



Land and Environment Court
of New South Wales

CITATION : Metricon Qld v Tweed Shire Council [2008] NSWLEC 1453

PARTIES : Applicant:
Metricon Qld Pty Ltd and Peninsula Group (Pottsville) Pty Ltd

Respondent:
Tweed Shire Council

FILE NUMBER(S) : 10214 of 2008

CORAM: Roseth SC

KEY ISSUES: Development Application :- , consistency with zone objective; impact on existing shopping centre

CASES CITED: Kentucky Fried Chicken v Gantidis (1979) 140 CLR;
Fabcot v Hawkesbury City Council (1979) 93 LGERA 373;
Cartier Holdings Cartier Holdings Pty Ltd v Newcastle City Council (2001) 115 LGERA 407;
Randell v Willoughby City Council (2005) 144 LGERA 119;
Milne v Minister for Planning [No 2] [2007] NSWLEC 66;
Jetset Properties v Eurobodalla Shire Council [2007] NSWLEC 198

DATES OF HEARING: 27 October 2008, 28 October 2008, 29 October 2008, 30 October 2008 and 31 October 2008

DATE OF JUDGMENT : 11 November 2008

LEGAL REPRESENTATIVES: Applicant:
Mr C McEwen, SC and Mr M Staunton, barrister instructed by Mr G Farland, solicitor

Mr J Robson, barrister instructed by Ms K Gerathy, solicitor

**LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Roseth SC

11 November 2008

**10214 of 2008 Metricon Qld Pty Ltd and Peninsula Group
(Pottsville) Pty Ltd v Tweed Shire Council**

JUDGMENT

- 1 **Senior Commissioner:** This is an appeal against the deemed refusal of a development application to erect a commercial centre comprising a supermarket, specialty shops, a service station, a child care centre and associated parking on lot 1 DP 1106275 on Seabreeze Boulevard, Seabreeze near Pottsville.

The site

- 2 The site is within the Seabreeze Estate, a satellite residential neighbourhood of Pottsville. Pottsville is described in council planning documents as a coastal village. Several such coastal villages are strung out along the Tweed Coast (the coastline south of Tweed Heads). Pottsville has other satellites: Koala Beach, Pottsville Waters, Pottsville Beach, Black Rocks and the future Dunloe Park.
- 3 The site is about 1.5km from the existing Pottsville Centre. Its area is 4.36 ha. It has frontages to Pottsville Road, Seabreeze Boulevard, Ballina Street, Valla Street and Mylestom Circle. On the western boundary is a parcel of land of about 400m² in public ownership, which contains an Aboriginal midden. There is a fall of about 3m across the site, from the southeast to the northwest.

- 4 The Pottsville Centre, which has recently had public improvements to its footpath, parking and roadway, is a traditional shopping centre. Its major store is an IGA supermarket of about 500m². Among the other shops are a pharmacy, a butcher, a lolly shop, a post office, a hairdresser, a café and a newsagent. Across the road is a real estate agent.
- 5 There is also a shopping centre at Pottsville Waters, which contains a Foodworks supermarket of about 400m².

The proposal and its history

- 6 The applicant proposes to develop the site for the following:
 - a supermarket of 3,250m² gross floor space (GFA);
 - specialty shops of 1,550m² GFA;
 - child care centre for 75 children;
 - service station of 225m² floor space;
 - car parking for 342 cars.
- 7 The supermarket is at the southeast corner of the site, where the terrain is the steepest. The applicant proposes to excavate it into the hillside. The childcare centre is at the north edge, while the service station is towards the west. Parts of the site are identified as "*future development sites*". While the applicant has nominated possible uses for these sites, they are not part of the application, so they cannot be taken into account.
- 8 The applicant lodged the development application on 11 January 2008. Following notification and advertisement, the council received 99 submissions, of which 59 were in support and 40 were objections. Of the 59 letters of support, 54 were form letters, while five were individually written. On 6 March 2008 the applicant filed an appeal with this Court against deemed refusal.

