



Land and Environment Court New South Wales

Medium Neutral Citation: North Sydney Leagues Club Limited v Tweed Shire Council [2014] NSWLEC 1142

Hearing Dates: 5, 6, 7, 8 May and 16, 17 June 2014

Decision Date: 16/07/2014

Jurisdiction: Class 1

Before: Hussey C

Decision:

- (1) The appeal is dismissed.
- (2) Development consent to DA 12/0527 for internal alterations, additions and reconfiguration of the car park to the Seagulls Club at 54-68 Gollan Drive, Tweed Heads West to permit a new general store is refused.
- (3) The exhibits may be returned except 1, 6, 7, 10, 15, 17, 24, A, F, H.

Catchwords: Development application: Incorporation of a general store within the existing club premises, consistency with recreation zone, social and economic impacts, compliance with retail strategy, prohibited under Draft Local Environmental Plan

Legislation Cited:

- Forestry Act 1916 No 55
- State Environmental Planning Policy (Infrastructure) 2007
- State Environmental Planning Policy No. 71 - Coastal Protection
- Draft Tweed Local Environmental Plan 2012
- Tweed Local Environmental Plan 2000
- Tweed Community Strategy Plan 2011/2021
- Tweed 4/24 Strategic Plan
- Tweed Retail Strategy
- Tweed Urban and Employment Land Release Strategy
- Far North Coast Regional Strategy
- North Coast Regional Environmental Plan 1988
- Coastal Zone Management Plan for Cobaki and Terranora Broadwater

Cases Cited:

- Abret Pty Limited v Wingecarribee Shire Council [2011] NSWCA 107
- Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 190
- Blackmore Design Group Pty Ltd v North Sydney Council [2001] NSWLEC 279
- Coffs Harbour Environment Centre Inc v Coffs Harbour City Council (1991) 74 LGRA 185 at 193
- Conservation of North Ocean Shores Inc v Byron Shire Council & Ors [2009] NSWLEC 69
- Hastings Point Progress Association v Tweed Shire Council [2009] 168 LGR 99
- Kentucky Fried Chicken Pty Ltd v Gantidis [1979] HCA 20
- Kivi v The Forestry Commission, 1982 47 Local Government Reports 38
- Maygood Australia Pty Ltd v Willoughby City Council [2013] NSWLEC 142
- Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim) [2012] NSWCA 358
- Retirement by Design Pty Ltd v Warringah Council [2007] NSWLEC 87
- The Mac Services Group PTY Limited v Mid - Western Regional Council [2014] NSWLEC 1072

Category: Principal judgment

Parties: North Sydney Leagues Club Limited (Applicant)
Tweed Shire Council (Respondent)

Representation: Thomsons Lawyers (Applicant)
Sparke Helmore Lawyers (Respondent)

Mr C McEwen SC (Applicant)
Mr M Staunton (Applicant)
Mr T Roberson SC (Respondent)

File Number(s): 10908 of 2013

JUDGMENT

Background

- 1 This appeal arises from council's refusal of a development application for alterations to the Seagulls Club located at 54-68 Gollan Drive, Tweed Heads to incorporate an IGA supermarket within the existing club building. Under the planning controls in force when the application was lodged, a grocery store was permissible with consent but the more recent Local Environmental Plan 2014 now prohibits this form of development on the site.
- 2 The Seagulls Club is a large regional leisure/entertainment facility, which has operated in the Tweed Shire for more than 30 years. Originally it was set up as the home ground of the Gold Coast Seagulls Rugby League Club. However the playing fields have now been converted for residential dwellings with the club premises and large sealed car park for some 580 vehicles together with another 232 car spaces on the grassed areas, remain within a parklike setting.
- 3 The club currently provides a range of entertainment/leisure uses, including:
 - Restaurant and bar facilities.
 - A bottle shop (for take-away liquor).
 - Gaming area/s and TAB facility.
 - A kid's entertainment complex (called Tabatinga Family Fun Centre).
 - A Revolution Fitness gymnasium.
 - Indoor sporting facilities.
- 4 As the club visitations have declined over the years and parts of the internal space freed up, the club now seeks to provide an additional facility in the form of the IGA supermarket.
- 5 However the council refused the development application and the council's contentions are summarised as follows:
 - Whether the proposal is consistent with the zone objectives,
 - Whether the proposal is consistent with the aims of the Local Environmental Plan and supporting strategic planning documents, including the adopted retail strategy,
 - Social and economic impacts,
 - Cumulative impacts on the community,
 - Permissibility under the new Local Environmental Plan
 - Public interest considerations.

The site

- 6 The site is described as Lot 2 DP 881169 and it has a total area of 4.94 ha. The principal access to the site is via Gollan Drive, which connects to Kennedy Drive that provides the main access route into the Tweed Heads commercial areas comprising the Centro Centre and Tweed Heads South shopping centre, a distance of some 7 - 8 km.
- 7 The area surrounding the site comprises a mix of low to medium density dwelling houses. Located approximately 250m to the north of the site is the Panorama Plaza neighbourhood centre containing a range of shops including grocery shop/newsagency, butcher, baker, hairdresser and liquor shop. It has a small adjacent car parking area.
- 8 The existing building contains an area in the order of 16,822 sq m, which is used for various purposes including:
 - Club purposes; 7891 sqm.
 - Gym; 1772 sqm
 - Futsal courts; 2104 sqm
 - Childrens recreation area 1440 sqm.
 - Unoccupied floor space; 3301 sqm.
- 9 The club's traffic consultant estimates that the existing uses generate a demand for 214 car spaces ignoring dual use trips. This results some 600 unused car parking spaces.

The proposal

- 10 The DA proposes an extension of the eastern elevation of the central part of the existing building to increase the gross

floor area by 314 sqm and then use it together with part of the existing building (1,965 sqm) for the purpose of the IGA supermarket making a total area of about 2279 sqm. A further internal area at the rear of the supermarket is proposed on a shared basis to allow the IGA to utilise the existing loading dock, internal corridors and cold storage area.

- 11 The proposal involves some reconfiguration of the existing car park to provide for 58 designated car parking spaces to accommodate demand from the IGA supermarket customers.
- 12 It is estimated that the general store will occupy 4% of the area of the land and 11% of the floorspace of the existing building as modified by the proposal.

Planning controls

- 13 The site is subject to a number of planning controls as follows. Firstly, there is the *Tweed Local Environmental Plan 2000* (TLEP) under which the site is zoned part 6(a) Open Space and part 6(b) Recreation. The development proposed by the DA will be located within the 6(b) Recreation zone. Development for a general store is permissible with consent in this zone.

- 14 Relevantly, the TLEP cl 8 Consent considerations provides:

8 Consent considerations

(1) The consent authority may grant consent to development (other than development specified in Item 3 of the Table to clause 11) only if:

(a) it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and

(b) it has considered those other aims and objectives of this plan that are relevant to the development, and

(c) it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.

- 15 Clause 4 contains the following aims of the Plan:

The aims of this plan are:

(a) to give effect to the desired outcomes, strategic principles, policies and actions of the *Tweed Shire 2000+ Strategic Plan* which was adopted, after extensive community consultation, by the Council on 17 December 1996, the vision of which is:

"The management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric is enhanced", and

(b) to provide a legal basis for the making of a development control plan that contains more detailed local planning policies and other provisions that provide guidance for future development and land management, such as provisions recommending the following:

(i) that some or all development should be restricted to certain land within a zone,

(ii) that specific development requirements should apply to certain land in a zone or to a certain type of development,

(iii) that certain types or forms of development or activities should be encouraged by the provision of appropriate incentives, and

(c) to give effect to and provide reference to the following strategies and policies adopted by the Council:

Tweed Shire 2000+ Strategy

Pottsville Village Strategy, and

(d) to encourage sustainable economic development of the area of Tweed compatible with the area's environmental and residential amenity qualities.

- 16 The relevant zone objectives for the Zone 6 (b) Recreation are:

Zone objectives

Primary objective

· to designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes.

Secondary objective

· to allow for other development that is compatible with the primary function of the zone.

- 17 The provisions of the *Draft Tweed Local Environmental Plan 2012* (Draft LEP) also require consideration. At the time of lodgement of the DA the DLEP was awaiting gazettal. However it was gazetted in April 2014 (TLEP 2014) with the site being zoned RE2 Private Recreation, under which the proposal is prohibited. But the DA has the benefit of the following savings clause:

1.8A Savings provision relating to development applications

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

18 The other relevant controls include:

- *North Coast Regional Environmental Plan 1988.*
- Clause 2, 2B, 46 & 47 are relevant.
- *State Environmental Planning Policy No. 71 - Coastal Protection* Clause 8 is relevant.
- *State Environmental Planning Policy (Infrastructure) 2007.*
- Clause 104 and Schedule 3 are relevant.
- *Tweed Development Control Plan (the DCP)*; The following sections of the DCP are relevant to the DA:
- A2 - Site Access and Parking Code
- A3 - Development on Flood Liable Land
- A4 - Advertising Signs Code
- A11 - Public Notification of Development Proposals
- A13 - Social-Economic Impact Assessment 4.2
- Tweed Shire 2000+ Strategic Plan,
- Tweed 4/24 Strategic Plan,
- Tweed Community Strategic Plan 2011/2021,
- Tweed Urban and Employment Land Release Strategy,
- Far North Coast Regional Strategy,
- Tweed Retail Strategy,
- Coastal Zone Management Plan for Cobaki and Terranora Broadwater

The evidence

19 The following experts presented detailed evidence in response to the contentions. Considering the overlapping nature of some parts of the evidence and the formatting of the joint reports in terms of discussion on disagreed points, I have initially considered all the evidence and the associated application of the various results, particularly the findings of the retail modelling, to the other contentions concerning social and cumulative impacts and on the community.

Economic assessment

- Mr B Haratsis; Applicant's economic consultant
- Mr A Hack; Respondent's economic consultant
- *Social impact assessment*
- Dr J Stubbs; Respondent's social planner
- Assoc Professor R Ryan; Applicants social planner
- *Town planning assessment*
- Mr N Tzannes; Respondent's town planner
- Mr A Byrnes; Applicant's consulting planner.

Contention 1 - consistency with Primary Objective of 6(b) Recreation Zone

20 This contention concerns whether the proposal is consistent with the primary objective because it constitutes a commercial use rather than a recreational use and it is an independent use, which has no correlation to existing recreational uses on the site.

21 As the proposed use is for the IGA supermarket, which is a form of a grocery store, it is a use "other than development specified in Item 3 of the Table to clause 11)", then consent may be granted only if the consent authority is satisfied that the development is consistent with the primary objective of the 6(b) zone as follows:

- to designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes.

