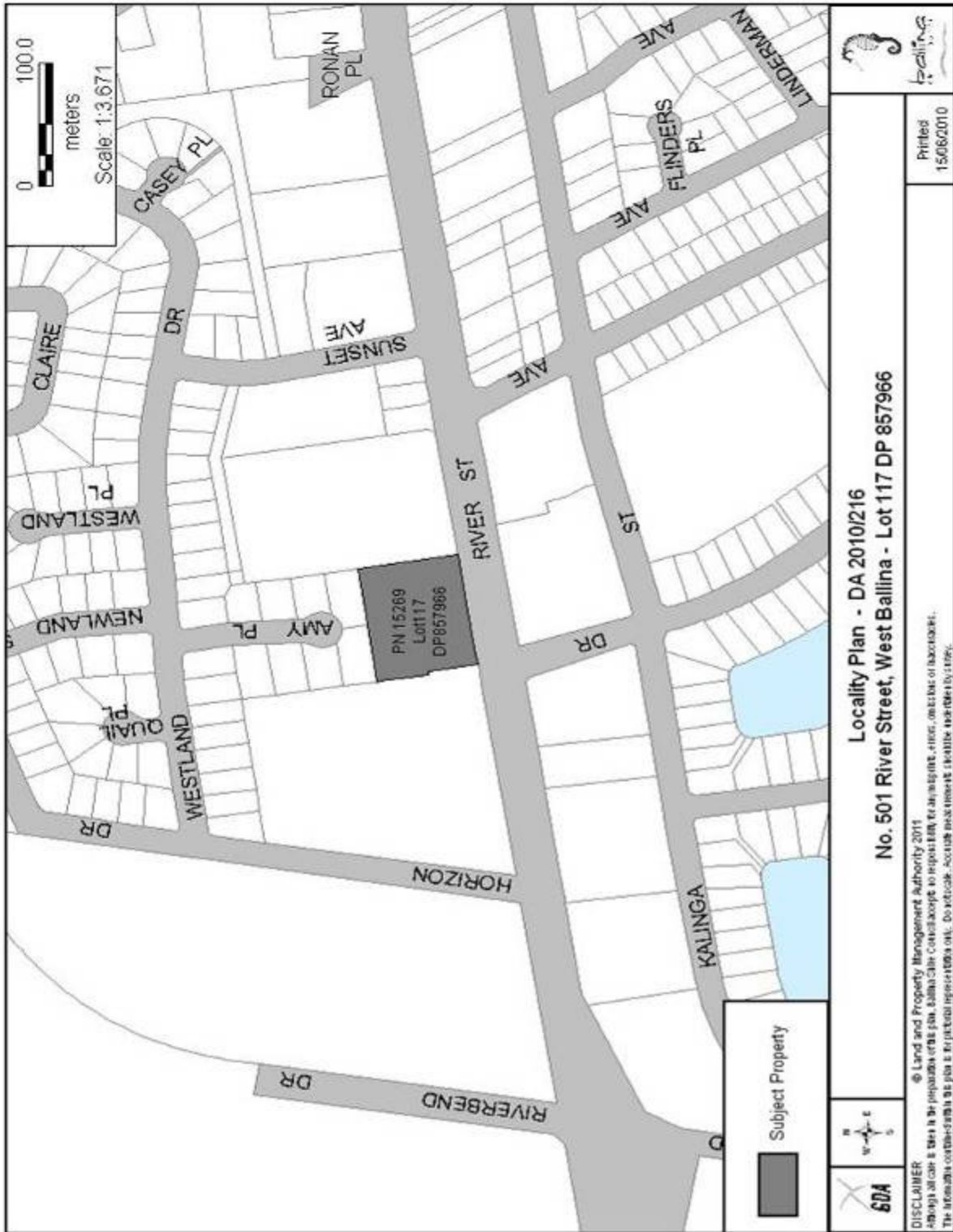
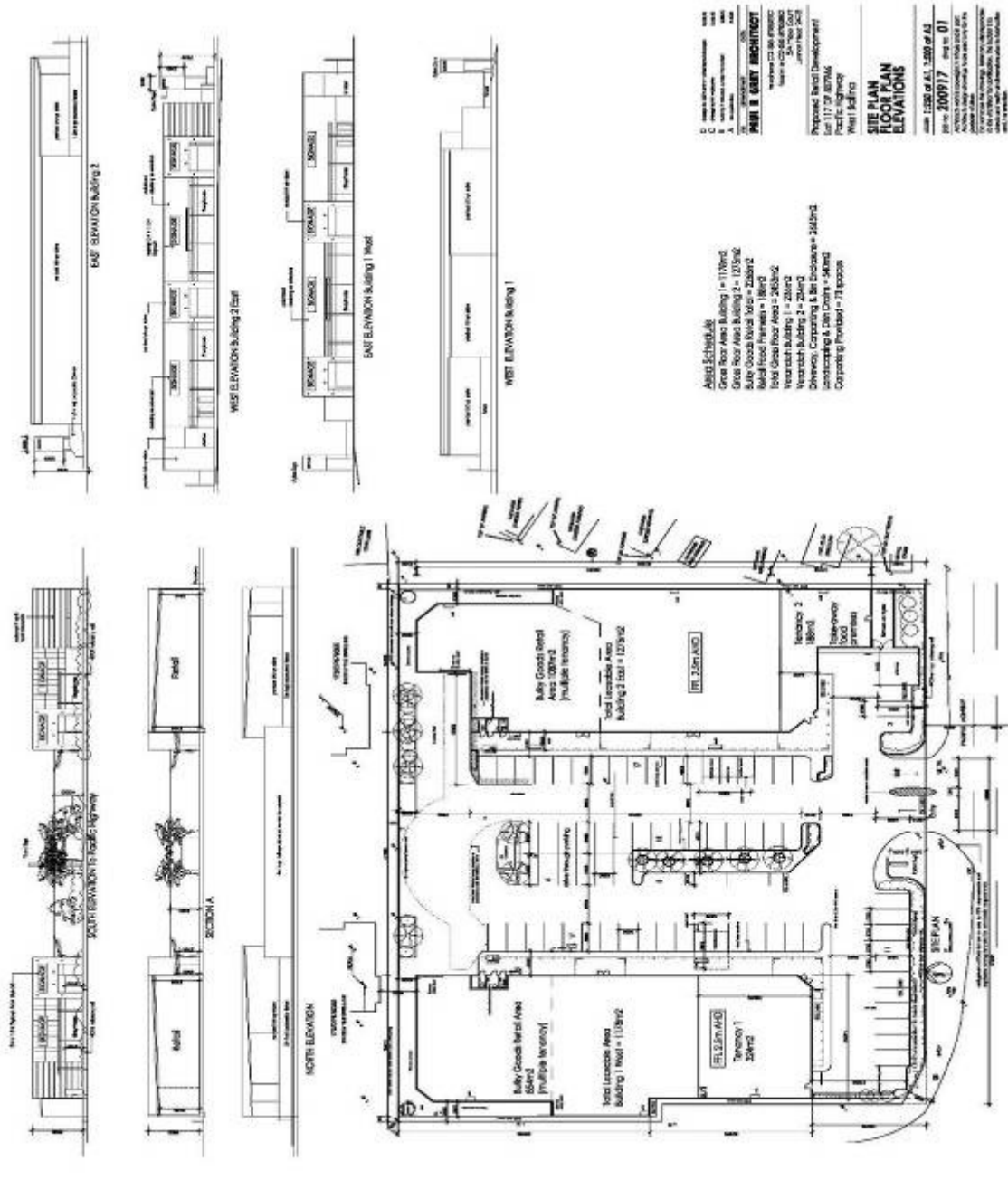


