

NORTH SYDNEY LEAGUES CLUB

**PROPOSED IGA SUPERMARKET
DEVELOPMENT AT TWEED
HEADS
(DA 12/0527)**

MEMORANDUM OF ADVICE

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NORTH SYDNEY LEAGUES CLUB

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Introduction

My instructing solicitors act for the North Sydney Leagues Club Ltd (NSLC). The company is the owner of land known as Lot 2 DP 881169 at 54-68 Gollan Drive, Tweed Heads West. Upon the subject land stands an existing building known as The Seagulls Club, which operates as a licensed club from the site and contains a variety of other ancillary elements, including recreation facilities and childminding. The Club is spread over three levels and has a total gross floor area of approximately 16,508 m². There are 582 formal carparking spaces and 232 informal (grassed) spaces.

NSLC has lodged a development application (DA 12/0527) with Tweed Shire Council for *internal alterations and additions comprising a new general store, extension of entrance and carpark reconfiguration*. In particular, it is proposed that a 1965 m² 'supa IGA supermarket' be established within the ground floor of the existing club and that 69 of the existing car spaces will be required to service the supermarket use. Development upon the subject site is controlled by the provisions of Tweed Local Environment Plan 2000 (TLEP) pursuant to which the site is zoned 6(b) Recreation. The current use of the building is permissible within the zone.

The development application is currently before the Council for consideration and questions of permissibility of the proposed use have arisen.

Advice requested

I have been requested to provide advice on the question of permissibility of the proposed supermarket. I have not been asked to advise upon the merits. In particular, I have been requested to provide advice on two issues:

1. Whether the proposed supa IGA supermarket is properly characterised as a 'general store' and is therefore permissible with consent within the 6(b) recreation zone under the TLEP; and
2. The application of clause 8(1) of the TLEP in combination with the Primary and Secondary objectives of the 6(b) zone. Specifically if the proposed development is permissible as a general store, is it open to the Council to be *satisfied that the development is consistent with the primary objective of the zone* as is required by cl8(1)(a).

Executive summary

For the reasons which are set out below, I am of the opinion that the proposed IGA supermarket is properly characterised as a 'general store' because it will sell general merchandise and it is therefore permissible with consent within the 6(b) Recreation zone pursuant to the TLEP. My opinion is derived from and supported by existing case law. Further, I am of the opinion that it is entirely open to the Council to be satisfied that the development proposed is consistent with the primary objective of the 6(b) zone, which is *to designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes*. In summary, the use of a small portion of the existing building will not be inconsistent with the primary objective because the land, even if confined to the subject site, will continue to be used primarily for recreational purposes. Further, as a specifically identified permissible use (general store), the proposal is development *that is compatible with the primary function of the zone* as identified by the secondary objective of the zone.

Background facts

As previously noted, the subject land is zoned 6(b) Recreation. There are numerous sites so zoned pursuant to TLEP. The subject land has an area of 4.94 ha (49,400 m²). The total floor space of the existing building is 16,822 m² and the proposed supermarket will occupy 1,965 m² of the ground floor of the building, which itself has a total ground floor area of 8,266 m². The existing ground floor area will be increased by approximately 314 m² as part of the proposal but otherwise it will occupy existing floor space. In percentage terms the proposed supermarket will equate to 11.68 per cent of

the total floor space located on the site and the parking requirement for the supermarket is 69 spaces, which is less than 12 per cent of the existing formalised 582 car spaces and approximately 8 per cent of the total available parking on the site. That part of the Club (being the majority of its floor space) which is not occupied by the supermarket will continue to operate as a recreational facility.

The Statement of Environment Effects details the proposed types of items which will be for sale. They comprise general merchandise typical of a supermarket and may be broadly characterised as food, alcohol and household items of a wide variety.

Relevant provisions of the TLEP

Clause 11 of TLEP sets out the relevant zones, the objectives of the zones and development that is permissible and prohibited. It includes zone 6(b):

Zone 6(b) Recreation

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.*

In item 2 certain development is specifically identified as permissible with consent. Item 2 includes *general stores*. In item 4 the prohibited uses are *any buildings, works, places or land uses not included in item 1, 2 or 3*. It follows that a land use included in item 2 is not prohibited.

The following definitions are relevant:

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

Shop: Land used for the purpose of selling, exposing or offering for sale by retail, goods, merchandise or materials, but does not include a building or place elsewhere specifically defined in this schedule or used for a land use elsewhere specifically defined in this schedule.