22 Insofar as the word 'designate' is not defined, I note that there are significantly different submissions regarding its interpretation in the subject context. Mr McEwan submits that it means that the land is set aside for the purpose and accordingly, the use of the land in the zone should be primarily for recreational use. Against this, Mr Robertson's submission is that when the primary zone objective talks about designating land, it talks about designating land whether in public or private ownership which is or may be used primarily for recreational purposes. That is, it is

describing what the zone has done by designating or specifying the land use rather than setting it apart.

23 Insofar as the planners agree that a grocery shop is not categorised as a recreational use, they addressed this contention on the basis that Mr Tzannes considers that while any alternative uses do not necessarily need to be recreational, nevertheless they must be consistent with the primary objective of the zone. Consequently he does not consider the proposal achieves this consistency because:

- It is of a scale which is not subordinate to the primary use of the site.
- If the supermarket is approved there will be some 1,965 sq m of area which will be sterilised and which can no longer be utilised for recreational purposes.
- Considering the various internal uses within the premises, the club would only equate to approximately 39% of the floor area.
- Given the area within the Club that is currently not being utilised for recreational activities and the additional sterilisation of a further 1965 sq m, it is questionable as to what will be the primary activity on the site because there is potential that the supermarket customers could exceed the number of patrons at the Club.
- The proposed supermarket is a standalone retail activity (the proposed size of the supermarket exceeds what is generally identified for a neighbourhood centre (approximately 1,000 sq m) that has no direct relationship to the existing recreational uses on site and it is not accessed from within the club nor does it require membership to enter.

24 He says that if the Seagulls Club ceased all operations, the proposed supermarket if approved would therefore still be able to operate independently. Given that the proposed use can operate independently of other operations within the Club, then the DA would not be consistent with the primary objective and there are no benefits in the co-location of the supermarket and the Club.

25 Against this Mr Byrnes says:

- That a quantitative assessment as indicated by Mr Tzannes is not the only way to assess whether the land is being used primarily for recreational purposes. Nevertheless, his view is that in making a quantitative assessment of the floor space to be used as a general store, the proposed use cannot be described as dominating the floor area of the site because it only takes up to 11.7% of the floor space existing on the site.
- He disagrees with Mr Tzannes' opinion that the better quantitative measure for the intensity of the use is "patronage" and not sq m dedicated to activities on site because this manner of assessment is imprecise as the "foot-traffic" to various uses does not capture the relative time spent at uses and therefore the intensity ascribed.
- The land is primarily used for recreational facilities not only by virtue of the amount of space dedicated to recreational purposes being far more than that proposed for the general store; but relevantly the proposal will not change the business of Seagulls Club or the nature and operation of the site from being predominantly characterised as a Club that offers members and guests a wide range of recreational opportunities.
- In his view, the operation of the general store will not alter the primary activity, use and character of the site from being that of recreational.
- He disagrees with Mr Tzannes' opinion that the proposal is capable of becoming the dominant use through the cessation of other uses on the site; and therefore on this basis the proposal cannot be considered to be subordinate.
- In his opinion a proposed use to be compatible with the recreational purpose of the land does not need to be a recreational use. A use does not need to be the same in purpose and character for it to be compatible. His view is that the proposal is a "compatible land use" as the general store can co-exist and operate independently from the Seagulls Club without diminishing the Club's main function and purpose to be a recreational facility for its members and guests. Further, the proposal incorporates elements that can be co-located and/or shared with the existing Club, such as carparking area, loading area, access points, and waste disposal area; demonstrating functional compatibility.

26 From their examination of this issue of the compatibility of non-recreational uses, the planners agreed that there is no requirement that any of the alternate permissible uses must be ancillary to the recreational use. They confirmed this by reference to the other types of permitted uses such as "emergency service facilities, forestry, markets and utility installations." I subsequently deal with this in the submissions.

27 Insofar as the council's evidence referred to factors such as foot traffic and turnover to indicate that the general store use would likely dominate the recreational use, I deal with this later.

Contention 2: Aims of HLEP and strategic planning documents

28 The contention is that the DA is not consistent with the aims of the TLEP and the associated strategic planning documents including the Tweed Shire 2000 + Strategic Plan from which the stated vision is:

The management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric is enhanced.

29 The planners addressed this contention in the joint conferencing and agreed that the strategic planning documents necessarily set broad intentions, which are then interpreted and inform the respective planning instruments. As part of the determination of this contention, I summarise their disparate opinions as follows:

TLEP

30 Mr Tzannes considers the proposal is inconsistent with the aims the TLEP, particularly cl 4(a) because:

- This development does not represent satisfactory management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric are enhanced. This outcome is to be achieved by compliance with the LEP 2000 appropriate zonings to ensure the development character and economic vitality of the Shire is retained/enhanced.
- The strategic plan provides for the location of retail and commercial development and human services being carefully planned to ensure facilities are accessible by all transport means. But the site is located at the end of a no-through road and is not accessed by public transport.
- Reference to the Typical Components of a Local Neighbourhood schematic diagram includes a number of different collocated uses. But the IGA store would be bisected by a bus route and the commercial/shops front this route that also includes a bus stop adjacent to the Square.
- The intent of the TLEP does not support the approval of a dispersed single trip generating development that is generally accessed by car nor does it support the creation of new standalone commercial centres.

31 Against this, Mr Byrnes says that the proposal is entirely consistent with aim (a), on the basis that it expressly seeks to maintain and establish a pattern of "self-contained villages". Further, the Plan identifies Seagulls as a Neighbourhood Centre, which is clarified to be a centre within a 400m radius that contains a mix of uses including shops, commercial, community facility, open space and housing. Therefore the proposal is entirely consistent with the intention of the Plan to promote selfcontainment in urban settlements, facilitate a village character with high levels of social interaction and reduce private car dependence. The proposal is also within the 400m radius walking catchment of other services and facilities.

32 With regard to aim (d) of the LEP, he does not agree with Mr Tzannes that the proposal is inconsistent, as the proposal provides a general store to a local population that does not presently have one, without having negative impacts on retail centres. Therefore the proposal is consistent with the aim of encouraging sustainable economic development that is compatible with the area's environmental and residential qualities.

Tweed 4/24 Strategic Plan

33 Mr Tzannes says that that the proposal is inconsistent with the aims and objectives of a number of the supporting controls including the Tweed 4/24 Strategic Plan; which has the following key objectives:

- To finalise retail and commercial development frameworks to support existing centres, guide investment in new facilities, and implement the recommendations of the Tweed Heads Task Force.
- Identify suitable areas of industrial and commercial land to meet current and projection needs, and promote its timely release to the market.
- Finalise the retail development strategy.

34 This opinion is based on the subject site not being located in a Greenfield area and the current zoning plan facilitates the above objects for the area, which are reinforced in the Retail Strategy. Therefore the approval of the IGA would be inconsistent with the strategy objective outcomes.

35 However Mr Byrnes says that Plan confirms that commercial developments have been excluded in most residential release areas and that there is a desire to create sustainable communities that integrate land uses and promote neighbourhood self containment. The strategy does not give rise to any concern that the proposal for a general store on the subject site would be inappropriate as it is "commercial in nature" or "independent of the Seagulls Club".

Tweed Community Strategy Plan 2011/2021:

36 In addressing this contention, Mr Tzannes said that due regard should be given to the following key objectives whereby his opinion is:

- *Objective 1.5.2; Land use plans and development controls will be applied and regulated rigorously and consistently and consider the requirements of development proponents, the natural environment and those in the community affected by the proposed development.* Accordingly, Mr Tzannes says that the proposal is inconsistent with this objective because will have an adverse impact on the viability of the Panorama Plaza.
- *Objective 2.5.1; To encourage establishment of well located centres to provide a wide range of mixed-use retail, commercial and community services supported by high amenity public space, quality urban design and good access by public transport or bicycle.* According to Mr Tzannes, the proposal is inconsistent with this objective because it does not encourage establishment of well located centres, in particular centres that have good access by public transport or bicycle.

37 Mr Byrnes' contrary view is that the proposal is consistent with the economic objective to "support the creation of a vibrant and self-sufficient retail network that fully services the local community." The strategy does not give rise to any concern that the proposal for a general store on the subject site would be inappropriate as it is "commercial in nature" or "independent of the Seagulls Club".

Far North Coast Regional Strategy (Strategy)

38 Mr Tzannes says that the Strategy promotes a hierarchy of commercial centres. New commercial development outside of the major centres, are to be "located within the boundaries of towns and villages, utilising existing commercial centres where possible, and integrated with the initial planning of new release areas". He does not think that the site is consistent with the strategy as the subject site is not an identified existing commercial centre, is not part of a new release area and is not included within a business zone in the LEP 2000. This regardless of the fact that that a portion of the club is no longer required for club purposes.

39 In response to this position, Mr Brynes notes that the "Regional Strategy" supports the utilisation of existing vacant commercial and industrial land, where appropriate to the proposed use, prior to the release of further lands." Accordingly, he disagrees with Mr Tzannes as the proposal is not inconsistent with this element of the Strategy as the application relates to a portion of the Seagulls Club that is no longer required for Club purposes.

Tweed Retail Strategy

40 This Strategy comes from a Council Resolution of 16 November 2005, which resolved the following seven principles:

- 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 large scale retail centres in the coastal region to a level which caters for the majority of chore type shopping needs. This concept to reflect the need to reduce fuel consumption and to support sustainability within each centre through discouraging vehicle use and encouraging walking and cycling.
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

41 According to Mr Tzannes, the proposal is not consistent with these objectives because:

- The character of existing towns and villages and the retail facilities are not being protected i.e.in particular Panorama Plaza.
- The proposal is not for an incremental expansion of existing retail centres, it is proposing a standalone retail land use.
- The proposal will have an impact on the expansion of the major district retail centre in Tweed Heads South.
- The proposal is not located on a public transport route, is relying on a trade area that exceeds 400 metres (which is considered to be a walkable catchment), does not discourage vehicle use and therefore does not support sustainability.

- 42 Mr Byrnes says the proposal is not inconsistent with the expressed objectives and that he disagrees with Mr Tzannes that the proposal is inconsistent with the seven adopted policy principles because:
- (a) the proposal will improve the character of the village by providing a general store where there is currently no such provision,
 - (b) the proposal is for the incremental increase in retail floor space to an area that is not currently served by a general store;
 - (c) the proposal does not change Tweed Heads south as being the major district retail centre;
 - (d) the proposal does not change the special appeal of the retail centre of Murwillumbah or similar styled villages;
 - (e) the proposal will reduce fuel consumption and support sustainability by permitting more people to walk and cycle to a local general store;
 - (f) the proposal is not a district retail shopping centre; and
 - (g) the proposal supports the adopted retail strategies and does not compromise them.

43 Mr Byrnes also addressed Particular 2.7, which concerns the consistency with the aims of the LEP and the strategic planning documents that inform the LEP and its zoning hierarchy in terms of whether it will comprise a use which is commercial in nature and independent of the Seagulls Club, and whether it will give rise to the creation of a new small centre or retail hub which will cumulatively impact on the retail hierarchy of the Tweed Shire generally and the West Tweed Heads area in particular.