Relevant planning controls and policies

- 9 Several planning documents at the State and regional level have some relevance to the application. They are:
- Far North Coast Regional Strategy;
 - North Coast Regional Environmental Plan (NCREP);
 - NSW Coastal Policy, which is called up by the NCREP;
 - North Coast Design Guidelines, which is called up by the NCREP;
 - Coastal Design Guidelines for NSW.
- 10 However, because the State and Regional planning controls are highly generalised, it is not easy to interpret what they mean for a particular site or a particular proposal. For this reason, the judgment concentrates on the council's planning controls, of which the most relevant are as follows:
- 11 The *Tweed Local Environmental Plan 2000* (LEP 2000) zones the subject site 2(c) *Urban Expansion*. Clause 4(a) aims to give effect to the desired outcomes, strategic principles, policies and actions of the *Tweed Shire 2000 + Strategic Plan*, which the LEP describes as having been *adopted after extensive community consultation*. Clause 4(c) aims to give effect and provide reference to the *Tweed Shire 2000 + Strategy* and the *Pottsville Village Strategy*. Clause 8 states that the consent authority may grant consent to development *"only if it is satisfied that the development is consistent with the primary objective of the zone and it has considered those other aims and objectives of this plan that are relevant to the development"*. Clause 8(c) requires satisfaction that the development would not have an unacceptable cumulative impact on the community, locality or catchment.
- 12 The primary objective of the 2(c) zone is
- to identify land for urban expansion (which will comprise mainly residential development focused on multi-use neighbourhood centres) and to ensure its optimum utilisation consistent with environmental constraints and the need to minimise residential landtake.*

- 13 The *Pottsville Village Strategy* (as mentioned above, this is called up by LEP 2000) identifies itself as an overview of important planning and environmental factors that need to be taken into account when making further decisions about the future of Pottsville. The council adopted the Strategy in 1998 following a public participation process that is described in paragraph 2.1. The Strategy identifies in several places the need for a review every five years. It has not been reviewed since its inception.
- 14 Paragraph 2.1 indicates that the recommendations contained within the Pottsville Village Strategy would be implemented by amending the LEP where necessary and by formulating a local area DCP with specific development controls for Pottsville.
- 15 On page 14, there is the *Pottsville Local Area Growth of the Village Plan*, which indicates that the Pottsville Centre is to be the *village centre* and Seabreeze is to have a *neighbourhood centre*. Other neighbourhood centres are shown at Koala Beach, Pottsville Beach, Pottsville Waters and Black Rocks. Village and neighbourhood centres are not defined; however, the village centre, of which there is one, is shown as larger than the neighbourhood centres, of which there are five. The same plan indicates that the village bypass is to be constructed and that the Seabreeze to Koala Beach Link Road is to be constructed.
- 16 Page 25 describes the *Preferred Local Area Plan*. In relation to retail facilities it says that
- The main retail commercial and community facilities concentrated together in central Pottsville by expanding the existing village centre south towards the old school site.*
- and
- A small group of convenience store(s), childcare centre, neighbourhood park, etc in each small community.*
- 17 Page 26 shows the *Pottsville Local Area Structure Plan 1998-2011*. This indicates the same retail hierarchy as the *Local Area Growth of the Village*

Plan. Paragraph 4.6 on page 36 discusses *Future Supermarket/Shopping Centre Site*, as follows

The growth of the Pottsville area is likely to generate the need for a new supermarket/shopping centre. Any such centre would be of a small scale only and should be encouraged to locate within the existing business district. A larger out of town centre would effectively compete with the village centre, which could result in an adverse impact on the economic viability of existing businesses and diminish the role of the business district as a community focus.

Discussions with representatives from the retail sector have revealed that a new shopping centre would incorporate a small supermarket in the order of 3000m² in size and a number of small specialty shops. Factoring in the likely requirement for some on-site car parking and unloading, a development site in the order of 6500m² would be required.