8.1 DA 2010/216 - Retail Development, West Ballina



Locality Plan - DA 2010/216
 No. 501 River Street, West Ballina - Lot 117 DP 857966



From: Narelle Hayter [relydesigns@internode.on.net]
Sent: Wednesday, 6 January 2010 1:56:52 PM
To: Ballina Shire Council
Subject: Submission to Council file reference DA 2010/216

Submission to Council file reference DA 2010/216

Paul R Gray Architect Pty Ltd
Lot 117 DP 857966
Pacific Highway,
West Ballina

6th January, 2010

How much more permanent damage from landfill blockages has the Tintenbar Valley got to contend with. I can still show dead pastures on my farm left by floodwater backups of two years ago.

The reasons that I cited in my previous submission to council (see below) regarding the Condon Group DP are exactly the same for this adjacent development proposal.

The Emigrant Creek floodplain worked quite well in its first one hundred years of white settlement. Buildings dotted the Tintenbar Valley as unimpeded floodwaters flowed quickly down to Ballina on their short journey to the sea.

Then began the valleys destruction with irresponsible landfill developments that continue right up to this very day. The valleys flow is virtually severed, sending floodwater repercussions right up the Tintenbar valley, so serious, that residents are now bombarded with SES flood evacuation plans and rescue procedures never before needed in the history of the valley.

Of serious concern is the piles of landholder information submitted throughout the years and overruled in favour of this fiasco with some of the worst mistakes carried out in recent times.

Someone must be held accountable?

With my property in ruins and my life at stake why would I, or anyone else with claims to a proper flood study, condone further landfill projects that destroy the valley.

John Hayter
Tintenbar

The same objections were previously submitted to Council in reference to
DA 2007/685
The Condon Group Ballina/Ballina Waterways Pty Ltd
Lot 11 DP 1011575
Pacific Highway,
West Ballina NSW 2478

Receipt was acknowledged 11 December 2009 and allocated document number 1445676.

NDC
Newton Denny Chapelle
CONSULTING SURVEYORS & PLANNERS

Date: 19 November 2009
Our Ref: 09/440

General Manager
Ballina Shire Council
DX 27789
BALLINA

Attention: Mr Andrew Smith

RECORDS 23 NOV 2009
Doc No:.....
Batch No:.....

Dear Sir,

Re: Development Application 2010/216
Lot 117 DP 857966 - Pacific Highway, Ballina.

Further to Council's letter of 23rd October 2009 to the Applicant Paul R Gary Architect Pty Ltd, the proponent has sought advice from McCartney Young Lawyers in respect to the matters raised in Council's letter pertaining to the permissibility of the development.

A copy of the legal advice prepared by Michael Young of McCartney Young Lawyers is attached for your perusal.

Based on the advice from McCartney Young Lawyers, we submit the Development Application as lodged may be considered as a permissible land use within the 2(a) Living Area zone and as such respectfully seek Council's agreement to exhibit the Development Application to permit the progression of the assessment process.

We note Council may wish to receive further information addressing specifically the zone objectives to accompany the already lodged documentation prior to exhibition. This documentation will be prepared upon Council's review and acceptance of the attached legal advice.

Should you have any questions, please do not hesitate contacting Damian Chapelle of this office.

Yours sincerely,
NEWTON DENNY CHAPELLE



DAMIAN CHAPELLE
Town Planner. BTP CPP.

JOHN NEWTON B. Surv. M.I.S. Aust. TONY DENNY B. Surv. (Hons) M.I.S. Aust. DAMIAN CHAPELLE BTP CPP
Office: Suite 1, 31 Carrington Street, Lismore, Postal Address: PO Box 1138 Lismore NSW 2480
Phone (02) 6622 1011 Fax (02) 6622 4088 DX7779 Lismore Email office@newtondennychapelle.com.au
Also at: Casino Court, 100 Barker Street, Casino NSW 2470 Phone/Fax (02) 6662 5000

McCartney Young Lawyers

Directors: Michelle McCartney & Michael Young

Our Ref: MY:20090385
Your Ref:

19 November 2009

Mr Rick Hyde
85 Reif Street
FLINDERS VIEW QLD 4305

Dear Rick

**Development Application Lodged by Newton Denny Chapelle on Behalf of R Hyde
Proposed Bulky Goods Retail Facility
Property: Lot 117, DP857966 - Pacific Highway, Ballina**

Instructions

A development application has been lodged by Newton Denny Chapelle (**NDC**) with Ballina Shire Council (**Council**). You have an interest in the land to which the DA relates (Lot 117 DP 857966 (the **Land**)). The Statement of Environmental Effects (**SEE**) (lodged with the DA) seeks consent for the following development:

"Consent is sought for the construction of a bulky goods retail facility comprising 2,833m² of gross floor area, 81 car spaces, advertising signage, earthworks, stormwater management, boundary fencing and landscaping."