44 In his opinion, there is nothing in the LEP and Strategic Planning documents that would make a proposal that is "commercial in nature" or "independent of the Seagulls Club" inconsistent with the aims of the LEP or strategic planning documents. The strategic planning documents do not state or imply that there is any strategic objection to a "commercial use", or an "independent" use, being operated within a 6(b) Recreational Zone. Therefore there is within the strategic planning documents a repeated objective for the development of neighbourhoods that are self contained, with a range of uses, and that contribute towards sustainability initiatives such as reduced reliance upon vehicles. The proposal is consistent with the aims of these documents.

Contention 3; Cumulative impacts

45 This contention arises from the LEP cl 8(1)(c) considerations, which requires the consent authority to be satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected.

46 In response to this contention, Mr Tzannes says that it should be assessed on a shire wide basis so that the cumulative impact of other similar applications in 6(b) land are taken into account, apart from the impacts on Panorama Plaza. He is not satisfied that the approval of the DA would result in a satisfactory community outcome because:

- If the Panorama Plaza was to close as a consequence of loss in trade, the variety of services these businesses provide will be lost and employment opportunities will no longer be available resulting in greater unemployment in the community, a reduction in services and opportunity for social interaction.
- The DA approval would upset the established pattern of development in the area given:

1. There is land included in the business zone within close proximity to the subject site that can accommodate the proposed land use.

2. The proposal is for a standalone retail use that is being proposed on land designated for recreational purposes and not a retail purposes.

3. The impact of the proposal brings into question the viability of the Panorama Plaza (23% loss in trade).

47 Mr Brynes disagrees with Mr Tzannes' approach saying that consideration should be given to what currently exists and then consideration to the cumulative impact of the subject development. But in the subject circumstances where the land has been rezoned to RE2, there is little likelihood of similar applications because shops are now prohibited.

Social and economic impacts

48 This contention is part of the concern as to whether the approval of the development would have any unacceptable social and economic impacts on the locality or affected community. The consideration of this issue is subject to the integration of the evidence from the economic experts, Mr Haratsis and Mr Hack, together with the social planners Dr

Stubbs and Assoc Professor Ryan who addressed this issue on the basis of the two following social impacts:

- (i) The social impact that arises from any economic impact on Panorama Plaza, and
- (ii) The social impact of co-locating a supermarket with a club that has gaming machines.

49 I deal firstly with the evidence of the economic experts because the social planners rely on the predicted economic outcomes arising from the approval of the IGA proposal. Mr Haratsis and Mr Hack relied on different models with Mr Haratsis using an economic impact assessment model. This model assesses economic impacts from the redirection of expenditure from residents in the main trade area, which is currently directed to centres both inside and outside the main trade area. This is allocated on the basis of total turnover plus judgements in relation to distance and comparability in terms of the role of the centre.

50 Mr Hack used an economic impact (gravity) model, which redirects expenditure to the IGA supermarket from competing centres. It does this based on the principles of redirecting more expenditure from stores with higher turnover and from competing stores that are closer to the IGA on the principle that people will try to minimise travel cost and time particularly in relation to food and grocery shopping.

51 In summary, the modelling parameters were tabulated as follows:

MODEL PARAMETERS

	Mr Haratsis	Mr Hack
Trade Catchment	Identified in Statement	Agreed but recognise that a new centre in the Bilambil area could contract IGA's PTA
Current Population	Agreed	Agreed
Population Forecast	Identified in Statement	Uncertainty about timing of land development in Bilambil
Spend per Household	Agreed	Agreed
IGA Turnover	Agreed with \$16m	Agreed with \$16m
Identification of Competitive	Identified in Statement	Agreed with inclusion of
Centres		Showcase, Coolangatta and ALDI South Tweed. Top-up centres outside the MTA are not significant.
Distance measured on Drivetime (Googlemaps)	Agreed for purposes of scenario development	Agreed

52 In view of the significant differences between these experts, they agreed that the best way to understand inputs and assumptions was to undertake sensitivity utilising five scenarios as follows:

- (1) Existing gravity model (Mr Hack's model) including Showcase and ALDI, Coolangatta and ALDI South Tweed.
- (2) Haratsis maximum competitive weekly shopping economic impacts. This scenario included all turnover from the butcher and bakery and competitive turnover from the grocery store including all groceries, fruit and vegetables and deli items.
- (3) Haratsis likely competitive weekly shopping economic impacts. This scenario included 50% from the butcher and baker and competitive turnover from the grocery store including all groceries, fruit and vegetables and deli items.
- (4) Economic impact of a hypothetical IGA supermarket located at 212 Kennedy Drive (site currently occupied by medical centre, chemist and Seafoods).

(5) Mr Hack's High Impact Scenario assuming closure of two tenancies

53 The following sensitivity analysis was derived from this modelling:

	GRAVITY MODEL IMPACTS						Panorama Plaza Impacts plus	
	Panorama Plaza Average		Grocery / Supermarket		Specialty Food		Supermarket Induced Expenditure	
	\$m	%	\$m	%	\$m	%	(\$m)*	%
Scenario 1	-1.2	-18.7%	-0.7	-39.0%	-0.5	-39.0%	-0.4	-6.5%
Scenario 2	-0.6	-9.3%	-0.1	-7.0%	-0.5	-39.0%	0.2	3.2%
Scenario 3	-0.4	-5.9%	-0.1	-7.0%	-0.2	-21.0%	0.4	6.5%
Scenario 4	-1.0	-16.8%	-0.6	-34.0%	-0.4	-37.0%	0	0.0%
Scenario 5	-2.4	-38.0%	-1.8	-100.0%	-0.6	-50.0%	-1.6	-25.8%

*Supermarket induced expenditure as forecast by Mr Haratsis. Mr Hack does not agree that this additional benefit will be realised.

Scenario 1: Existing gravity model (Mr Hack's model) including Showcase and ALDI, Coolangatta and ALDI South Tweed.

Scenario 2: Haratsis maximum competitive weekly shopping economic impacts. This scenario included all turnover from the butcher and bakery and competitive turnover from the grocery store including all groceries, fruit and vegetables and deli items.

Scenario 3: Haratsis likely competitive weekly shopping economic impacts. This scenario included 50% from the butcher and baker and competitive turnover from the grocery store including all groceries, fruit and vegetables and deli items.

Scenario 4: Economic impact of a hypothetical IGA supermarket located at 212 Kennedy Drive (site currently occupied by medical centre, chemist and Seafoods).

Scenario 5: Mr Hack's High Impact Scenario assuming closure of two tenancies.

54 Based on the modelling, Mr Haratsis says that Scenarios 2 and 3 are the most likely outcomes from the gravity model. Importantly he believes that the proposed supermarket will induce additional spend to the specialty shops at Panorama Plaza. He estimates that approximately 5% additional to the IGA supermarket spend could be redirected to the existing shops at the Panorama Plaza, that is \$800000. Therefore Scenario 2 and 3 would result in a small net positive impact on Panorama Plaza.

55 Against this Mr Hack believes that Scenario 1 is the more likely impact and Scenario 5 shows additional secondary impacts from the IGA on Panorama Plaza should closure occur. His reasons are:

- Panorama Plaza is the closest centre to the proposed IGA supermarket;
- Some of the existing tenants, particularly the supermarket, bakery and butcher will directly compete with the IGA

- since they sell like for like products;
- The IGA will provide a role for top-up shopping as well as weekly food and grocery shopping. This is confirmed from other sources including the RPS report, the concerns and fears of the business owners and the results of the questionnaire survey of Assoc Professor Roberta Ryan.
- 56 From the examination of these disparate opinions, the economic experts agreed that:
- There is a current unsatisfied demand for a supermarket of the size proposed by the DA and that at present, persons in the catchment of the proposal are forced to travel 6-8kms to Tweed Heads or South Tweed on congested roads to undertake their weekly shopping. To that extent all of the economic and social experts agree that if the DA is approved there will be a beneficial social impact in terms of travel time, distance and sustainability. The Club premises is safe, has ample car parking and is conveniently located.
 - Panorama Plaza provides for convenience and top up shopping to households within 1 km of the centre. Also that Panorama Plaza has two anchors being the Bottle Shop and the General Store.
- 57 The main difference between the experts concerns the likely impact of the proposed development on Panorama Plaza as they agree that the proposed development will not have an unacceptable impact on any of the other retail facilities in the relevant area. In assessing this competing evidence, I note that there was some difficulty because Mr Hack did not disclose all the input details of his modelling. In cross examination he admitted that his model did not account for the following matters:
- (a) any induced expenditure;
 - (b) any competitive response by the owners of the businesses at Panorama Plaza;
 - (c) any upgrade to the Stores;
 - (d) any convenience factor of being able to park at the Plaza;
 - (e) any customer loyalty;
 - (f) any upgrade to the Plaza ;
 - (g) the re-leasing of any shops that become vacant;
 - (h) that the Plaza supermarket might continue in conjunction with some other use in the same store;
 - (i) that the liquor store might expand ;
 - (j) that the liquor store is likely to remain as an anchor;
- 58 However these different models were reviewed together with the respective adjustment factors on discounts/increases in trading distribution as shown in Exhibit 22.
- 59 Accordingly, one of the critical differences between Mr Haratsis and Mr Hack is whether the proposed development will result in increases in turnover of the businesses at Panorama Plaza as a result of its location in proximity to the proposed general store. In oral evidence Mr Hack agreed that when a supermarket is co-located with specialty shops, that colocation usually leads to an increase in turnover of 30% for the specialty stores ("induced expenditure"). However he says the usual co-location arrangement is a shopping centre where the supermarket forms the anchor with the specialty shops located around it.
- 60 Insofar as Mr Haratsis acknowledged that the outcome of the proposal was not to create the usual shopping centre arrangement, he noted that the shops at Panorama Plaza were located along the route of travel and in close proximity to the proposed supermarket and they were likely to obtain some benefit by way of increase to their turnover as a result of their proximity to the proposed supermarket, particularly as the supermarket is expected to generate up to 10,000 trips per week. On a conservative basis, Mr Haratsis used a figure of 5% as opposed to his usual 35-40% noting that the second anchor at Panorama being the bottleshop is still likely to draw customers to the Plaza. This results in the \$800000 induced expenditure amount.
- 61 In terms of the impact on Panorama Plaza, the Applicant also refers to the financial figures for the Panorama Plaza supermarket, which showed that the profit had increased substantially over the last 3 years with \$65,000 to June 2011, \$120,000 to June 2012 and \$285,000 in June 2013. Accordingly the Applicant's submission is that considering these financial results and the results from Mr Haratsis' traditional economic impact model, then the supermarket is not vulnerable and it is highly unlikely that Panorama Plaza will close and that at most there will be a change in the retail offer of the Plaza.