- 18 The Village Strategy then goes on to consider three possible locations for the new supermarket/shopping centre, all of them in the Pottsville centre. Area A, on the corner of Coronation Avenue and Phillip Street, is identified as the preferred location. Area B, which requires an amalgamation of the current IGA site and a portion of lot 7008 is also identified. Area C is the third possible location, being the old school site to the south of Phillip Street. I understand that no one considers these sites feasible in 2008.
- 19 The *Tweed Shire 2000 + Strategic Plan* is called up by cl 4(c) of LEP 2000. The *Tweed 4/24 Strategic Plan* of September 2004 updates and replaces the 2000 + Plan. While the plan makes some reference to retailing in Pottsville (but only in terms of promising future investigations), I cannot find anything in the replacement document that would shed light on the questions to be answered in these proceedings.

The *Council's Resolution of 16 November 2005 - Retail Strategy* (the Retail Strategy Policy) followed work that the council commissioned economic consultants, Core Economics, to carry out. The Retail Strategy Policy was exhibited for public comment. It contains seven points, as follows:

1. *The character of existing towns and villages and the retail facilities they already have be protected.*

2. *Where appropriate, council will support the incremental expansion of existing retail centres in such a way as not to threaten or fracture those existing centres, rather than building new ones.*
3. *Reinforce Tweed Heads South as the major district retail centre by encouraging the expansion and when Tweed's population demands that increased range and level of shopping.*
4. *Maintain and, wherever possible, enhance the special appeal of the retail centre of Murwillumbah and those village centres of similar style.*
5. *Limit the scale of new retail centres in the coastal region to a level, which caters for the majority of localised daily needs. This concept to reflect the need to reduce fuel consumption and to support sustainability within each centre.*
6. *Council does not support the establishment of another district retail shopping centre.*
7. *The retail concepts in these recommendations form the basis of locality plans in the Shire and any retail development applications which are submitted in the interim of these locality plans being prepared and approved by council be assessed so that the above retail strategies are supported and not compromised.*

20 **Section B15 Seabreeze Estate** of the **Tweed Development Control Plan 2008** (DCP B15) was originally known as DCP 38, having been made in 2000 following public exhibition in late 1999. The Structure Plan at page B15-20 shows shops on both sides of Seabreeze Boulevard. The legend describes them as *Neighbourhood focus (local shops and services)*. This suggests a traditional main street shopping centre. Performance Criterion C3 of DCP B15 is:

Create a centrally located neighbourhood centre, which is within a 5 to 10 minute walk of most dwellings.

21 B15 DCP addresses non-residential development at B15.3.12. The objective of non-residential development is:

To facilitate provision of appropriate community facilities and other non-residential development to meet the neighbourhood service needs of this housing estate.

The performance criterion for non-residential development is to

Provide for neighbourhood shopping centre, church and other appropriate non-residential facilities such as childcare centres, and a medical centre in a central location as shown on B15-Map 7-Structure Plan (ie the Structure Plan mentioned above).

- 22 Under *acceptable solutions*, the Seabreeze shopping centre is described as:

The range of uses within the neighbourhood centre to be restricted to convenience shops and services servicing the day-to-day needs of the surrounding areas, such as fruit shop, milk bar, general store, hairdressing salon, café, video outlet, childcare centre and the like.

- 23 I note that the B15 DCP was not part of the Tweed Development Control Plan 2008 when it was exhibited. The section that dealt with the Seabreeze Estate was called A15 and it indicated a full line supermarket within Seabreeze. In the event, for reasons that are in dispute but ultimately not relevant to my decision, section A15 did not make it into the adopted Tweed Development Control Plan. Section B15 made it instead.

- 24 I note also that the council has exhibited a ***draft Locality Plan*** and a ***draft Development Control Plan*** for Pottsville. These are in line with the position taken in section A15 of the exhibited Tweed Development Control Plan 2008, in that they endorse a full line supermarket within the Seabreeze Estate. These two draft documents are based on a study by the planning consultants *Architectus*, which suggests that the commercial centre of Pottsville should be located in the Seabreeze Estate rather than in the existing centre. The draft Locality Plan and draft Development Control Plan have not been adopted. They are inconsistent with the council's position in these proceedings. No reason has been given why the council exhibited documents with which it does not agree.