By reference to page 7 of the SEE the development is further described as "2 separate free standing buildings containing 4 tenancy areas for bulky goods retail and food shop (tenancy 1 - bait & tackle, tenancy 2 - food premises)."

The development is to be undertaken on the Pacific Highway, West Ballina. The adjoining development on the Highway includes the Caltex road service facility (petrol station). Previous consents for the Land include Motel, Motor Showrooms and car repair stations.

I am instructed that the retailing that will occur on site is related to outdoor leisure and recreation. Fishing rods, tackle and bait will be sold, together with a variety of other large items associated with outdoor leisure including boat motors, canoes, kayaks and the like.

I am instructed that recently Mr Andrew Smith of Council contacted Mr Damian Chapelle (NDC) and advised that he was of the opinion that the development sought consent for the purposes of a "shop", being a use that is particularly identified in the Objectives of the 2(a) zone.



Liability limited
by a scheme
approved under
Professional
Standards
Regulation.

Level 1 85 Tamar Street Ballina NSW | PO Box 183 Ballina NSW 2478
Phone: 02 6683 5566 | DX 27660 BALLINA | Fax: 02 6683 5544
Email: info@my-lawyers.com.au | Web: www.my-lawyers.com.au
McCartney Young Lawyers Pty Limited incorporated legal practice
ABN: 66 134 784 062



The Objectives (clause 9, 2(a) zone, 1 (A)(b)) are phrased so that development that is "an essential land use within the urban living area", is permissible in the 2(a) zone; such development does "not include[e] a shop".

Having regard to the instructions noted above you have sought my advice in relation to the DA and in particular whether the DA seeks consent for a purpose for which consent can be granted.

Summary of Advice

Having regard to the relevant law, and the locality in which the development is proposed to be undertaken, I am of the opinion that the DA seeks consent for a development that is permissible on the Land.

The Legislation & Identifying the Difficulty

Any development application lodged with Council seeks, in very broad terms, to use land for a particular purpose. To determine whether development can be undertaken for a particular purpose in a particular zone, regard must be had to the "Development Control Table" in clause 9 of the Ballina LEP (and the Table relevant to the 2(a) zone is reproduced at the end of its letter).

The DA proposes to use the Land for the purpose of "bulky goods retailing" in the 2(a) zone. That is, the DA characterises the development as being for the purposes of "bulky goods retailing".

The Ballina LEP does not define "bulky goods retailing" for the purposes of the LEP. However, clause 27 of the Ballina LEP recognises "bulky goods retailing" (that clause applies to land within Zone 4 and land referred to in Schedule 4). Development for "bulky goods retailing" can be undertaken on the Land because it is a use that is permissible in the zone: any use not nominated in Items 2, 4 or 5 (of the Table to cls 9 of the LEP as it applies to the 2(a) zone) can be undertaken with consent.

The Ballina LEP adopts the "Model Provisions", including the definition of a "shop". Furthermore, pursuant to the Model Provisions, there are a number of other types of retailing activities which can be pursued as development – or use of land – that should not be characterised as a "shop". This is because "shop" will only characterise or define a retail use that is not otherwise specifically defined in the Model Provisions. Other retailing that is specifically defined in the Model Provisions includes "refreshment rooms" and "general store".

On the basis of the LEP and the Model Provisions, the use of the Land for the purposes of a "food store" is a use permissible in the zone and consent can be granted to that use.

If the development the subject of the DA was to be characterised as being for the purposes of a shop, then that development is actually *permissible* in the 2(a) zone. Clause 9 specifically permits development for the purposes of a shop (Item 4 in the controls on the 2(a) zone as set out in cls. 9 of the LEP). It is the "Objectives" that suggest that such development is not permissible.

Pursuant to clause 9(7) of the LEP, Council cannot grant consent to the development unless the development is consistent with the objectives of the zone.

The legal matrix created by the Ballina LEP gives rise to confusion as to what type of retailing (other than a "general store") might be permissible in the 2(a) zone.

Consideration of the Issues – Why the DA is Permissible as a "Shop"

The SEE highlights the context in which the development is proposed. The Land has frontage to the Pacific Highway and adjoins commercial development that also fronts the Highway. Residential development is "at the rear" of the Land. Previous consents for the Land permitted development that is not residential (tourist development; motor showrooms (a form of retailing; see the definitions in the Model Provisions) and associated car repair stations).

The Land exists in a highway locality that is not residential in nature. Consent has previously been granted by Council to use the Land for purposes which might in another locality be considered as incompatible with a residential use (notwithstanding the zoning). (In this respect, use of the land for the purpose of "bulky goods retailing" may be no more or less intrusive in the residential zone than these other uses.)

With these background observations in mind I make the following comments:

1. As noted "shops" are singled out in the Objectives to the 2(a) zone as "development which is [not] considered by the Council to be an essential land use within the urban living area". However the development that is expressly permissible in the zone includes development for the purposes of a "shop". Clause 9 of the Ballina LEP could have prohibited development for a shop (but still made development for the purposes of a general store permissible) but it does not. So how can this confusion in permissibility be resolved? I suggest that in the course of the merit assessment of a development application seeking consent to use land zoned 2(a) for the purposes of a shop (which is a permissible use), the development must be assessed against the Objectives of the zone. That is, Council cannot simply point to the words in the "Objectives" of the zone and refuse the DA. Council must make an assessment of the development against the Objectives.
2. In this respect, there is authority on how the Objectives of the zone are to be applied when assessing the development.