- 62 In further support of this outcome, Mr Haratsis also applied his economic experience and judgment to Mr Hack's gravity model and produced scenarios 2, 3 & 4. Scenario 2 removed non-competitive weekly shopping commodities from the grocery store but included 100% of trade from the butcher and baker. This resulted in an average impact of 9.3% loss of trade at Panorama Plaza. Scenario 3 removed 50% of the butcher and baker's trade from the impact model and resulted in a 5.9% impact on the plaza. However these adjustments to the gravity model did not include any induced expenditure. When induced expenditure is added back there is a positive economic impact on the plaza. Scenario 4 modelled the placement of a supermarket at the location at Kennedy Drive identified by Mr Tzannes. Both experts agreed that such a proposal would have a similar affect to the proposal.
- 63 As previously noted, the economic modelling was reviewed as shown in Exhibit 22 and G, wherein scenario 6 assumed a convenience store of 230sqm was placed at the Club and scenario 7 was a re-run of scenario 2 using Mr Haratsis' revised figures put to him by Mr Robertson in crossexamination. Under scenario 7 there was a 10.8% impact on the Plaza. Under scenario 6 a 230sqm general store at the Club would have the same impact on Panorama Plaza as the proposed development.
- 64 Mr Hack also conceded in cross-examination that if a 230sqm convenience store was placed at the Kennedy Drive location identified by Mr Tzannes then it would have a similar impact on Panorama Plaza. From this the Applicant submits that either Mr Hack's model is unreliable or if it is reliable then the impact of the proposed development is limited to the competitive effect of any general store on Panorama Plaza in the locality.
- 65 This contention asserts that the DA does not comply with Principles 1, 2, 3 and 7 Council's Retail Strategy as adopted on 16 November 2005 (para 40).
- 66 Insofar as the planners have previously dealt to some extent with this matter, Mr Tzannes' further comments are that he does not consider Seagulls is an existing retail centre. Nor does he agree with Mr Haratsis' conclusion that the proposed use cannot be accommodated on land currently included within the 3(b) land within the locality.
- 67 However the submissions for the applicant are that the proposed development does not propose to change any zoning for the general store, which is a permissible use on land zoned 6(b). The proposed development is to take place within an existing building with existing carparking. It is within the walkable catchment of Panorama Place and will form part of the same neighbourhood centre in which Panorama Plaza is located. Rather than alter the character it will be entirely consistently with the character as envisaged by the zoning and the strategic documents.
- 68 In response to the next assertion that the existing retail facilities at Panorama Plaza will not be protected, the applicant's submission is that due regard should be given to the authority in *Gantidis* (which I return to later). Its application would mean that the objective cannot be interpreted to mean protect existing shops from competition, rather it must refer to protection of the facilities that Panorama Plaza provides to the local community. According to Mr Haratsis' evidence the facilities will be not only protected but will also be enhanced.
- 69 Whilst Mr Hack's evidence is that there will be a competitive impact on the general store and at least one other specialty shop, it is the applicant's submission that any closure of these shops is likely to be made good by replacement with a more competitive or other complementary offer. The experts agreed that the liquor offer will remain viable. Therefore the loss of the general store and specialty shop, if that occurs, will be made good by the general store.
- 70 In regard to the size of the proposed IGA, the applicant's case is that consideration should also be given to the hypothetical reference to the establishment of a 230 sq m general store at the Club, which is predicted to have a similar impact on Panorama Plaza as the establishment of a 1,965 sq m supermarket where indicated by Mr Tzannes at Kennedy Drive will have a similar impact on Panorama Plaza.
- 71 It is then submitted by the applicant that the evidence shows that the existing facilities at Panorama Plaza are adequately protected to the same extent that they would be if the supermarket, which is accepted is needed, were to be placed elsewhere within the locality. There is no evidence that any other centre or facilities will be unacceptably impacted by the proposal. Mr Hack concedes that there will be a sufficient population and demand to support the proposed supermarket and the other contemplated supermarket at Bilambil Heights.
- 72 The next contention relates to point 2 of the retail strategy which provides:
- 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.
- 73 The submission for the applicant is that the development does not constitute a new centre as it is a general store

substantially within the existing fabric of an existing underutilised building with excess floor area and carparking. The use is permissible on the land. Therefore the development will not threaten or fracture existing centres but rather it will either maintain or enhance the facilities provided by Panorama Plaza for the reasons given by Mr Haratsis.

74 The next part of the contention relates to point 3 of the retail strategy which provides:

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.

75 The applicant's response to this is that whilst the proposed development will draw some trade away from Tweed Heads South it is an agreed position that the economic impact is acceptable and that persons will still travel to Tweed Heads South for fulfil their needs which are not and will not be satisfied by the proposed development and Panorama Plaza (80% of expenditure within the agreed primary trade area will still escape). Consequently, the proposal fulfils an existing need and brings about an outcome which is consistent with adopted principle 5 of the strategy which provides:

Limit the scale of new large scale retail centres in the coastal region to a level which caters for the majority of chore type shopping needs. This concept is to reflect the need to reduce fuel consumption and to support sustainability within each centre through discouraging vehicle use and encouraging walking and cycling.

76 Furthermore, the applicant's position is that based on the planners agreement that the proposal will reduce vehicle trips, it will also encourage dual use trips with the existing club and recreational facilities, together with the provision of a shuttle bus service and the proposed supermarket is within easy walking distance of the existing bus stops at Panorama Plaza, then the proposal is consistent with Principle 3 of the retail strategy.

77 The remaining contention relates to Principle 7, which refers to the assessment of retail development applications. In response, the Applicant considers of the retail strategy will not be compromised by the approval of this application.

Social impacts

78 Insofar as social impact was raised as a contention, its assessment is dependent on the economic modelling. As noted the social planners identified the following two components that are relevant in this matter. Firstly, the social impacts arising from any economic impact on Panorama Plaza and secondly, the social impact of co-locating the supermarket with a club that has gaming machines.

79 This contention requires consideration in accordance with the provisions of cl 17 of the LEP as follows:

17 Social impact assessment

(1) Objective

· to ensure proper consideration of development that may have a significant social or economic impact.

(2) Where the consent authority considers that a proposed development is likely to have a significant social or economic impact in the locality or in the local government area of Tweed, the consent authority may grant consent to the proposed development only if it has considered a socio-economic impact statement in respect of the proposed development.

(3) The socio-economic impact statement that the consent authority considers must do at least the following:

(a) identify the likely future impacts of the development on the affected community,

(b) analyse the impacts in terms of magnitude, significance, duration, effect on current and future conditions and community services, and the like,

(c) determine if the impacts will cause a loss of amenity within the locality due to a net reduction in community services and facilities,

(d) determine and assess possible measures for the management or mitigation of likely impacts.

80 In their joint conferencing the social planners agreed that the original Socio-Economic Impact Assessment by RPS Australia East Ltd did not adequately address the cl 17 requirements. Consequently they addressed the contention on the basis of the details in their tendered statements.

81 In regard to the first part of the social impact argument, the social planners agree that there is a beneficial social impact to the wider locality by establishing a neighbourhood supermarket. But they disagree as to the social impact in the immediate locality. I accept that to a certain extent the evidence of the social experts follows the evidence of the economic experts.

82 The social experts initially agreed that if Mr Haratsis' evidence is accepted then there will be no adverse impact in the immediate locality because there will be no unacceptable impact on Panorama Plaza. However, if Mr Hack's evidence is accepted then there will be an adverse social impact on the locality because of the impact on Panorama Plaza.

83 Associate Professor Ryan says that any adverse social impact will be 'modest' and limited to the physical deterioration

of the social fabric of Panorama Plaza that occurs when shops close. She does not regard the Plaza as a particularly inviting location, in part due to its run down appearance.

84 One of the interesting aspects of the social planners evidence concerns the public consultation phase whereby Assoc Professor Ryan arranged a telephone survey based on:

- Limited public consultation being undertaken with randomly selected residents from the local area. This public consultation included a twenty-two question telephone survey of a total of 301 randomly selected and statistically representative residents from the local area.
- UMR Research conducted the survey on the weeknights of Thursday 10th and Friday 11th April 2014 using Computer Automated Telephone Interview (CATI) random dialling software dialling landline telephone numbers in the suburbs of Banora Point, Bilambil, Bilambil Heights, Terranora, Tweed Heads, Tweed Heads South and Tweed Heads West. Trained interviewers conducted the interviews.
- The survey covered the following topic areas:
- Shopping behaviours, including frequency and location of shopping activities
- Gambling behaviours, including frequency and location of gaming machine use
- Membership status and reasons for using the Seagulls Club
- Level of support or otherwise for the proposed development, including perceived potential benefits or impacts
- Relative importance of Seagulls Club to sense of community when compared with other key landmarks in Tweed Heads West

85 The purpose of the survey was to identify the views of residents toward the proposed development regarding the following aspects:

- local shopping facilities used by residents, and whether residents would use the proposed development including reasons for this use, as potential indicators of community need for the proposed development.
- potential benefits and impacts of the proposed development, as a potential indicator of community views toward the appropriateness of the proposed development being co-located with a registered club that includes gaming machines.
- whether residents would be more or less likely to use the proposed development before or after they visited the club, as a potential indicator of potential increase in the risk of gambling related harm
- sense of community associated with landmarks in the area, as a potential indicator of whether views about the proposed development are related to the level of importance of the Seagulls Club to the community.

86 The survey responses were tabulated into 10 figures. Of particular relevance Figure 4 deals with frequency of use of the various shopping centres in the area and concludes that

87 Figure 4 in Exhibit E shows the following results:

- Tweed City, Centro Tweed and Banora Point and Banora Central Shopping Centres are the most frequently used shopping centres surveyed in the Tweed LGA.
- Shopping facilities across the Tweed Heads West area were amongst the most infrequently used. For example, across the entire sample, 263 respondents (87%) indicated they did not use Panorama Plaza more than once a month, 266 respondents (88%) indicated they did not use Kennedy Plaza more than once a month, and 289 respondents (96%) indicated they did not use Bilambil Heights Shops more than once a month.
- Shopping facilities in Tweed Heads West were most likely to be used by residents of Tweed Heads West with 22 respondents (32%) from Tweed Heads West indicating they use Panorama Plaza more than once a month, 11 respondents (16%) from Tweed Heads West indicating they use Kennedy Plaza more than once a month, and no respondents indicating they use Bilambil Heights Shops more than once a month. 49 respondents (68%) from Tweed Heads West indicated they did not use Panorama Plaza more than once a month, 59 respondents (83%) indicated they did not use Kennedy Plaza more than once a month, and 72 respondents (100%) indicated they did not use Bilambil Heights Shops more than once a month.