- 25 The ***Seabreeze Estate Master Plan*** (the Master Plan) was first adopted in 2000. It has been amended on several occasions, last in 2007. The Master Plan was prepared by the applicant and approved by the council. The Master Plan shows the shopping centre in the Seabreeze Estate as an area of 2,200m², which is sufficient for only two to three shops.

Matters in contention

- 26 The council submitted its Statement of Contentions, which extends over 29 pages. During the hearing the issues were simplified as the following three:
- The proposed commercial centre is inconsistent with the council's plans, policies and strategies.
 - The proposed shopping centre will have an unacceptable impact on the existing Pottsville Village Centre.
 - The design of the proposed shopping centre is inappropriate.

Supporters and objectors

- 27 The Court heard the evidence of 27 persons commenting on the proposal. These may be divided into three groups: those in support, those objecting on general grounds, and those objecting because of feared impacts on their business. The supporters were: Mr B Small, Ms I Lewis, Ms A Skuse, Ms J Watson, Mr D Clark, Ms B Hinds, Ms G Curry, Ms D McGavin, Mr F Baldwin and Ms J Boorman. All the supporters lived in the Pottsville area. Their main reason for supporting the proposal was that they wanted a full line supermarket closer to their homes. Currently the closest full line supermarket is at Kingscliff, and many travel as far as Tweed City, which requires only five minutes more travelling time. Another reason for support was the local employment a large supermarket would generate.
- 28 Those who objected on general grounds were Mr J and Mrs M Hefferan, Mr A Johnston, Mr S Newman, Mr M Wells, Mr B Cummings, Ms D Beard and Ms M Khyentse. The objectors noted that the Master Plan indicates a small shopping centre and they considered that the applicant should keep faith with the promises of the Master Plan. Objectors from Koala Beach were concerned about additional traffic travelling towards a large shopping centre in the Seabreeze Estate.
- 29 Mr I Wightman, who owns the IGA supermarket building, pointed out that where out-of-centre commercial development is allowed, it tends to lead to

the demise of the centre. Mr K Huddle, who manages the IGA supermarket at the Pottsville Centre, said that he bought the store and invested in it on the basis that he was assured that there would be only a small centre at Seabreeze. Mr C Murdock, who owns and manages the pharmacies at Pottsville Waters and at the Pottsville Centre, said that the proposal would have an adverse impact on his business. His evidence was reinforced by that of his wife, Mrs T Murdock, who is the President of the Pottsville Business Association. Mrs Murdock said that the proposed shopping centre at Seabreeze was much larger than that shown in the Master Plan and that it will draw shoppers away from the existing centre, eventually replacing it. Mr K Jeffries, who runs the butcher's shop at the Pottsville Centre, said that a loss of customers would force him to reduce the variety of the products he can offer. Mr G Cooper, who runs the post office in the Pottsville Centre, said that he depended on other shops such as the IGA supermarket doing well. Mr D McDowell, who runs the newsagent at the Pottsville Centre, said that he had slowly worked up his business and he feared losing what he had worked for over the years. For example, with a large centre at Seabreeze, he may not have enough turnover to justify his licence to sell lottery tickets.

30 Professor V Feros objected on behalf of a commercial competitor, Kings Beach No 2 Pty Ltd, which intends to build a shopping centre north of Pottsville at Casuarina. In Professor Feros' view, the site is in the wrong location for a large shopping centre, being eccentric to the population it is intended to serve. The proposal would have devastating impact on the existing Pottsville Centre.

31 I draw the following conclusions from the above evidence:

- There are residents who want a full line supermarket at Seabreeze because they find the IGA at Pottsville too small and too expensive and the trip to Kingscliff or Tweed too long.
- There are residents who object to a full line supermarket at Seabreeze because of the traffic, parking and commotion it will attract.

- It is not possible to estimate the relative numbers of supporters and objectors; only a random sample survey could do that.
- The butcher, supermarket operator, post office operator, pharmacist and newsagent at the Pottsville Centre, and the members of the Pottsville Business Association are fearful of the adverse impact a full line supermarket and specialty shops at Seabreeze would have on their businesses.

Is the proposal consistent with council's strategy?