"The proper approach to the question of consistency with the zone objectives is now well settled. The guiding principle is that a development will be generally consistent with the zone objectives if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is incompatible (*Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 at 27)."

(Pearlman J, *ADI Limited v Hawkesbury City Council* (2000) 110 LGERA 406 at para 26)
3. Furthermore, there is authority on how the permissibility of the use is to be given weight when determining competing clauses in the relevant planning law.

"In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development

of any site. Although the fact that a particular use may be permissible is a neutral factor, planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects. Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened.

In most cases it can be expected that the court will approve an application to use a site for a purpose for which it is zoned, provided of course the design of the project results in acceptable environmental impacts.

(McClellan CJ, *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237 at paras 117–118; cited by Biscoe J and Tuor C in *Addenbrooke Pty Ltd v Woollahra Municipal Council*, [2008] NSWLEC 190 at para 52)

4. Therefore the permissibility of the development, for the purposes of a "shop", should be acknowledged by Council. It will then be a matter for reports – and the opinion of the consent authority – to determine whether the development is "not antipathetic" to the Objectives of the zone. In this respect, the design of the development and its overall merits will be extremely relevant.
5. The SEE prepared by Damian Chapelle demonstrates how, given the locality of the subject land, the development is "not antipathetic" to the objectives. It is appropriate that this assessment be undertaken by a planner. However I note the following on the relevant Objectives:
 - (a) The Objectives (A(a)) require the consent authority to consider development that is *ancillary* to housing – together with the "scale, type" etc of the development and whether the development is "compatible with the character and amenity of the surrounding residential area". That is, the "Pacific Highway context" ought to be considered as the surrounding area and given particular weight.
 - (b) The Objectives (A(b)) require the consent authority to consider development that is "an essential land use within the urban living area". It is unclear to me as to why a "heliport" (for example) might be a more essential land use within the urban living area, rather than a shop, and therefore why it is that a shop is singled out in the Objectives to the 2(a) zone. It can certainly be argued that: the type of bulky goods retailing proposed for the Land (fishing, outdoor leisure etc); the location of the Land on the Highway near access points to the Richmond River; and the opportunity to add to the "enjoyment of life" for people living in Ballina; all suggest that the development is not antipathetic to the Objectives.

Consideration of the Issues – Why the DA is Permissible for “Bulky Goods Retailing”

On the basis of the matters noted above, I believe that even if your development is characterised as being for the purposes of a “shop”, consent can be granted. However, I draw attention to these additional arguments relevant to the characterisation to the development as being for the purposes of “bulky goods retailing”.

1. The use of the broad term “shop” does not recognise a number of other retailing activities which may be permissible in the 2(a) zone having regard to:
 - (a) The existing provisions of the Ballina LEP; and
 - (b) Planning law generally.

2. I have noted that the Ballina LEP adopts the “Model Provisions” which identify and define development for the purposes of a variety of uses, including a “refreshment room”. Development for that purpose, as a separate retail type activity, can be undertaken in the 2(a) zone (because it is not prohibited use). In this respect the food premises as proposed in the DA are permissible. In this respect I have had regard to:
 - (a) The decision of Justice Lloyd in *Grace & Anor v Thomas Street Café Pty Ltd* (unreported, [2006] NSWLEC 547, 4 October 2006) where use of premises for the purposes of a “milk bar” was a use that fell within the broad definition of “refreshment room” (within an existing use rights case).
 - (b) I have also had regard to the Standard Instrument which defines “food and drink premises” in a manner consistent with “refreshment rooms” – although it is a broader definition of “refreshment rooms” than that provided for in the Model Provisions.

3. The “Standard Instrument – Principal Local Environmental Plan” was gazetted on 31 March 2006 and is known as the LEP Template. The Standard Instrument provides a definition for different types of retail development”. In addition to “food premises” – as noted above – the Standard Instrument provides definitions of other retailing uses (including bulky goods premises, neighbourhood shop, retail premises, takeaway food and drink premises).

Having regard to the way planning law is developing with respect to the identification of uses under an LEP, it is not helpful to simply think of the current development as a “shop”. Similarly the range of development that might be permissible in the 2(a) zone, being development for the purpose of retailing, must have regard to the different types of retailing that are now recognised at planning law and that are now recorded in the Standard Instrument.

4. Mr Chapelle has described the development as being for the purposes of a “bulky goods retail facility”. In clause 27 of the LEP, “bulky goods” are defined *for the purposes of that clause* (“large goods which are, in the opinion of the council, of such a size and shape as to require [both] a large area for handling, storage or display and easy and direct vehicular access to enable the goods to be collected by customers after sale”). The definition of “bulky goods premises” in the Standard Instrument is similar. A development application seeking consent to

use land for the purpose of "bulky goods premises" should be considered as development for something other than a "shop".

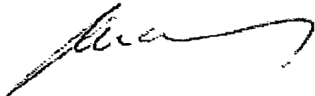
5. In so far as the development may seek consent for a use that is not specifically identified in the 2(a) zone; and use of the land for the purposes of a "refreshment room" or "bulky goods premises" are not specifically identified; then development for those purposes is permissible pursuant to Item 3 of the 2(a) zone (Table to cls. 9) as they are innominate uses. That is, the development is not for the purpose of a brothel ("Item 5 Prohibited"); it is not development for the purposes of a shop ("Objectives"); and the development does not otherwise fall within any of the other categories specifically listed in the 2(a) zone.

Conclusion

Having regard to the matters noted above, the DA should proceed to be assessed by Council. Consent is sought for a development that is permissible in the zone.