Once zoning permissibility is established, cl8 of TLEP operates as a pre-condition to the power to grant consent.

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.*

It is to be noted that cl8(2) contains more stringent controls with respect to item 3 uses in the zoning table.

Advice

Is the proposed supermarket properly characterised as a 'general store'?

I am firmly of the opinion that the proposed supermarket is properly characterised as a general store as defined in TLEP. Further, the facts in this case, on the question of characterisation, are identical to those in *Hastings Co-operative Ltd v Port Macquarie Hastings Council & Anor* (2009) 167 LGERA 205 where Lloyd J determined that a proposed supermarket selling a range of goods identical to those proposed in the present case, was a 'general store'. The definition of general store was the same, as was the definition of shop. In *Hastings* Lloyd J summarised and applied other decisions

of the Court to the same effect. In my opinion the weight of authority is overwhelmingly in favour of the opinion which I have expressed.

Although in general parlance a general store would be described as a shop; that is not to the point. It is the definitions which must be interpreted. Further, historical notions of general stores being small, general outposts must also be put to one side because the definition in TLEP will prevail. Pursuant to TLEP the definition of shop *does not include a building or place elsewhere specifically defined*. 'General store' is so defined as *a shop used for the sale by retail of general merchandise ...*. The fact that the definition of general store refers to 'a shop' is of no consequence. For the purposes of TLEP a 'general store' is excluded from the definition of 'shop'. This fact was confirmed by the Court of Appeal in *Hastings Co-op Ltd v Port Macquarie Hastings Council* (2009) 171 LGERA 152.

As was made clear by Lloyd J in *Hastings*:

It is clear from the definitions above that the essential difference between a 'shop' and a 'general store' is that a 'shop' offers for sale by retail 'goods, merchandise or materials' and a 'general store' offers for retail 'general merchandise'. Hastings Co-operative rightly submits that, as there is little difference between goods, merchandise and materials, the significant difference between the definitions comes from the use of the word 'general' [8].

As noted by Sheahan J in Merryland at [132], the definition is satisfied where a range and variety of product lines are offered for sale by retail. In the present case, it seems to me that the supermarket does offer a range and variety of product lines, and that they are by no means specialised merely because they may broadly be characterised as 'food and household items' ... Having regard to the broad range of merchandise which will be sold at the proposed supermarket, it is my view that the merchandise is general rather than specific in nature, particularly the range of non-food items. I conclude, therefore, that the proposed supermarket in the present case is, for the purposes of the Hastings Local

Environment Plan, correctly characterised by the Council as a 'general store' [23].

As previously noted, the range of goods proposed to be sold in the *Hastings* case is identical to that in the present case and there is no reason to distinguish the *Hastings* decision. It stands as clear authority for characterisation of the proposed supermarket as a general store. Indeed, in the present case the argument in favour of the proposal being a general store is even stronger than in *Hastings*. In that case general stores were not specifically permissible with consent. Permissibility arose because the use was not specifically prohibited, even though use for the purpose of a shop was specifically prohibited. In the present case use for the purpose of a general store is specifically identified as a permissible use in the 6(b) zone.

Finally, the size of the proposed store is of no relevance for the purpose of the definition because the general store definition does not limit the store to being of a maximum floor space. In *Hastings* the proposed supermarket had an area of approximately 3,011 m². In *Merryland Development Company Pty Limited v Penrith City Council* (2001) 115 LGERA 75 Sheahan J held that a proposed supermarket was a general store in circumstances where it proposed a floor space of 3,800 m² and a range of products which was less extensive than in the present case. The definition of 'general store' in TLEP requires only that the premises sell, by retail, *general merchandise*. If the range of products to be offered can be so described (as it clearly can in this case), then that is the end of the inquiry into permissibility and the development is a general store for the purposes of the planning instrument. This is reinforced by the fact that item 4 in the zoning table sets out prohibited development. What is prohibited is *any buildings, works, places or land uses not included in item 1, 2 or 3*. Because general stores is included in item 2, it must follow that use for the purpose of a general store is not a prohibited land use.