- 32 Paragraphs 11-25 set out the relevant parts of the council's planning documents, policies and strategies. The parties disagreed whether the proposal was consistent with them. This is partly because they interpreted certain words differently, and partly because they placed different weight on documents.
- 33 It seems to me beyond doubt that the proposal is inconsistent with the B15 DCP and the Master Plan. It is equally certain that it is consistent with the exhibited (and now apparently discarded) A15 DCP and with the draft Development Control Plan for Pottsville. Planning documents, which admit of different interpretations are LEP 2000, the Pottsville Village Strategy and the council's Retail Strategy of 16 November 2005. I do not think that the Tweed Shire 2000 + Strategic Plan contains anything to clarify the debate.
- 34 I turn to LEP 2000. Pursuant to cl 8, the Court has power to approve the application only if it is satisfied that the proposal is consistent with the primary objective of the 2(c) zone. Since the primary objective of the zone is to provide for *mainly residential development focused on multi-use neighbourhood centres*, the Court must be satisfied that the proposal is a multi-use neighbourhood centre. *Neighbourhood centre* is not defined; therefore one should either turn to the ordinary use of the expression or seek the opinion of experts, or both.
- 35 The Court heard the evidence of two economists with special expertise in retailing, Mr Brian Haratsis, for the council, and Mr Peter Leyshon, for the

applicant. While they had assumed different trade areas for the proposed supermarket, both of them assumed trade areas much larger than the Seabreeze Estate. Mr Haratsis, who assumed the smaller trade area, said that the proposal was too large to be called a neighbourhood centre. Mr Leyshon disagreed. Mr Haratsis' opinion given in evidence in this case, however, is contradicted by an earlier report he had prepared for Alfredton West (a suburb of Ballarat in Victoria), in which he had written that *"typically, a neighbourhood centre has around 10,000m² of retail floor space and contains a supermarket and approximately 35 specialty stores"*. In cross-examination Mr Haratsis said that in Ballarat a neighbourhood centre is 10,000m², but in Tweed it is much smaller. From the context of his report it appears that a neighbourhood centre in Ballarat is just below the town centre in the retail hierarchy. This demonstrates that the term is used differently in different places. My task is to decide what the term means in LEP 2000.

36 The notion of neighbourhood centres being the focus of mainly residential development suggests that the task of the centre is to serve the housing around it rather than far-away populations. This is consistent with the notion that a neighbourhood centre serves a residential neighbourhood, rather than a coastal region such as the Tweed coast. I conclude that the term neighbourhood centre, as used in LEP 2000, refers to a smaller shopping centre than here proposed. The proposal is therefore not consistent with the primary objective of the 2(c) zone. I do not think I have power to approve it.

37 I turn to the Pottsville Village Strategy. This document makes it abundantly clear that it intends the existing Pottsville Centre to remain the location of the main retail and community facilities in Pottsville. The part of the Strategy that is favourable to the applicant's case is that a new shopping centre incorporating a supermarket of about 3000m² is likely to be required in Pottsville. The Strategy adds that such a centre should be encouraged to locate within the existing business district.

- 38 The applicant argues that the Pottsville Village Strategy is out of date, having been conceived ten years earlier. Despite several promises among its pages that it will be reviewed in five years, it has never been reviewed. I accept the applicant's submission that this reduces the weight that should be given to it.
- 39 I turn to the council's Retail Strategy of 16 November 2005. This supports the council's case more than the applicant's. For example, the Strategy supports the incremental expansion of existing retail centres. While this aim is preceded by the words "*where appropriate*", a proposal that threatens an existing retail centre cannot be considered to be consistent with the Strategy.
- 40 I conclude that the proposal is inconsistent with the primary aims of the 2(c) zone; with the Pottsville Village Strategy; the council's Retail Strategy of 16 November 2005; the current DCP for the Seabreeze Estate, section B15 of the Tweed Development Control Plan 2008; and the Seabreeze Estate Master Plan. The only document with which it is consistent is the draft Development Control Plan, which has been exhibited but not adopted.
- 41 I do not accept the applicant's submission that the inconsistency is justified by the fact that some of these instruments are eight to ten years old. While it is desirable to review plans regularly, resources available to a council and the changing priorities of government do not always allow this. Moreover, a planning policy such as the protection of existing centres is not worth much if it is changed each time a plan is reviewed. People make investment decisions on the basis of such policies, and their investment horizon is usually beyond ten years. Long-term planning policies are in the public interest; and so is adherence to them when assessing applications.