Of course, the Objectives must be addressed, and that is a matter about which further advice can be taken from Mr Chapelle. On the assumption that the Objectives can be satisfied – and the merit issues associated with the development can be addressed – then Council can proceed to grant consent.

Yours faithfully



Michael Young
Direct Line: 02 6683 5560
michael@my-lawyers.com.au

Extract From Clause 9 of the Ballina LEP – Table**Zone No 2 (a) Living Area Zone****1 Objectives of zone****A The primary objectives are:**

- (a) to regulate the subdivision and use of land to permit housing and ancillary development where the scale, type and traffic generating characteristics of the ancillary development are compatible with the character and amenity of the surrounding residential area,
- (b) to permit development which is considered by the council to be an essential land use within the urban living area, but not including a shop (other than a general store), and
- (c) to allow detailed provision to be made, by means of a development control plan, to set aside specific areas within the zone for varying housing densities as well as other associated urban and tourist facilities.

B The secondary objective is to allow a variety of housing types and designs and to encourage greater visual amenity by requiring site landscaping.**C The exception to these objectives is development of land within this zone for public works and services, outside the parameters specified in the primary objectives.****2 Without development consent**

Nil.

3 Only with development consent

Any purpose other than a purpose specified in Item 2, 4 or 5.

4 Advertised development—only with development consent

Building identification signs; bulk stores; bus depots; bus stations; business identification signs; car repair stations; commercial premises; helipads; heliports; industries (other than home industries); junk yards; liquid fuel depots; mineral sand mining; mines; motor showrooms; roadside stalls; shops; stock and sale yards; stock homes; transport terminals; warehouses.

5 Prohibited development

Brothels.

Date: 6th April 2010
Our Ref: 09/440

General Manager
Ballina Shire Council
DX 27789
BALLINA

Attention: Mr Lachlan Simms

Dear Sir,

**Re: Development Application 2010/216
Lot 117 DP 857966 – Pacific Highway, West Ballina.**

Newton Denny Chapelle in association with McCartney Young Lawyers have been requested by the applicant, Paul Grey Architect, to address Council's information request dated 14 January 2010 in specific regard to the application of the 2(a) Living Area zone objectives to the proposed development and secondly the amenity impacts on adjoining development from the proposal.

1. Consistency with Zone Objectives

Requirements of the Ballina LEP

Clause 9(7) of the *Ballina Local Environmental Plan 1987* is in the following terms:

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

We submit it is clear from the decided cases that a clause such as 9(7) is a precondition to the exercise of the power to grant consent. That is, Council must consider whether the development satisfies the "Objectives" before it proceeds to otherwise consider the merits of the development and whether it warrants consent. McCartney Young Lawyers who have assisted in the drafting of this reply have noted *Franklins Ltd v Penrith City Council and Anor* [1999] NSWCA 134 at [18] and [26] in supporting this position.

JOHN NEWTON B. Sc. (Hons), M.Eng. (Hons), A.Eng., TONY DENNY B. Sc. (Hons), M.Eng. (Hons), A.Eng., DAMIAN CHAPELLE M.Eng. (Hons)
Office: Suite 1, 31 Carrington Street, Lismore, Postal Address: PO Box 1138 Lismore NSW 2480
Phone (02) 6622 1011 Fax (02) 6622 4088 DX7779 Lismore Email office@newtondennychapelle.com.au
Also at: Casino Court, 100 Barker Street, Casino NSW 2470 Phone/Fax (02) 6662 5000

The Ballina LEP stipulates a number of objectives to the 2(a) living area zone:

1 Objectives of zone

A The primary objectives are:

- (a) to regulate the subdivision and use of land to permit housing and ancillary development where the scale, type and traffic generating characteristics of the ancillary development are compatible with the character and amenity of the surrounding residential area,*
- (b) to permit development which is considered by the council to be an essential land use within the urban living area, but not including a shop (other than a general store), and*
- (c) to allow detailed provision to be made, by means of a development control plan, to set aside specific areas within the zone for varying housing densities as well as other associated urban and tourist facilities.*

B The secondary objective is to allow a variety of housing types and designs and to encourage greater visual amenity by requiring site landscaping.

C The exception to these objectives is development of land within this zone for public works and services, outside the parameters specified in the primary objectives.

For completeness, we note the following additional provisions from the Ballina LEP.

First, the development that is permissible in the 2(a) Living Area zone (Clause 9, development control table):

4 Advertised development – only with development consent

Building identification signs; bulk stores; bus depots; bus stations; business identification signs; car repair stations; commercial premises; helipads; heliports; industries [other than home industries]; junk yards; liquid fuel depots; mineral sand mining; mines; motor showrooms; roadside stalls; shops; stock and sale yards; stock homes; transport terminals; warehouses

Second, the definition of shops in Clause 5 of the Ballina LEP (as adopted from the Model Provisions and incorporated into the Ballina LEP by Clause 6):

"shop" means a building or place 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 clause, a building or place used for a purpose elsewhere specifically defined in this clause.

Third, I note the definition of "general store" (again as adopted from the Model Provisions):

"general store" means a shop used for the sale by retail of general merchandise and which may include the facilities of a post office

To return to the Objectives, it is the opinion of McCartney Young Lawyers objective "C" is not relevant to the current development. Furthermore, McCartney Young Lawyers query Council's view that the development is thought to be inconsistent with a number of other Objectives specified in the 2(a) zone. For example Council is satisfied that the objective of "encouraging

greater visual amenity by requiring site landscaping" can be satisfied by the development [Objective B).

It is only Objective "A(b)" that is said by Council to be problematic; and that Objective "A(b)" is only problematic in circumstances where Council seeks to exclude a "shop" from the type of development which is "an essential land use within the urban living area".

The position is further complicated by the fact that the Objectives of the zone, in so far as development for the purposes of a shop is said to be incompatible with Objective A(b), is development that is permissible in the zone for that very purpose.

Consistency with Zone Objectives

There are a number of planning arguments in support of the proposition that the development is consistent with the Objectives of the zone, including Objective "A(b)".

