the Fair Trading Act 1987 (NSW) are the appropriate vehicles for regulating economic competition. Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by

market forces, subject to the Trade Practices Act and the Fair Trading Act. It is not part of the assessment of a proposal under the Environmental Planning and Assessment Act for a consent authority to examine and determine the economic viability of a particular proposal or the effect of any such proposal on the economic viability of a trade competitor. Moreover, it is at least arguable from the fact that the Trade Practices Act now applies to local government councils, that if a local council were to refuse or to limit a proposal for development on the ground of competition with a trade competitor, it could be guilty of anti-competitive conduct contrary to Pt 4 of that Act.

It seems to me that the only relevance of the economic impact of a development is its effect "in the locality", that is to say, in the wider sense described in Kentucky Fried Chicken Pty Ltd v Gantidis (1974) 140 CLR 675 at 687"

In his consideration of whether the proposal would have an adverse economic and social impact on the existing Windsor and South Windsor shopping centres, Lloyd J said [at p383]:

In short, I accept the opinion of Mr Leyshon that there is likely to be a 10 to 15 per cent decline in non-supermarket trading in the Windsor town centre if the present proposal were to proceed. That is to say, the out of town, stand-alone supermarket now proposed will to a significant extent break the synergy or nexus between supermarket and non-supermarket shopping in Windsor. To "marginalise" the non-supermarket businesses in the manner described by Mr Leyshon would clearly put at risk the viability of those businesses. The effect would be as described in Kentucky Fried Chicken v Gantidis: the facilities presently enjoyed by the community in Windsor would be put in jeopardy by the proposed development and the resultant community detriment would not be made good by the proposed development itself. That is a proper consideration to take into account as a matter of town planning. It is a very real risk which, on balance, I am satisfied should not be taken. For these reasons Issues (6) and (12) are resolved in favour of the respondent and this development application should not be approved.

In the matter of *De Angelis v Wingecarribee Shire Council* [2013] NSWLEC 1148 Commissioner Brown upheld an appeal in relation to a development proposal for a retail/residential development in Bowral. One of the arguments put forward by the Council in that case was that the proposal (which included a Kmart store of 6351.9sqm, ground floor retailing including 10 speciality stores and 4 residential dwellings) would have an unacceptable impact on the economic viability of the Bowral Town Centre. The Bowral Town Centre consisted of a Target Country and Millers Fashion, along with a number of other speciality stores and it was estimated that the proposed development could result in a vacancy rate from the current level of 11.6% to 17.9% and a redirection of \$8 million from existing retailers.

Taking into account the decision in *Fabcot and Kentucky Fried Chicken* (referenced above) the Court found that there could be no argument that any community detriment would not be made good by the proposed development, given the range of goods stocked at Kmart. Although the Court agreed that Target Country and Millers Fashion may be affected and that one of the stores may close, this would not prejudice the Bowral Town Centre. Furthermore, the Court found that it would be unlikely that the existing specialty retailers would see the new site as a preferable retail location.

We note that the advice from Corrs Chambers Westgarth, dated 28 November 2023, addresses the objectives of the E3 Zone and we agree with this advice. This advice concludes that:

- (a) The proposed development is not expected to compete with, but to enhance, existing land uses in surrounding local and commercial areas; and
- (b) The proposed development would not compete with the vast majority of stores in Moss Vale Town Centre and the projected population growth, coupled with the current vacancy rates, indicates a strong demand for retail floor space within the Moss Vale Town Centre, in particular a full line supermarket as is proposed by the development. Currently there is no full line supermarket similar in size to that proposed

The Urbis Report confirms that there is significant growth in the market generally to support a large quantum of additional retail floor space. The Urbis Report also confirms the economic analysis provided by Location IQ (dated May 2023) which has been prepared in support of the development proposal, thus confirming that the proposal is consistent with the objectives of the E3 zone and section 4.15(1)(b) of the EP&A Act.

Conclusion

For all of the reasons above we are of the view that the Council should be reasonably satisfied that the proposed development is consistent with the E3 zone and also satisfies the requirements of section 4.15(1)(b) and therefore it would be lawful for the Council to proceed to determine the development application, by way of approval, particularly in relation to these matters.

Furthermore, based on the above we consider that should Council determine to refuse the development application for the reason that it the proposal is not consistent with the E3 zone (as set out in its letter of 12 August 2024) we consider that you would have good prospects of appealing any refusal (on these grounds) to the Land and Environment Court.

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy on +61 2 8035 Emma Whitney on +61 2 8035 7931 or ewhitney@millsOakley.com.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Anthony Whealy'.

Anthony Whealy
Partner

Accredited Specialist — Local Government and Planning