Impact on the existing Pottsville centre

42 Clause 79C(1)(b) of the *Environmental Planning and Assessment Act 1979* states that, among the matters to be considered in assessing a development application are

the likely economic impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

43 Numerous judgments have dealt with the correct application of the words *social and economic impacts in the locality*, for example *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR; *Fabcot v Hawkesbury City Council* (1979) 93 LGERA 373; *Cartier Holdings v Newcastle City Council* (2001) 115 LGERA 407; *Randell v Willoughby City Council* (2005) 144 LGERA 119; and, most recently, *Milne v Minister for Planning [No 2]* [2007] NSWLEC 66. I referred to these cases in a 2007 judgment *Jetset Properties v Eurobodalla Shire Council* [2007] NSWLEC 198, and that judgment was referred to in these proceedings.

44 The main principles that should guide me in the assessment of social and economic impacts are:

- The mere threat of competition between commercial interests is not a planning consideration.
- The threat to the viability of a whole shopping centre is a relevant planning consideration.
- The relevant "*locality*" must be determined in each case.

45 Therefore, a finding that the subject proposal affects, for example, the business of the IGA supermarket in the Pottsville Centre or the Foodworks supermarket in Pottsville Waters would not be a relevant consideration. However, a finding that the proposal affects the viability of either of those centres would be an impact to be taken into account under cl 79C(1)(b). Of the two centres, I concentrate on the Pottsville Centre, which appears to be the council's and the objectors' major concern.

- 46 Mr Leyshon and Mr Haratsis used different methods to distribute the impact of the proposal and different assumptions on trade area and average sales rate per square metre of floor space. It is therefore difficult to compare their evidence or to conclude which of them is to be preferred.
- 47 Mr Leyshon estimated the proposal's impact on the turnover of the Pottsville IGA to be minus 18.8% and on the Pottsville Waters Foodworks to be minus 28.6%. Mr Haratsis estimated the impact on the Pottsville IGA it to be minus 43% and on Foodworks to minus 37%. Mr Leyshon estimated the impact on the whole Pottsville Centre to be minus 12.9%. Mr Haratsis did not estimate the impact on the centre, reasoning that an over 40% reduction in turnover of the IGA is likely to lead to its closure, which would be followed by closures of other shops and therefore the virtual demise of the centre.
- 48 How shall I distinguish between these widely (and wildly) different predictions? The first thing to keep in mind is that the experts are not measuring something that exists, but rather guessing at future shopping behaviour. The possibility of error is ever present. Indeed, they cannot both be right, though they may both be wrong. If I accept a low estimate of impact on the Pottsville Centre, and the impact turns out to be greater, I have caused irreparable harm not only to the shopkeepers of the centre but to all those residents who want to keep the village centre alive.
- 49 I am concerned by the fact that Mr Leyshon's estimates of impact are expressed in percentages with one decimal point. This implies accuracy far greater than is realistic to expect in economic forecasting. I also find it hard to accept his prediction that the impact on the Foodworks supermarket will be significantly greater than on the IGA supermarket. Given that the proposal is much closer to the IGA than to Foodworks, this prediction is counter-intuitive and not convincingly explained. Finally, I find Mr Leyshon's estimate of the impact on the Pottsville Centre (minus 12.9%) unconvincing. Why would the impact on other shops, which rely on the IGA for their existence, be so much less than on the IGA? It seems

likely that people who switch their weekly or their "top-up" shopping from the IGA to the new supermarket at Seabreeze, would also use the pharmacy, the butcher and the hairdresser at Seabreeze. They would have no reason to shop at Pottsville.