- The West Ballina locality fronting the Pacific Highway comprises a mix of tourism, motor retailing, retail premises and trade orientated developments and in this context, the proposal is considered to be a compatible use when regard is made to the scale, type and traffic generation of adjoining land uses fronting the Pacific Highway.
- The character of the locality has been established through the existing land uses and associated built form fronting the Pacific Highway. It is recognised the 2(a) Living area zoned lands which front the Highway have a low and undesirable residential amenity due primarily to traffic noise, hence Council has historically approved a variety of commercial land uses which have therefore established both the land use and built form character for this precinct. It is submitted the proposed development is compatible with the built form and land uses which front the Pacific Highway.
- The nature of the tenancies are such that they require a larger area to handle the bulk supply or larger items which typically are not capable of being operated within a typical premises which exist in West Ballina Shopping Complex or the Ballina CBD.
- Residential development and associated population within West Ballina has increased since the introduction of the Ballina LEP 1987 and as a result increased demand for retail development which is accessible to the residents is considered to be a desired outcome. The development is considered to be ancillary to the surrounding residential area as evidenced in Council approving other commercial developments fronting the Pacific Highway between Horizon Drive and Barlow Lane.

In determining whether the development is consistent with the zone objectives, we highlight advice from McCartney Young Lawyers which states Council do not need to be satisfied that the development promotes the objectives of the zone: it need only be satisfied that the development is not antipathetic to the objectives of the zone (*Schaffer Corporation Ltd v Hawkesbury City Council* [1992] 77 LGRA 21 at 27).

It is further noted the Draft Comprehensive LEP provides for the adoption of the *BB Enterprise Zone* over the subject land extending to adjoining lands through to Barlow Lane. Council has identified a commercial/business context for this precinct which responds to both the current land uses and importantly the context in which the lands are located (i.e. highway frontage).

The Enterprise zone permits, inter alia, "shops" and larger box retailing (landscape & garden supplies; timber & building supplies) on the land and as such the strategic direction for land uses on the site is commensurate with the current planning proposal. The comprehensive LEP identifies "shops" as providing grocery, personal care products, clothing, music, homewares, stationary and electrical goods. It is noted the retail activities are not to impact the strength of existing centres by limiting retailing, however, it is noted the zone provides for an underlying commercial land use context and associated built form on the subject land.

Zone Objective Conclusion

The development is permissible

As a matter of construction of the Ballina LEP development for the purposes of a shop is permissible in the 2(a) zone. The Ballina LEP could have expressly – and only – permitted development for the purposes of a "general store" in the 2(a) zone but it has not been structured in this manner. The intention of the Ballina LEP must be to allow development for the purposes of a "shop" (as defined) so long as such development otherwise satisfies the Objectives of the zone.

Whether the development satisfies the objectives of the zone?

McCartney Young Lawyers have stated that the Objectives provisions of an LEP are the general provisions that apply to the consideration of development:

"The objectives specified for the various zones, including those specified for the residential 2 zone, are general provisions imposing general standards for appropriate development in the respective zones. The objectives for each zone provide the essential context, together with any applicable DCP, for the Council's consideration of every development application relating to land in that zone. More particularly, the objectives of the residential 2 zone and the DCP provide the essential context for the Council's consideration of every development application relating to land in the residential 2 zone."

(Manly Council v Hortis [2001] 113 LGERA 321 [2001] NSWCA 81 at para [29])

The general context of the objectives must be contrasted with the specific purposes for which consent can be granted. On that basis, the objectives of the 2(a) zone provide a context which has been addressed in both this letter and the Statement of Environmental Effects which demonstrate the suitability of the development when regard is made to the zone objectives.

2. Conservation of North Ocean Shores Inc. v Byron Shire Council & Ors [(2009) NSWLEC 69; (2009)]

We note Council's letter of 14 January 2010 raises for consideration the question of whether the proposed development is permissible having regard to the "Objectives" of the 2(a) Living Area zone. The author of Council's letter has made particular reference to the decision of Preston CJ in *Conservation of North Ocean Shores Inc. v Byron Shire Council & Ors [(2009) NSWLEC 69; (2009) 167 LGERA 52] (CONOS)*.

The decision reached by Preston CJ in *CONOS*, with respect to whether the proposed development was consistent with the objectives of the zone, was fundamentally founded on his Honour's conclusion that the development application sought consent for the purpose of a "place of assembly": the DA never sought development consent to construct or use roads and pedestrian paths for the *purpose* of roads, agriculture or any other purpose which was a permissible development in the 7(k) habitat zone (*CONOS*[63]).

It was not that the proposed works could not be consistent with the objectives of the zone; indeed the construction of roads, pedestrian paths and associated infrastructure in the 7(k) habitat zone is development that was permissible with consent. However Preston CJ found that consent for permissible development to carry out that work was not sought in the DA. In this regard the *development* (place of assembly) could never have been consistent with the objectives of the zone because the development for which consent was sought was prohibited in that zone.

These issues do not arise in this development application. The development for which consent is sought – a shop – is permissible in the 2(a) Living Area zone. The current proposal is not determined on the basis of whether the development for which consent is sought has been correctly identified in the DA. Nor is the matter determined on the basis of whether it is characterised in a particular way. This matter seeks consent for a shop (a particular type of shop) and that development is permissible in the zone.

3. Address Clause 9(4)

Comments addressing Clause 9(4) of the Ballina LEP are provide for Council below,

(4) A development application to carry out development (not being designated development referred to in subclause (2) (c) shall be accompanied by an environmental impact report which contains:

(a) a full description of the development proposed by the development application,

COMMENT: This is contained within Section 3 of the Statement of Environmental Effects prepared by Newton Denny Chapelle dated October 2009

(b) a statement of the objectives of the proposed development, and how those objectives relate to the objectives of the zone,

COMMENT: Reference should be made to the comments provided within Section 1 of this letter.