88 Figure 10 tabulates the responses to the question: "If you visited the Seagull Club, which of the following services or activities would interest?" are relevant. The results indicate that 49% of the respondents who would use a supermarket at the Seagulls Club would use it for convenience shopping. The highest rates of convenience shopping are also found amongst respondents from those suburbs with infrequent use of local shopping facilities (i.e. Tweed Heads West, Bilambil/Bilambil Heights/Terranora). This indicates shopping facilities in these suburbs may not satisfy community

need for convenience shopping.

89 In terms of the social integration concern the survey concluded that:

- It is possible the proposed development may have positive social impacts in terms of increased social connectedness and maintaining personal independence of elderly persons by colocating a supermarket with a registered club that is an important contributor to sense of community in the Tweed Heads West area.
- The potential direct benefits of the proposed development accruing to older persons in the immediate locality and Tweed Heads West may have positive flow-on impacts to the wider community in terms of a more socially integrated community.
- It is possible the proposed development may have positive social impacts by providing services to elderly residents of Tweed Heads West that are similar to those provided by local community service providers that are currently experiencing difficulties meeting demand and underutilised by elderly residents of Tweed Heads West (i.e. social integration services).
- It is possible the proposed development may have positive social impacts by providing part time employment opportunities close to home for the incoming school leaver population with high school level qualifications and residents of the immediate locality that are employed part time and travel to Tweed Heads and Tweed Heads South to access employment.

90 For the impact of increased access and exposure to gaming, Assoc Professor Ryan concluded from the survey that:

- Increased risk of gambling related harm through increased geographic accessibility and exposure to gaming is a function of increased density of gaming machines. The proposed development is for a supermarket that does not propose to increase the density of gaming machines. It is not likely the proposed development will increase the risk of gambling harm through increased geographic accessibility or exposure to gaming machines.
- Increased risk of gambling related harm through increased temporal accessibility and exposure to gaming i.e. a function of increased density of gaming venues. The proposed development is for a supermarket that does not propose to increase the density of gaming venues. It is not likely the proposed development will increase the risk of gambling harm through increased temporal accessibility or exposure to gaming venues or gambling markets.
- Increased risk of gambling and problem gambling is generally experienced by males; persons aged 18-34; single, widowed or divorced persons; persons who have left school before year 10, or who achieved year 1 or diploma level; and persons earning \$30,000-\$50,000 per annum. When compared with the demography profile of the Tweed LGA, evidence of the demographic profile of the area suggests it is less likely the proposed development may increase the risk of gambling harm for residents in the immediate locality and Tweed Heads West.
- Community views indicated some concerns about the potential impact and risk of increased gambling associated with locating a supermarket proximate to a licensed club with gaming machines. Other research and evidence does not confirm these views.

91 Dr Stubbs opinion on the survey is that the findings are broadly in line with what she would expect to find in relation to increased vulnerability to problem gambling, higher rates of frequent gambling, as well as the likely competition with between Panorama Plaza and the proposed IGA, that is, a highly localised market, and competition principally for convenience items.

92 Insofar as Dr Stubbs says that the findings in a survey are never definitive, rather hypotheses are accepted or rejected at an appropriate level of confidence. In this case the survey has been adjusted to achieve a 95% confidence interval, which is acceptable.

The submissions

93 In view of the overlapping issues I initially addressed the evidence of the respective experts in order to reasonably integrate the various opinions on the issues of common interest. It is apparent from the final submissions that the threshold issue concerns whether the form of expression of the zoning and planning controls facilitates the proposed development.

94 For the ultimate determination of this matter, it seems to me that the context of the proposal is important. Insofar as the proposal is for a relatively large IGA of approximately 2,000 sq m into the Seagulls Club, it is located about 250 m from the existing Panorama Plaza neighbourhood centre, which is of an older style of centre that contains a grocery store, other small businesses and parking.

95 This subject neighbourhood centre is about 8 km to Centro Shopping Centre, which together with Tweed Heads South

provide the main shopping areas in the shire that could have an influence on the proposal. As Centro is located in Tweed Heads town centre it is near the large Twin Towns RSL Club that contains many gaming machines. Likewise the Tweed Heads Bowling club is located about 700 m to the south of Centro and it contains many gaming machines. The relative proximity of these licenced clubs to the shopping centre was used as a comparison to the proximity of gaming machines in the Seagulls Club to the IGA supermarket.

- 96 Whilst there are other smaller shopping centres, it appears to me from the evidence that they are unlikely to have any significant impact in regard to the proposal. Except possibly for the designated neighbourhood centre with 3(b) business site zoning in "Kennedy Drive" that is largely undeveloped and is located in reasonable proximity to Panorama Plaza.
- 97 For the determination then of the application, the prevailing control is the Tweed LEP 2000 under which the site is zoned part 6(a) Open Space and part 6(b) Recreation. Accordingly a grocery store is permitted with consent on the 6(b) land. Subsequently consideration has to be given the weight to the provisions of the more recent TLEP 2014, which now prohibits the proposal.
- 98 Clause 8(1) only allows the consent authority to grant consent if it is satisfied that the development is consistent with the primary objective of the zone, which in this case is to:
- To designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes.
- 99 Disparate submissions were made regarding the definition and intent of "designate". Mr McEwen submits that it should be construed in a common sense way to mean "set aside" with the result that the proposed development (i.e. use of the land for the purpose of a general store) must be consistent with the primary objective to set aside land which is or may be used primarily for recreation purposes.
- 100 The requirement for consistency in cl 8(1)(a) then should be construed as requiring that the development be not "antipathetic" thereto as stated in (*Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 at 193). It is then important in construing the primary objective to give the words "is or may be used" and the word "primarily" work to do.
- 101 The submission is that the word primarily means "for the most part". It is a clear indicator that the primary zone objective does not require that all of the land set aside be used for recreational purposes. The words "is or may be used" set up a temporal requirement. The effect of those words is not to require that the land is used but rather require that the land is currently or may in the future be used for recreational purposes.
- 102 As the proposed development is to use a small part of the existing building for the purposes of a general store (1,965sq m and 58 car spaces), it leaves some 15,17sq m of the existing building available for recreational purposes of which of which 13,207sq m is being used for recreational purposes (Club, Gym and Children's Recreational Facility) and 1,964sq m which may be used for recreational purposes.
- 103 Consequently, the submission is there is no requirement that a permissible non-recreational use be ancillary to a recreational use. The uses permitted in the zone include "emergency service facilities, forestry, markets and utility installations" none of which could be ancillary to recreational purposes. In this regard the town planning experts ultimately agreed it was not necessary that the proposed use be ancillary to a recreational use. Accordingly, the end result is the land now and in the future is still capable of being used primarily for recreational purposes if 2,000 sq m of its floor space is approved for use as a general store.
- 104 However, Mr Robertson's contrary submission is that there are two initial steps required to determine whether there is power to grant consent. The first is to characterise the use posed for the land. If the use is for recreational purposes, then it is unnecessary to go further. Not only would it be permissible in the narrow sense general store but it will also meet at least clause 8(1)(a) of the 2000 LEP compliance with the primary objective of the zone. However the planners agree that the use is not for a recreational purpose. Therefore his submission is that the use for shopping purposes, or that the retail purpose is antipathetic to the use of the land for recreation purposes.
- 105 The next question concerns uses other than the primary use as to whether the use proposed is ancillary or subservient to a recreational use of land. If it is, then it is not antipathetic to recreation, because it promotes recreation. He illustrated this by reference to the following examples:
- A kiosk in a park which supplies refreshment to park users would be classified as a 'general store' and it is

subservient or ancillary to the park use. But in planning terms, it is an independent use and while it is not itself recreation, it supplies refreshments to people undertaking recreation. So in a general sense, it promotes the recreation purpose.

- A local store in a caravan park, where you can buy the necessities of life a variety of goods available to the users of the park. Caravan parks are typically in 6B zones a form of recreation, and the store that although is an independent use to the caravan park nonetheless promotes the use of the land for recreation.

106 Accordingly these examples were put forward as types of general stores that are consistent with a recreation purpose, because they are connected to and subserve the tourist population and not beyond. In planning terms, each use is independent of the dominant use, but the purpose is plainly to support the dominant use, or to supply services to the people engaged in the dominant use of recreation.

107 Mr Robertson submission disagrees with the applicant's submissions that some of the permitted uses such as forestry are not ancillary to the primary recreation use. Using the forestry example he says that "forestry" is a defined term and one of the definitions of "forestry" in the instruments is forest protection, which is undertaken to encourage recreational and environmental uses of forests. In fact the State Forests of New South Wales provide substantial support for recreational uses: picnicking and camping areas, road networks, and areas for both active recreation shooting and passive recreation bushwalking. This recreation use is confirmed by reference to the *Forestry Act 1916* No 55, which contains a number of objectives including "*consistent with the use of State forests for the purpose of forestry and of flora reserves thereon, to promote and encourage their use as recreation*".

108 Mr Robertson's counter point to the applicant's submission that as a 'grocery store' is listed as a permissible use, then the zoning question is significantly answered, is that permissibility is irrelevant to the cl 8 question. He says that zoning is dealt with in Pt 2 of the 2000 LEP. Clause 7 sub cl (6) of the 2000 LEP provides that in the event of any inconsistency between Pt 2 and any other part the provisions of the other part prevail. Clause 8 is in Pt 1 and it therefore prevails over the zoning table.

109 He submits that this is unusual because the consistency clause is usually in the zoning table itself, which is made subject to the rest of the LEP. This LEP is quite different. What it does is it erects an impermeable legal barrier to the grant of consent where you are not satisfied that the development is consistent with the primary objective of the zone and it does so in a way which cannot be read down by other provisions of the instrument. Consequently, the reference by applicant to the permissibility of non-recreational uses in the zone and in particular to the permissibility of a general store is irrelevant to the interpretation and functioning of cl 8.

110 Turning then to the consistency clause, cl 8(1)(a), it states the words "only if" the Court is satisfied of consistency between the development and the primary zone objective can it grant consent. Mr Robertson then refers to the matter of *Hastings Point Progress Association v Tweed Shire Council* [2009] 168 LGR 99, a case which concerned a question of consistency between instruments, not within the instrument itself, wherein The Court of Appeal decided that where cl 8(1) of the Tweed LEP mandates that the council refuse consent to development unless the three conditions to which it refers are satisfied.

111 The next matter is the question of whether the permissibility of the use has any function in the application of cl 8. The submission is that you do not get to cl 8 unless the use is permissible but once you are in cl 8 the permissibility of the use is irrelevant. It has nothing to do with the cl 8 test because this test is to compare a development which is in terms a permissible development, with the primary objective of the zone.