50 In oral evidence Mr Leyshon said that he would support the application even if he believed that the IGA supermarket would close, because the other shops in the Pottsville Centre would still survive. How can that be right? Can a centre in which the only food shop is a butcher, survive? This seems unlikely. I prefer Mr Haratsis' opinion that, if the IGA closes, other shops would also close.

51 It seems to me that even on the basis of Mr Leyshon's evidence, there is a high likelihood of the demise of the Pottsville Centre. Mr Leyshon characterises an impact of minus 12.9% as in the medium to high range. If his prediction is even slightly wrong and the impact is 16% rather than 12.9%, he would characterise it is high/very high.

52 Before I leave the subject, I turn to two arguments that the applicant has made in support of the contention that the impact on Pottsville Centre would not be significant. The first is that shops have existed at Pottsville Centre before the IGA came into existence. I do not think that this proves that the Centre would survive if the IGA closed. First, Pottsville had a smaller population before the establishment of the IGA. Second, with the exception of the butcher, the shopkeepers who spoke to the Court have either set up recently in the centre or renovated and expanded their shops recently. Third, whatever shops existed in the Pottsville Centre before the IGA did not have to compete with a full line supermarket and several specialty shops a short way down the road.

53 The second matter argued by the applicant is that none of the shopkeepers said in cross-examination that they would close their shops if their business declined. It seems to me that the question of what the

shopkeepers would do if their business suffered a serious decline is so complex that one cannot reasonably expect a well-considered response to it in cross-examination. If the decision faced the shopkeepers of Pottsville Centre in reality, they would probably take months or even years over it.

The design of the proposal

54 The Court heard the evidence of Ms G Morrish, for the council, and Mr N Dickson, for the applicant, both of them architects and urban designers. In Ms Morrish's opinion, the proposed supermarket should strive for a more "main street"-like character, have more active frontages and follow the hillside rather than be excavated into it.

55 If one accepts that a commercial development of over 4000m² is appropriate on the site, then it would be difficult to deny approval for it on the grounds that it looks too much like a supermarket. I do not think that the design is different from any number of other supermarkets of a similar size on the Tweed Coast (and elsewhere), for example the one at Banora Point, to which I was taken during the proceedings, and which was recently approved. In any case, there is little point in discussing design details of a proposal, which, for reasons unrelated to design, is unacceptable.

Conclusions

56 This judgment concludes that building a full line supermarket with associated commercial activities within the Seabreeze Estate is inconsistent with the council's planning controls and retail strategy and that such a development would severely impact on the existing Pottsville Centre. Given those planning controls and the council's policy to protect the Pottsville Centre, the proposal should not proceed.

57 This judgment should not be construed as saying that there should never be a full line supermarket within the Seabreeze Estate, nor that the site is an inappropriate location for it in all circumstances. The council may in the

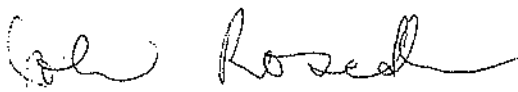
future change its position and sacrifice existing centres in the interest of shopping convenience. The effect of the Court's approving this application would have been to force such a change in position on the council. This would not have been an appropriate use of the Court's powers.

59 The parties have attempted to bring into the debate the question of an alternative site for a full line supermarket. I have excluded this aspect from the hearing because I do not think it is the Court's task to find an alternative site. If the proposal were appropriate, it should be allowed to proceed even if there were an alternative site that some people consider to be a better location. As it turns out, the proposal is not appropriate. Consequently, it should not proceed, even if there is no agreement on an alternative site. That having been said, the ease or difficulty of finding an alternative site for a full line supermarket that everyone agrees will be needed one day, is likely to influence the council when it considers whether a change to its retail strategy is justified.

60 For the above reasons the appeal is dismissed.

Orders

1. The appeal is dismissed.
2. Development application to erect a commercial centre comprising a supermarket, specialty shops, a service station, a child care centre and associated parking on lot 1 DP 1106275 on Seabreeze Boulevard, Seabreeze near Pottsville is determined by refusal.
3. The exhibits are returned.



Dr John Roseth
Senior Commissioner