(c) a full description of the existing environment likely to be affected by the proposed development, if carried out,

(d) identification and analysis of the likely environmental interactions between the proposed development and the environment,

(e) analysis of the likely environmental impact or consequences of carrying out the proposed development,

COMMENT: The development is proposed upon land significantly disturbed through the previous land uses for a motel and the associated demolition of the buildings in association with the subsequent approvals for a residential flat development and motor showroom.

Accordingly, there are no environmental impacts associated with natural features on the land.

The development is adjoined by commercial development to the west, commercial caravan park to the east and residential development to the north. It is therefore pertinent for the development to have regard to its integration with the northern residential dwellings and the permanent caravan park residents which abut the eastern boundary. Section 3 of this letter addresses this matter in greater detail with respect to shadow diagrams and available solar access, whilst an addendum noise impact assessment will be lodged with Council under separate cover by the applicant..

(f) justification of the proposed development in terms of environmental, economic and social considerations,

COMMENT: The development may be justified in the following ways.

- *Environmental.* The development provides for improved stormwater management from the land than currently exists, introduction of planted areas which improves the landscape attributes of the development. Reference should be made to Attachment 1 of the Statement of Environmental Effects prepared by Newton Denny Chapelle dated October 2009.

- *Economic:* The development provides benefits both during the construction stage and operational stages of the development and associated land use. The land is currently vacant and as such provides no current stimulus to the local economy. By approving the proposal, the development will provide greater opportunities for retailing of larger items that is not currently available within the current commercial areas of West Ballina, strengthens the role of Ballina as the retail centre of the North Coast; maintains the retail hierarchy of both the Kerr Street and River Street commercial precincts which are unable to provide this form of retail activity.
- *Social:* The development will provide for the adaptive re-use of a vacant site at the gateway of Ballina. This will assist in revitalising the urban form of West Ballina with greater accessibility to retail and food premises to local residents.

(g) measures to be taken in conjunction with the proposed development to protect the environment and an assessment of the likely effectiveness of those measures,

COMMENT: Reference should be made to Attachments 1 & 2 of Statement of Environmental Effects prepared by Newton Denny Chapelle dated October 2009 which address, stormwater management and noise impact ameliorative measures.

(h) any feasible alternatives to the carrying out of the proposed development and reasons for choosing the latter, and

COMMENT: Reference is made to the Draft Comprehensive LEP which nominates permissible land uses allowing land uses which permit retail transactions, however which do not impact the retail hierarchy. To this end, based on the nominated permissible land uses, synergies exist with the current proposal as a development of a larger single tenant for hardware supplies or white goods is identified as a permissible land use as no land currently exists within the B3 Commercial Core area to develop such a facility and as such given this form of retail activity is prohibited in the IN1 General Industrial Zone under the Comprehensive LEP, we submit the development will not impact upon the retail hierarchy of the two primary retail areas in Kerr Street and River Street, whilst consolidating the West Ballina locality.

(i) consequences of not carrying out the proposed development.

COMMENT: The no-go option of not proposing the development will result in the land being vacant until the comprehensive LEP is gazetted whereby retail land uses for general goods and hardware premises may be developed upon the land. We note the current GFA could be proposed and as such the no-go option does not provide any benefits as the employment opportunities and greater accessibility to larger item retailing will have been unreasonably deferred.

3. Amenity Impact

The project architect has modified the proposed built form to provide greater relief to the northern and eastern neighbours. Reference is to be made to Plans 200917 which illustrates both the amended design and associated shadow diagrams.

The modified layout of the eastern building provides an increased setback of 2.5 metres for the north-eastern portion of the site, whilst the northern elevation has been recessed 2.5 metres.

The increased setback and lowering of the built form on the interface with the adjoining neighbours provides significant relief to the adjoining properties with respect to the dominance of the built form and importantly on the ability to receive sufficient solar access within both their place of primary residence and the associated private open space.

The plans provided by the project architect detail the overshadowing for both the current 5.7 metre wall and a reduced wall height of 3 metres. A comparison of the two plans details the existing 5.7 metre wall achieves an acceptable level of solar access and that the reduction in wall height to 3 metres achieves only a minor improvement to the eastern neighbours. Given the orientation of the site and proposed building alignment the proponent seeks Council's acceptance of the current wall height at 5.7 metres.

We trust this letter adequately addresses Council's query in regard to safety, security and crime prevention for the proposed development. Should Council have any questions regarding the contents of this letter, please do not hesitate to contact me on (02) 6622 1011.

Yours sincerely,

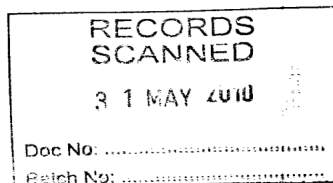
DAMIAN CHAPELLE

A handwritten signature in black ink that reads "Dai Chapelle". The signature is written in a cursive, slightly slanted style.

Town Planner, BTP CPP.

Contact Cecilia Rose
Direct 02 8223 4175
Email cecilia.rose@maddocks.com.au
Partner Stan Kondilios
Our Ref SXK.CYR:5688675
Your Ref DA 2010/216

27/05/2010



Maddocks

Lawyers
Level 21, Angel Place
123 Pitt Street
Sydney New South Wales 2000 Australia
GPO Box 1692
Sydney New South Wales 2001

Telephone 61 2 8223 4100
Facsimile 61 2 9221 0872

info@maddocks.com.au
www.maddocks.com.au

DX 10284 Sydney Stock Exchange

By Email And Post

Andrew Smith / Rod Willis
Development Services Manager / Group Manager Regulatory Services
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Dear Andrew and Rod

Advice regarding permissibility of a shop
Property: Lot 117 DP 857966, Pacific Highway, West Ballina
DA 2010/216

1. Council has requested advice "with regard to the relevant test or criteria in law assessing whether a proposal is 'consistent' with zone objectives in the context of clause 9(7) of the BLEP. Is it relevant to consider surrounding land uses in the locality of the development site in assessing consistency with objectives?"
2. We set out below our advice in this regard.