112 Following this it is noted that the consistency requirement differs from other LEPs in that it isolates an objective because it requires consistency with the primary objective thereby isolating it from the zoning table a particular objective which it describes and it then requires consistency with that objective. Consequently, this determination is not meritbased as is explained in the following judgment of the Chief Judge in *Conservation of North Ocean Shores Inc v Byron Shire Council & Ors* [2009] NSWLEC 69:

18. Clause 9(3) sets a pre-condition by reference to the zone objectives. It provides:

"(3) Except as otherwise provided by this plan, the Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council is of the opinion that the carrying out of the development is consistent with the objectives of the zone within which the development is proposed to be carried out."

19. The clause requires the Council, as the consent authority, to form the requisite opinion that the carrying out of the development is consistent with the relevant zone objectives before it embarks on a consideration of the merits of the development application and before it has power to grant consent: ...

If the Council fails to form the requisite opinion that the carrying out of the development is consistent with the

relevant zone objectives, the power to grant consent will not be enlivened and any purported exercise of the power will be ultra vires.

- 113 Following this determination is required as to whether the proposed use is consistent with the primary objective in the 6(b) zone, considered within the context of these controls. Mr Robertson submits that it must be in agreement with or in accordance with the primary objective and not opposed or contradictory or contradicting it. It is not enough that it is not antipathetic to the primary objective, as submitted for the Applicant, in the sense that the development can live together with the primary objective.
- 114 In support of this proposition, Mr Robertson cites Biscoe J in *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 wherein he stated:
- 45 Clause 17(2) of the Harbour REP prohibits the grant of development consent unless the consent authority is satisfied that the development is "*consistent with the aims*" of the Harbour REP and the "*objectives of the zone*" in which it is proposed to be carried out. The definition of "*consistent*" in the *Macquarie Dictionary* (third edition) is: "*agreeing or accordant; compatible; not self-opposed or self-contradictory*". In a similar context to the present it has been said that "*consistent*" means not antipathetic: ***Schaffer Corporation v Hawkesbury City Council*** (1992) 77 LGERA 21 at 27 and ***Hospital Action Group Association Inc v Hastings Municipal Council*** (1993) 80 LGERA 190 at 264, both decisions of Pearlman CJ. In ***Gillespies v Warringah Council*** (2002) 124 LGERA 147 at [70], [74] Bignold J considered that the word "*consistent*" is not confined to the notion of the proposed development not being antipathetic and is synonymous with compatible. I agree.
- 115 Therefore Mr Robertson's submission is that the fact that you are not antipathetic does not mean that you are consistent and you have also to be compatible in the sense of the agreement or in accordance with or in accord with not self-opposed or self-contradictory. If you apply this wider view of consistency then a supermarket does not have to interfere with the club to be inconsistent with it. It does not have to be directly opposed to the club or the operations on the land to be inconsistent with it. It is sufficient to be inconsistent, that it is not compatible, that it is opposed or contradicts it, not in agreement or in accordance with it.
- 116 Accordingly, it is very difficult to say that a leisure use is in accordance with or in agreement with a use which is necessary, one for which you have no choice i.e. supermarket shopping. There is a fundamental difference between the two. One involves a matter of choice, leisure reaction a diversion from life and the other is part and parcel of life, so the two are directly opposed. They are not compatible or could not be compatible at least at the scale we are discussing here of a supermarket that does not subserve the club community that is clearly taking a trade area which is wider than the club and where club membership is not a requirement for entry.
- 117 The submission is an independent use such as the supermarket is in the context of this proposal is self-contradictory when placed within a recreational zone. It is too large to subserve the users of the club alone, it is directed to capture retail expenditure of the community at large and it, therefore, transcends the recreational use of the land. This can be demonstrated in the following ways:
- it occupies significant floor space as large or larger than each of the discrete recreational uses of the land; gym, futsal court, children's area,
 - it will undoubtedly be advertised by signage and other means to attract custom and is likely to overshadow the club entrance which is relatively discrete and will appear to be the principal use of the building on the land.
 - its use will extend into ancillary areas of the land such as the car park, loading docks and the roadways which will be trafficked by different vehicles to those likely to traffic the land for recreational purposes. Delivery trucks and other vehicle atypical of recreational use but necessary because they are devoted to the commercial users supplying goods to the supermarket and no doubt maintenance of its equipment, including freezers,
 - as it is estimated to attract at least 10,000 customers a week, this is far more than the club or even the aggregation of all recreational uses of the land. Taking visitation alone it will overshadow those recreational uses. Turnover and visitation are indicators of intensity of use, of the land.
- 118 Against the applicant's submission that visitation is not an appropriate criterion, Mr Robertson submits that the amount of visitations will overshadow the recreational use of the land inasmuch as the supermarket will displace a recreational use. By displacing that use, it prevents the recreational use from being carried out consistently with the supermarket on the same land.
- 119 In support of this submission Mr Robertson refers to the matter of *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)* [2012] NSWCA 358, which dealt with the use of public recreational land for grazing. The Court found that the use of recreational land for grazing was inconsistent with its use for recreation because recreational users would have to be excluded or could be excluded from the grazing land. The

two uses were simply not compatible, the Court held, because recreational access would have been prevented when the land was being grazed.

120 Insofar as the determination related to "public" recreation, Mr Robertson's submission is that the word "public" is irrelevant because the point the Court made was that the recreation purpose of the land could not take place at the same time as the grazing and that is certainly the case with the supermarket. The two uses are simply not compatible because of the reasons they explained.

121 The next question in the consideration of what is meant by the primary objectives to "designate" land whether in public or private ownership which is or may be used primarily for recreational purposes? Mr Robertson's submission is that this provision must be construed in the context that it is a zoning objective. The purpose of zoning is to designate land for a use whether it is presently used for that purpose or may be used in the future. So much is clear from the decision in *Retirement by Design Pty Ltd v Warringah Council* [2007] NSWLEC 87, wherein the Chief Judge stated:

78 WLEP does not use the word "zoned"; it uses the word "used". The zoning of land establishes parameters or rules to permit or control development to be carried out on the land. Zoning is prospective in focus. "Used", in contrast, focuses on the present state of affairs. A locality "used primarily for urban purposes" is one in which the land uses in the locality are already primarily for urban purposes. A locality "zoned primarily for urban purposes" is one where the rules so permit and control development for urban purposes as to bring about the state of affairs that the locality will be used primarily for urban purposes.

122 Consequently, following this authority in reference to the primary objective of the zone to designate land it means that the land whether in public or private ownership which is or may be used primarily for recreational purposes. It is saying is that is what the zone has done rather than set it apart as submitted for the Applicant. So the question then is whether a development is consistent with that description. This is land that has been zoned recreationally and the outcome of the zoning should be that it either is or will be used in the future, primarily for that purpose. Then you address the question of consistency on that basis.

123 Mr Robertson's response to the applicant's submission that various non recreational uses are permitted, including markets, so that cl 8 should be construed in a way that recognised that the land was not to be confined to recreational uses is that "market" is a defined term in the LEP. Its definition is:

a temporary outlet for the sale of local crafts and goods, a large proportion of which are not available through normal commercial outlets, which operates on one day of a week only and which does not require the erection of permanent structures.

124 Therefore a market so defined can operate compatibly with the recreational purpose of the land for two reasons. First, the market itself may be a recreational purpose. It does not supply the necessities of life, it supplies arts and crafts type of concept of a market and people may visit it, and take pleasure from doing so. It is not something that is a necessity.

125 If it is then assumed it is not for a recreational purpose, this use does not prevent the use of land on which it occupies once a week for recreational purposes. It is not like the grazing case where people are excluded necessarily from the grazing area, so it cannot be used for recreational purposes and not like the supermarket, where the use of which is not for recreation and cannot be described as for recreation, which does not subserve the club or its membership, but rather the larger community.

126 Such market would take place in the carpark or on the grassed area of the land. It would occur only for limited hours on one day a week, would not prevent the use of the land at any other time for recreational purposes and therefore not consume the land. Such a development would be permissible, but this use is different to a supermarket, on the other hand, which consumes the land and prevents it from being used for any recreational purpose.

127 Another aspect of the non recreational use of the land concerns the amount of land taken up by that use to determine what represents the primary use of the land. It is the applicant's submission that the proposed supermarket with a floor area of approximately 2,000 sq m and 58 car parks consumes about 4% of the overall 4.94 ha. Consequently when considering the whole of the land, the approval of the supermarket would not prevent the continuation, the intensification or future use of the vast balance of the land for recreation.

128 The counter submission for the respondent is that the area of use does not determine the outcome of the purpose for which the land is used. This position is illustrated by reference to an early logging case *Kivi v The Forestry Commission*, 1982 47 Local Government Reports 38, whereby it was proposed to log a relatively small section of the overall much larger forest area. In assessing whether the environment was significantly effected, it was the environment of that area that was being logged that was significant.

- 129 Following that approach in the subject matter, consideration is required of the purpose for which land is used. The submission is that when looking at the purpose of land use, you do not look at the aerial extent of it and say, "Well, just because it occupies the majority of the area of the land, therefore that impresses upon the whole of the land that purpose." Instead you should look at the intensity of the use; you look at the people who come to the land for the use, and you look at the activities that are done on the land for the use. Then you characterise it.
- 130 When this exercise is undertaken on this land with this activity, the outcome is the establishment of the supermarket as a co-dominant use. Insofar as the word "collocation" is used throughout the evidence, but we instead have a co-dominant use. That is, you are not able to say once the supermarket is established that the primary or the first use of the land; the principle use of the land is the club, or is recreation.
- 131 This is an important cl 8 consideration because if there are two dominant uses, or two principal independent uses of the land, that is not sufficient, because the land must be the primary use of the land. The effect of the supermarket is that its trade area is well beyond the uses of the land and is an incompatible use to recreation. Even if it is only 11% of all used floor space in this land, the impact of its use extends across the whole face of the land because users of the supermarket can park anywhere in this land. They can use the whole of the car park. There is no distinction at all between the supermarket and the other uses of the land. Also the supermarket will generate further service vehicle trips that require use of the roadway system to access the loading dock and collect garbage services, which are not part of the recreational land use.