Will the proposed development be consistent with the primary objective of the 6(b) zone

Clause 8(1)(a) prevents the grant of development consent unless the consent authority *is satisfied that the development is consistent with the primary objective of the zone within which it is located.*

I am of the opinion for the reasons which follow that, having regard to the proper context of the clause, construed as part of the planning instrument as a whole, the relevant state of satisfaction can properly be reached.

In the 6(b) zone the primary objective is *to designate land, whether in public or private ownership, which is or may be used primarily for recreational purposes.* It is of particular importance to note that the secondary objective is *to allow for other development that is compatible with the primary function of the zone.* That other development must include the land uses which are specifically stated to be permissible with consent, including general stores, childcare centres, markets, tourist facilities, clubs, motels and refreshment rooms which are not generally for recreational purposes.. The zoning table when read with the primary and secondary objectives makes it plain that such permissible land uses, although different in nature, are assumed to be compatible with the primary function which is the use of land for recreational purposes.

Returning to the primary objective, one must focus on the word 'primarily'. In context, 6(b) land is not required to be used solely for recreational purposes. 'Primarily' is an ordinary English word which should bear its ordinary English meaning of 'chiefly' or 'principally': see *Modog v Baulkham Hills Shire Council* (2000) 109 LGERA 443 at [12]; *Retirement by Design v Warringah Council* (2007) 153 LGERA 372 [97].

Thus, in order to correctly approach the task set by cl8, it must be recognised that the 6(b) zone intends to allow for development which, of itself, is not for recreational purposes but which will be compatible with the primary function of the zone. That primary function is described in the primary objective.

Clause 8(1)(a) refers to development that is *consistent* with the primary objective of the zone. Again, that word bears its ordinary meaning and has been considered in a number of decisions of the Court.

I would hold that it has its ordinary and natural meaning (eg as in the Macquarie Dictionary: 1. Agreeing or accordant; compatible; not self-opposed or self-contradictory; 2. Consistently adhering to the same principles, course, etc.): Dem Gillespies v Warringah Council (2002) 124 LGERA 147.

The word compatible is accepted to mean 'capable of existing together in harmony'.

It follows, in my opinion that cl8(1)(a) is to be approached by asking whether or not the use of part of the subject land for a general store will conflict with or be incompatible with the land being otherwise used primarily for recreational purposes. Put another way, will the proposed use of general store prevent the land being mainly or principally used for recreational purposes? In my opinion, it will not do so for the following reasons.

First, the primary objective must refer to all land within the Tweed Local Government area which is zoned 6(b) and not just the subject site. So understood, it is highly unlikely that a permissible non-recreational purpose on part of the subject land could be inconsistent with the primary objective. Second, even if limited to the subject land, as previously noted, the proposed supermarket will occupy only part of the ground floor of the three storey club and a minor proportion of the floor space of the Club (1,965 m² out of 16,822 m² [11.68 %]). The carparking needs of the supermarket will occupy a similar percentage of the available formal parking (69 spaces out of 582 [12%]). Numerically therefore the Club, and the land upon which it is located, will continue to be used primarily for recreational purposes because the existing uses of the Club will continue upon 90% of its area and those uses are properly described as recreational purposes. I refer to (and agree with) the comments of Mr Byrnes (Think Planners Pty Limited) addressed to the Council in a letter of 22 January 2013:

It is apparent from a review of the floor space and carparking demand that the General Store comprises a minor component of the site's use, which is predominantly that of a recreational facility. The Club provides a wide range of recreational activities on site. Members and their guests visit the Club for numerous reasons such as enjoying meal, dining/bistro facilities; socialise in the lounges; participate in recreational bingo, keno or gaming; meet with people at the bar; attend the gymnasium; allow their children to enjoy the recreation facilities; and play indoor sports at the futsal courts. The broadening of the site's uses to include a general store does not diminish the primary purpose and predominant business of Seagulls Club being that of a recreational facility. The general store forms a complementary activity on site.

Finally, the subject land has a total area of almost 5 ha (49,400 m²). The use of 2,000 m² for a general store and 12% of the formal parking is, on any reasonable view, a minor use of the land and as such will in no way preclude it from being used primarily for recreational purposes. Accordingly the Council should be able to readily be satisfied that the proposed development is consistent with the primary objective of the 6(b) zone. There is no conflict. Indeed, it will be an harmonious relationship where the primary use will remain as one for recreational purposes thereby satisfying the requirements of cl8(1)(a).

I so advise.



C. W. McEwen SC

Chambers

2 May 2013