Summary of Advice

3. We have summarised below for ease of reference the conclusions of our advice. The detailed information upon which we rely to provide Council with this advice, and the reasoning leading to these conclusions, is set out in detail following our summary below.
 - The development application must be characterised as a "shop" for the purposes of the *Ballina Local Environmental Plan*, and not as a "bulky goods retailer" or as a "general store";
 - The development is permissible within the 2(a) – Living Area Zone;
 - The 'test' for "consistency" with the objectives of a zone is that the proposal is not "antipathetic" to the objectives, and that the objectives provide an "essential context" for the assessment of a proposal;
 - It is usually not relevant to consider surrounding land uses when assessing a proposal's consistency or otherwise against the objectives of a zone;
 - The development application cannot be considered as consistent with objective 1A(b) of the 2(a) – Living Area Zone, given the words "but not a shop (other than a general store)".

Maddocks | Celebrating 125 Years in 2010
[5688675: 7110277_1]

Interstate office
Melbourne
Affiliated offices around the world through the
Advoc Asia network - www.advocasia.com

Background and Information Provided

4. Council has provided us with the following documentation for the purposes of the preparation of this advice:
 - (a) Development Application Form for DA 2010/216;
 - (b) Plans and Elevations;
 - (c) Aerial locality map;
 - (d) Email instructions from Lachlan Sims, Town planner dated 24 May 2010;
 - (e) Extract of Statement of Environmental Effects relating to "Development Proposal";
 - (f) Letter from Newton Denny Chapelle dated 19 November 2009, attaching advice prepared by McCartney Young Lawyers; and
 - (g) Letter from Newton Denny Chapelle dated 6 April 2010.
5. The development application seeks consent for a "retail development comprising 2833 m2 floor area, carparking for 81 cars, advertising signage, earthworks, stormwater management works, boundary fencing and landscaping" (see Development Application Form).
6. The proposed use of the building is described in the development application as "commercial retail". The development description in the Statement of Environmental Effects expands the proposal described in the development application form, stating the retail complex includes "two separate freestanding buildings containing four tenancy areas for bulky goods retail and food shop [Tenancy 1 – Bait & Tackle, Tenancy 2 – Food Premises]".
7. The land is located within the 2(a) – Living Area Zone pursuant to the *Ballina Local Environmental Plan 1987 (BLEP)*. The site is bounded by single dwelling residential allotments to the north, a caravan park to the east, a former service station development to the west and a local shopping complex to the south, which is zoned 3- Business.

Characterisation of the Development Application

8. The Development Application seeks consent for a retail development consisting of two separate buildings, comprising two bulky goods retail premises, a bait and tackle shop and a food and drink premises.
9. The BLEP by operation of clause 6 adopts the *Environmental Planning and Assessment Model Provisions 1980 (Model Provisions)* (with some exceptions which are not relevant for the purposes of this advice). The Model Provisions define "shop" as follows:

a building or place 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 clause, a building or place used for a purpose elsewhere specifically defined in this clause.
10. The Model Provisions define "general store" as follows:

a shop used for the sale by retail of general merchandise and which may include the facilities of a post office.
11. Neither the Model Provisions nor the BLEP define "bulky goods". "Bulky goods" is defined specifically in clause 27 of the BLEP for the purposes of that clause, Zone No 4 and the land

on the environment and justification for the proposal in terms of economic, environmental and social considerations. Advertised development appears to be development which, for the purposes of the BLEP, is considered to have greater impacts which require deeper consideration in terms of clause 9(4).

17. Development for the purposes of a "shop" is categorised as "Advertised" development in the zoning table for Zone 2(a) – Living Area Zone. Therefore, a "shop" is permissible in the zone. We have concluded that the Development Application is for the purpose of a "shop" and therefore the proposal is *permissible* in the zone.
18. Clause 9(7) of the BLEP operates to require Council to assess all proposed development against the objectives of the zone, and states Council shall not grant consent unless the proposed development is consistent with the objectives of the zone. We set out below a consideration of the case law and principles which may assist Council in assessing consistency with the zone objectives.

Assessing the Zone Objectives

19. Having determined that the proposal is a "shop" for the purposes of the BLEP, and that a "shop" is permissible in the 2(a) – Living Area Zone, Council must then turn to assessing the application against the objectives of the 2(a) – Living Area Zone, pursuant to clause 9(7) of the BLEP.
20. Council must assess the application against all of the relevant objectives in the zone. We are instructed the objective of concern to Council in this matter is objective 1A(b) which states:

to permit development which is considered by council to be an essential land use within the urban living area, but not including a shop (other than a general store),...
21. The words of most concern are "*but not including a shop (other than a general store)*".
22. There is some guidance provided in case law as to how to interpret "consistency" with zone objectives. Her Honour Justice Pearlman provided the following statement in *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 (at 27) which is the most consistently referred to authority: "The guiding principle, then, is that a development will be generally consistent with the objectives if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible."
23. Some further discussion regarding the application of objectives in the zone is provided in *Manly Council v Hortis* (2001) 113 LGERA 321 at [29] which states: "The objectives for each zone provide the essential context, together with any applicable DCP, for the Council's consideration of every development application relating to land in that zone."
24. In general terms, this means that the development proposal when assessed against the zone objectives must not result in a development that is opposed in nature to the zone objectives, and is consistent with the 'essential context' which is set out by the objectives.
25. In the circumstances of this case, the relevant zone objective refers to development which is an essential land use within the urban living area, *but not including a shop (other than a general store)*. The Applicant has provided legal advice and town planning advice which assesses the application against this objective. The legal advice to the Applicant concludes that the development application is consistent with the relevant zone objective 1A(b). We concur with the assessment that the proposal is capable with consistency with the first part of the zone objective – "to permit development which is considered by council to be an essential land use within the urban living area", however there has not been a careful