Conclusion

- 132 Having considered the evidence, the submissions and undertaken a view I do not consider this application merits approval. The threshold issue in this matter for the granting of any consent concerns the provisions of cl 8 of TLEP 2000. Clause 8 (1)(a) requires the development to be consistent with the primary objective of the 6(b) Recreation zone, which is to designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes.
- 133 Insofar as there were different submissions about the definition of 'designate', in the context of this development I do not consider them determinative. The proposal is for a grocery store, which is a permitted use that I accept is not a recreational use, as agreed by the planners. Therefore following Mr Robertson's submission, I am initially inclined to accept that the retail function in this recreational zone is not consistent with the primary recreation purpose.
- 134 I have then considered the various examples presented to illustrate how a grocery store use may be connected to the recreational use so as to promote the recreational use as does the store in a caravan park or a kiosk in a park so as not be antipathetic to that use. In this regard I note Mr McEwen's submission that "consistent" should be construed as not "antipathetic" thereto.
- 135 However it seems to me that Mr Robertsons qualification referred to in *Addenbrooke* regarding the wider view of the word "consistent" not being confined to the notion of not being antipathetic and is synonymous with compatible, should be applied. It follows from this that a supermarket does not have to interfere with the club to be inconsistent with it.
- 136 Taking into account the operation and scale of the proposed supermarket, which I consider is of a significantly different relationship to a kiosk or caravan park store in a recreational zone, I am not satisfied that the supermarket is compatible with the recreational club use, based on Mr Robertson's submissions that:
- The supermarket would be an independent use, which depends on a substantial part of the existing club premises and associated land area being separated from the club use.
 - It will have high visibility with separate signage and more prominent entry arrangements than the more discrete club entry.
 - It will introduce more service vehicle traffic to the site.
 - Its use will be intensified with the attraction of a significantly large number of customers, up to 10,000 per week, which is significantly more than those users of the club facilities.
- 137 The approval of the large supermarket would mean that its consent would run with the land and effectively consume that part of the land. Consequently it would prevent this land being available now or in the future being used for recreational purposes as it is unlikely there would be any practical time limitation on its use. It is not like the alternate "permissible market" use, which would typically revert to recreational use. On this basis I do not consider this supermarket proposal is compatible with the primary recreational use of the land.
- 138 Insofar as the applicant submits that the supermarket and associated uses such as the car park require a relatively

small part of the overall site, I think that due weight should be given to the intensity of the proposed use. Accordingly the supermarket will introduce a large number of customers and associated activities, which I accept from Mr Robertson's submissions will result in the likely co-dominant use of the land. Given the obvious change in the scale and extent of the clubs activities over recent years to its current uses, I am unable to conclude that in the future the recreational use will remain the primary or dominant use. The future use of the land is a relevant consideration in my view, taking into account the Chief Judge's findings regarding the purpose of zoning of land in *Retirement By Design*.

- 139 Therefore, in my opinion I do not consider the proposed development of the large IGA supermarket is compatible with the primary recreational use of the land and the cl 8 (1)(a) consent consideration is not satisfied resulting in the refusal of the application.
- 140 If however the application is otherwise considered to satisfy this primary consent consideration test, I have also considered the other cl 8(1)(b) and (c) consent considerations, which includes the other relevant aims and objectives of the plan.
- 141 Clause 4 contains the relevant aims and (a) and (c) require consideration of the *Tweed Shire 2000+ Strategy (Plan)*. It is apparent that there is a set of controls that attempt to manage and direct development into the future in order to achieve the expressed vision of the Plan. The controls provide for a hierarchy of commercial centres recognising the status of the Centro Centre and Tweed Heads South as the primary commercial areas within range of the subject site. There are then secondary neighbourhood centres at Panorama Plaza and the largely undeveloped site in Kennedy Drive.
- 142 The Tweed Shire 2000+ Strategic Plan is one of the key controls. In the community and culture section it identifies a number of neighbourhood centres with an effective 400m radius together with other potential neighbourhood centres. In the Tweed Heads West area there is one neighbourhood centre and two potential neighbourhood centre areas diagrammatically shown near Seagulls.
- 143 Insofar as there is a contest between Mr Tzannes and Mr Brynnes about the location of the Tweed Heads West neighbourhood centre, I accept that the diagram is not specifically located. In the context of the TLEP zonings for the business zone at the Panorama Plaza and confirmation of this zoning in TLEP 2014, I think that the diagram is intended to identify the Panorama Plaza shops as the preferred centre. It best fits the various uses shown in the diagram and is located on Kennedy Drive, which is a bus route.
- 144 Accordingly I rely on Mr Tzannes' opinion that Panorama Plaza is the designated neighbourhood centre and not Mr Byrnes' opinion that it is the Seagulls site because it is within the 400m radius. I do not consider the planning controls would permit the range of components envisaged for the neighbourhood centre core on the 6(b) Recreation land, where the primary use is to be recreational. Instead the controls aim to protect and expand existing centres such as Panorama Plaza. I think this opinion is reinforced because the main entry to Seagulls is not on the main road servicing a bus route, which Panorama Plaza is.
- 145 Therefore I do not consider the Strategic Plan supports the development of a large supermarket at Seagulls as stated by Mr Byrnes because such facility is encouraged to be located within the neighbourhood centre so it can co-exist with other components. It seems to me that Mr Byrnes' assertion that the proposal is consistent with the Strategy because it supports the *utilisation of existing vacant commercial and industrial land*, does not apply to this private recreation site. I consider these matters a negative aspect of the proposal. This notwithstanding the applicant's speculation that the approval of the IGA would maintain and revitalise Panorama Plaza.
- 146 Insofar as reference was made to the Tweed 4/24 Strategic Plan it seems to have limited application to the subject proposal. But I do not consider the proposal is consistent with the objective to finalise retail and commercial frameworks to support existing centres. The approval of the IGA is unlikely to support the existing Panorama Plaza centre in my assessment.
- 147 The Tweed Community Strategy Plan 2011/2021 is another in the set of controls that require consideration of the impact on those affected in the community and to encourage well located centres to provide mixed use retail with good public transport access. As the IGA would be a stand alone grocery shop, I do not accept Mr Byrnes' opinion that the application complies because the Seagulls site does not allow the other complementary neighbourhood centre uses, if its primary use is to remain as recreation.
- 148 Various opinions were expressed about the Tweed Retail Strategy adopted in 2005, which a matter for consideration. Notwithstanding that I accept that there is apparently a demand for more retail area in this Tweed Heads West area, I think that the approval of the IGA grocery store would be contrary to the Principles 1 and 2 for Council to protect and

support the incremental expansion of *existing* retail centres.

- 149 It seems to me that the intent of this strategy is to encourage the consolidation of existing centres rather put at risk those centres by the fragmentation of key retail facilities, which the IGA would do. In this regard I note Mr Tzannes' evidence that a typical neighbourhood centre is in the order of 1000 sq m and it should contain a range of shops. Consequently I do not rely on Mr Byrnes previously mentioned justifications that the IGA satisfies the intent of the Strategy.
- 150 The contentions include consideration of the economic and social impacts of the development. As previously noted the economic experts undertook various modelling scenarios. Considering the lack of agreement on the type of model and input assumptions, it is apparent to me that the outcome from the various modelling scenarios can only be taken as a guide and should be realistically integrated with other factors such as the opinions of the directly affected Panorama Plaza owner and tenants concerning likely economic and social impacts on Panorama Plaza.
- 151 The owner of the Panorama Plaza Mr C Watson who has owned the Plaza for 12 years and acknowledged that could be refurbished but the economic conditions in the West Tweed Area have been tough over recent years. He was to continue to support the local community. In cross examination he did not agree that many thousands of customers to the IGA would incrementally improve sales. Instead he thought the reverse would happen and that the liquor store would be challenged from more liquor sales at Seagulls.
- 152 The grocery store tenant of 25 years Mr McGreachen also gave evidence. He said the large IGA would be devastating to his business and a 10% loss in trade would push them out. Over his period he has developed a loyal customer base that regularly use the service in the Plaza and as the IGA would replicate most of his products it would result in negative economic and social impacts.
- 153 However the submissions for the Applicant are that the trend line shows that Panorama Plaza is not vulnerable, particularly by reference to recent trading figures showing an annual increase in profits supporting this proposition. But Mr Robertson submits that the modelling evidence indicates that Panorama Plaza is exposed to unreasonable financial risk and that store profits basically reflect a fair income considering the hours worked by the family operator, a submission, which I accept.
- 154 As noted previously one of the critical differences between Mr Haratsis and Mr Hack is whether the proposed development will result in increases in turnover of the businesses at Panorama Plaza as a result of its location in proximity to the proposed general store. Accordingly Mr Haratsis said that there would be a flow on benefit to Panorama Plaza as a result of the co-location of the IGA in the form of his assumed \$800000 induced expenditure.
- 155 However, the submissions for the respondent challenged this on the basis that the assumptions were not soundly based. Instead greater reliance should be given to the telephone survey, which was confirmed as reliable being within a 5% confidence interval. The survey shows that Panorama Plaza is principally used by the local community for convenience shopping. Also shows that about 49% of the local Tweed Heads West community would go to IGA for their convenience shopping. Considering the evidence that the IGA will carry all the products and more than the Panorama Plaza carries, with the likelihood of more competitive prices and specials, I have some difficulty in accepting Mr Haratsis' opinion that Panorama Plaza will not be adversely impacted.
- 156 According to the evidence of Mr Haratsis the Panorama Plaza annual sales estimate was \$4.6m and projected to \$4.8m, without the development. This assumes a population growth of 3.8%, which Mr Robertson submits is in error because it is based on out of date Dept of Planning figures. Instead there is minimal growth in the order of 0.8% as shown in the current projection (Ex 18). Therefore I think Mr Haratsis unreasonably overestimates future sale revenue by \$200,000. I accept the exhibits show the minimal growth scenario is more realistic.
- 157 Then with the development, the sales projection is to \$5m. His estimate is that there could be an overall loss of \$600,000 to PP i.e. from \$4.8m to \$4.2m but then there is a gain of \$800,000 due to induced expenditure, which results in the \$5m amount. As his estimated loss is 12.5%, some of that loss must be to Panorama Plaza.
- 158 In light of Mr Robertson's submissions I have considered the evidence on Mr Haratsis' model for the comparison of the supermarket on supermarket impact, whereby he assumes there is the same impact irrespective of distance from the IGA. His approach means that there is the same loss from the IGA revenue pool of \$15.6m for much more remote centres at Kingscliff for example.
- 159 It seems to me that this approach is somewhat unrealistic because it ignores the function of the centre and its separation distance. This approach also did not take account of the telephone survey results because Mr Haratsis

preferred to rely on an onsite survey, which was not undertaken, and instead relies on his experience for the adjustments. Considering that the results of the telephone survey were found to be reliable, it shows where the respondents do all of their supermarket shopping. As Mr Haratsis did not adopt the survey results on this specific question and instead relied upon his own assumptions, I think this diminishes his modelling approach considering the survey revealed about 50% of the West Tweed Heads residents will use the IGA.

160 The alternate position presented by Mr Hack on the estimated impact on the PP stores is shown in his following Table:

Table - Estimated Impact from Proposed IGA Store on Panorama Plaza

	Turnover before Impact	Redirected Trade	% Loss in Trade
Supermarket	1.80	0.81	45.0%
Liquor Store	2.00	0.00	0.0%
Carvery	0.60	0.08	12.5%
Bakery & Butcher	1.15	0.52	45.0%
Other	0.65	0.00	0.0%
TOTAL	6.20	1.40	22.6%

- 161 Insofar as Mr Hack accepts that there could be induced expenditure impacts, it is on the basis that such expenditure would result from having a conglomeration of collocated shops in the Panorama Plaza where shoppers would easily go from shop to shop and spend. Whilst he estimated a loss of 45% in trade for the PP supermarket and 23% overall for PP, he acknowledged that there could be some induced spending from the IGA presence but the loss would be greater than the gain. Contrary to Mr Haratsis' evidence, Mr Hack said he regularly uses telephone surveys although the particular survey was not used in this case. Consequently, when the results of the survey are considered with the modelling, it I have some concerns with the reliability of Mr Haratsis' alternative assumptions.
- 162 Given the different modelling approaches, I think it reasonable to consider the relative convenience of shopping. If the IGA is approved it will carry the full range of goods carried by the PP except probably the newspapers, lotto and liquor purchases. As some 49% of the local catchment area indicated they would use IGA for convenience shopping and 37% said they would use it for their regular shopping, its seems to me that the attraction to Panorama Plaza for convenience shopping would be significantly diminished. I do not see much attraction or economies in two separate convenience shopping trips. Based on these percentages, I consider there is likely to be a significant loss of sales at the Panorama Plaza, as opined by Mr Hack, whose evidence I prefer to rely upon. I have some difficulty in accepting the reality of Mr Haratsis' 5% (\$800,000) induced spending amount at the Plaza.
- 163 As noted previously, the social planners relied to some extent on the economic assessment results. Their agreement was that if Mr Hack's position was accepted then there would likely be an adverse social impact on PP, although 'modest' in Assoc Professor Ryan's opinion.
- 164 In light of my assessment that the approach of Mr Haratsis not be relied upon because I think there will likely be a significant diversion of trade away from Panorama Plaza, then there is the likelihood of 1 or 2 shops at PP closing, which I understand would cause adverse social impacts. In my assessment these impacts will be neutralised with the refusal of the DA and the retention of PP shops.
- 165 For my consideration of this matter, I note the social planners evidence that there could be potentially positive benefits with the approval of the IGA because it could offer better convenience for some, it could reduce travel time/costs and it could provide greater product choice at more competitive prices
- 166 However these benefits arise only if the larger IGA merits approval on the 6(b) recreational land. As I do not consider the proposed IGA satisfactorily responds to the prevailing controls, I do not consider these potential benefits should be given such weight leading to the approval of the application.
- 167 In regard to the benefits of providing more competitive shopping, I have considered the applicant's submissions

regarding *Kentucky Fried Chicken Pty Ltd v Gantidis* [1979] HCA 20 where the Court held that:

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, (at p 687).

168 Following this authority in the subject matter, whilst I consider there is likely to be an adverse economic impact on the PP shops, I would give that aspect little weight. Instead, from my overall consideration of the prevailing planning controls, I do not consider the proposal adequately satisfies the provisions of cl 8 of the LEP.

169 The other part of the potential social impacts concerned the co-location of the supermarket with the Club containing gaming machines. I accept the evidence that the key factor in assessing gaming related harm concerns the density of the gaming machines.

170 Insofar as the planners referred to the results of the telephone survey, the local Tweed demography and other academic papers on problem gambling, it was stated in the joint report that:

Tweed LGA is identified as a high-risk EGM area under the Gaming Machines Act 2001 (Band 3 Local Government Area), and has double the rate of density of EGMs compared with the NSW average. Seagulls is a large EGM club (having four times number of EGMs compared with club averages for NSW, and double the rate for clubs in Tweed LGA).

171 According to Dr Stubbs' interpretation of the survey results:

- Any increased access and exposure to EGMs at the Seagulls Club would be expected to increase the risk of frequent play and problem gambling in an already vulnerable locality. This is through increasing exposure and visibility of a large EGM venue for those already at risk of moderate or severe problem gambling when they visit the supermarket (e.g. increased temptation to gamble for those trying to avoid playing EGMs); and increasing frequency of play (and thus risk of problem gambling) for those who are not already problem gamblers when they visit the IGA potentially several times per week for convenience shopping; and increasing exposure to EGMs for non-Club members or users when they visit the IGA, Ms Ryan suggests, the Club is already acting as a hub of community activity.
- The fact that the proposal does not increase 'density' of EGMs does not mean that it does not increase risk of gaming harm. As noted in *Storer et al*, the relationship is more complex, and the authors do not exclude other 'accessibility' factors in contributing to problem gambling.
- Given the existing vulnerability of this community, an activity that increases exposure to gaming machines where people are conducting everyday activities (i.e. grocery shopping) or congregate for other activities is best avoided.

172 However Assoc Professor Ryan says that there is limited research evidence or academic studies which to consider as to whether the proposed store will lead to an increased risk of problem gambling due to increased numbers of people accessing the site. The increase in accessibility due to the increase in recreation uses on the site has not to date demonstrated that there has been increased access to gaming machines or increased harm or threat of problem gaming resulting from increased accessibility. In any case the Seagulls Club has existing, demonstrated practices and controls to manage problem gambling.

173 It is apparent that the social planners are not agreed on the potential impact of co-locating the IGA with the Club. However given the number of gaming machines is the critical factor and there will be no increase in machine, I suppose the best outcome could be a neutral impact. I am not convinced from the evidence that the co-location would result in positive social benefits in response to the potential gambling contention.

174 The remaining issue concerns the weight to be given to the new LEP 2014, under which the land is in the RE2 Private Recreation zone, which would prohibit the proposal. However this application has the benefit of the savings clause whereby it is to be determined under the provisions of Tweed LEP 2000, under which a grocery store is permitted. It was agreed that LEP 2014 be considered as imminent and certain.

175 For the consideration of this issue, reference was made to recent cases including *The Mac Services Group Pty Limited v Mid-Western Regional Council* [2014] NSWLEC 1072, wherein Dixon C decided that it was not necessary to consider the new LEP. However an alternative view was expressed by Pepper J in *Maygood Australia Pty Ltd v*

Willoughby City Council [2013] NSWLEC 142. However for the purpose of the subject determination, the Applicant agrees to the long accepted approach of Lloyd J in *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279, where he determined:

28. Finally, *Detita Pty Ltd v North Sydney Council* [2001] NSWLEC 209 (unreported) was heard after the 2001 LEP had been made. I held (at par [6]) that the effect of the savings clause (cl 5(3)) meant that the notionally draft planning instrument must be awarded such weight as must be given to any such instrument when its implementation is certain and imminent. I further decided (at par [11]) that in the circumstances of that case the notionally draft local environmental plan should be afforded determining weight.

29. It seems to me that in applying the savings clause, cl 5(3), to the present case, one cannot ignore the fact that the 2001 LEP has been made. In applying the words of the clause that "*the environmental planning instruments repealed or amended by this plan shall apply as if this plan had been exhibited but had not commenced*", it is necessary in the light of that circumstance to assume that the making of the notionally draft plan was certain and imminent. In *Architects Haywood v Bakker Pty Ltd*, Pearlman J said that the savings provision does not require a different approach. I thus reject the submissions of the applicant that this approach is not consistent with the purpose of cl 5(3).

30. Whether one applies the test of "*significant weight*", or "*some weight*", or "*considerable weight*" or "*due force*" or "*determining weight*" to the later instrument is not, however, the end of the matter. The savings clause still has some work to do. The proposed development is a permissible development by dint of the savings clause. In giving the 2001 LEP the weight of being imminent and certain, that does not mean that there is no further inquiry. It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith. Various expressions have been used to define this concept, but the approach which has been favoured in the Court of Appeal is to ask whether the proposal is "*antipathetic*" thereto (*Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 at 193).

176 Accordingly there are 3 objectives for the RE2 zone:

- To enable land to be used for private open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.

177 I note Mr McEwan's submissions regarding Beasley JA findings in *Abret Pty Limited v Wingecarribee Shire Council* [2011] NSWCA 107 where her Honour said that the objectives themselves are not necessarily consistent because they reflect conflicting demands upon development within the particular local government area. That conflict is evident in the objectives for the RE2 zone. Whilst the objectives facilitate use of land for recreational purposes in the first and third objectives they also recognise the objective of permitting compatible land uses.

178 Considering then the zone objectives, I do not consider a large grocery store as proposed is a recreational use or compatible with such use, as previously determined. It would displace the use of the land for recreational purposes and therefore not comply with the first objective Likewise I do not consider the proposal would enhance the natural environment for recreational purposes.

179 However the second objective allows a range of recreational settings and compatible land uses. It seems to me that the proposal does not provide a recreational setting, nor a recreational activity, as previously determined. Presumably applications under LEP 2014 would have to establish the compatibility of any such alternative use with the recreational use in a similar manner to the examples previously mentioned.

180 Just because the grocery store is substantially located within the existing Club building, I do not consider this adequately demonstrates that the uses would co-exist in harmony. In this regard I have concerns about the impact of the scale of the development, traffic and access impacts that have not been addressed in detail. Based on the compatibility examples previously addressed, I rely on my initial finding that a large grocery store is similarly not a compatible use in the private recreation zone. Accordingly I do not consider this proposal is consistent with the zone objectives and therefore does not support the approval of the development.

181 In summary then, I understand the evidence that there is an unsatisfied demand for more shopping space in this west Tweed Heads area and that the construction of the IGA could practically be undertaken and substantially satisfy this demand. But there is a raft of strategic controls, some of which lack specificity, where neighbourhood centres are designated and they include business zones that allow the provision of more shopping space.

182 These controls reinforce the current strategy to maintain and protecting existing centres. I do not consider the Seagulls site is designated as the focal point for the development of the various shopping components in the commercial square even though it is located within the 400m radius of influence. The evidence indicates to me that the neighbourhood centre is focussed on Panorama Plaza

183 Furthermore, it seems to me that the proposed IGA (with GFA of about 2200 sq m) is a quite large grocery store,

which is not the size envisaged by the controls, if such neighbourhood centres generally have an overall area of about 1000 sq m as stated by Mr Tzannes. Presumably the opportunity to change this strategy and provide more shopping opportunities has been considered but obviously not adopted in the recent updating of the LEP 2014 or associated strategic plans. I consider the maintenance of the Panorama Plaza as the core of the local neighbourhood centre with its existing infrastructure represents orderly development based on the current planning control provisions and a reasonable public interest outcome.

184 In the ultimate, my opinion is that this proposal is not consistent with the provisions of cl 8(1)(a) of Tweed LEP 2000 and the application should be refused.

Court orders

185 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development consent to DA 12/0527 for internal alterations, additions and reconfiguration of the car park to the Seagulls Club at 54-68 Gollan Drive, Tweed Heads West to permit a new general store is refused.
- (3) The exhibits may be returned except 1, 6, 7, 10, 15, 17, 24, A, F, H.

R Hussey

Commissioner of the Court

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.