

While the photographs in Annexure B do not show all of the goods being retailed, the goods shown are nonetheless representative of the size of goods throughout the premises. Virtually the entire range of goods might be described as small portable goods.

The bulkiest good being retailed appeared to comprise a couple of sets of crutches located in the back right corner of the premises (see Photograph 2 in Annexure B). The next bulkiest goods were packets of nappies (measuring some 60cm x 30cm x 30cm); toilet rolls (measuring some 40cm x 30cm x 30cm) and vaporizers (in boxes) of a similar size to the toilet rolls. I do not however consider these latter goods as 'bulky' goods.

It is prudent to note the small handheld red shopping baskets available for use by customers and which are shown in Photograph 3 (Annexure B); and, that no shopping trolleys or the like are available for use by patrons. I think this is reflective of the small portable nature of almost all of the goods retailed from the premises.

Goods Categories (floor area)

As previously stated in *Types of Goods Sold*, I think the only "bulky" good retailed from the premises are crutches, as shown in Photograph 1 of Annexure B. This product appeared to occupy a small area of the premises (back right corner alongside the Pharmacy), and measured some 1m in width by 1.5m long. I think therefore that only some 3m² of the premises contains "bulky" goods (this area does not comprise shelving as such, with goods hanging vertically). If the premises are approximately 646m² in area, then this represents less than 1% of its overall floor area.

Goods Categories (linear shelving)

The premises contain 4 rows of shelves approximately 22m in length (all 1m wide) creating 5 aisles. Each row has approximately 6 shelves, creating approximately 528m² in shelving area.

Both sides of the premises are also used for retailing (approximately 0.3m wide and of total length 70m; I have used a figure of 5 shelves for both sides). This creates approximately 105m² in shelving area.

The Pharmacy contains approximately 105m² in shelving area.

None of the above figures include freestanding goods arrangements (see for example Photograph 4 in Annexure B), or goods displayed from either counter (see for example Photograph 4 in Annexure B).

The overall total of shelving is approximately 738m².

I have estimated the "bulky" goods component, in terms of shelving, as 3m². This 3m² represents less than 1% of shelving devoted to what I would call "bulky" goods.

The Pharmacy

A photograph of the Pharmacy (Photograph 1) is included in Annexure B. It comprises a long counter behind which staff and pharmaceutical goods are located. Customers line up at this counter to be served, and a small seating area is located at the end of Aisle 5 where customers can take a seat while waiting for prescriptions to be attended to.

Goods Purchased

I purchased a number of goods from the premises, and these are shown in **Photograph 8** in **Annexure C**. They include:

- > Allens Kool Mints (Entry/Foyer)
- > Oral B Toothbrush
- > Sapoderm Medium Soap Pack
- > Kleenex Tissues (Entry/Foyer)
- > Tea Tree Conditioner

A copy of the receipt for these goods is included in **Annexure C**.

I also had a prescription attended to at the pharmacy, purchasing a packet of Cefalexin Sandoz. This is shown in **Photograph 9** in **Annexure C**. A copy of the receipt for this good is included in **Annexure C**.

Town Planning

I have not as yet been able to obtain any development consent notices for the site; gaining access to such documents can unfortunately take some time.

The site is nonetheless zoned 3B Business City Support under the City of Coffs Harbour Local Environmental Plan 2000 (LEP 2000).

Within the 3B Business zone, *"shops (only in areas defined in Schedule 3)"* are permissible with consent, as are *"bulky goods salesrooms"*.

A *"shop"* is defined as:

"a building or place used for the purpose of selling, whether by retail or auction, or for the hiring or display for the purpose of selling or hiring, of items (whether goods or materials), but in the Table to clause 9 does not include a building or place elsewhere defined in this Dictionary."

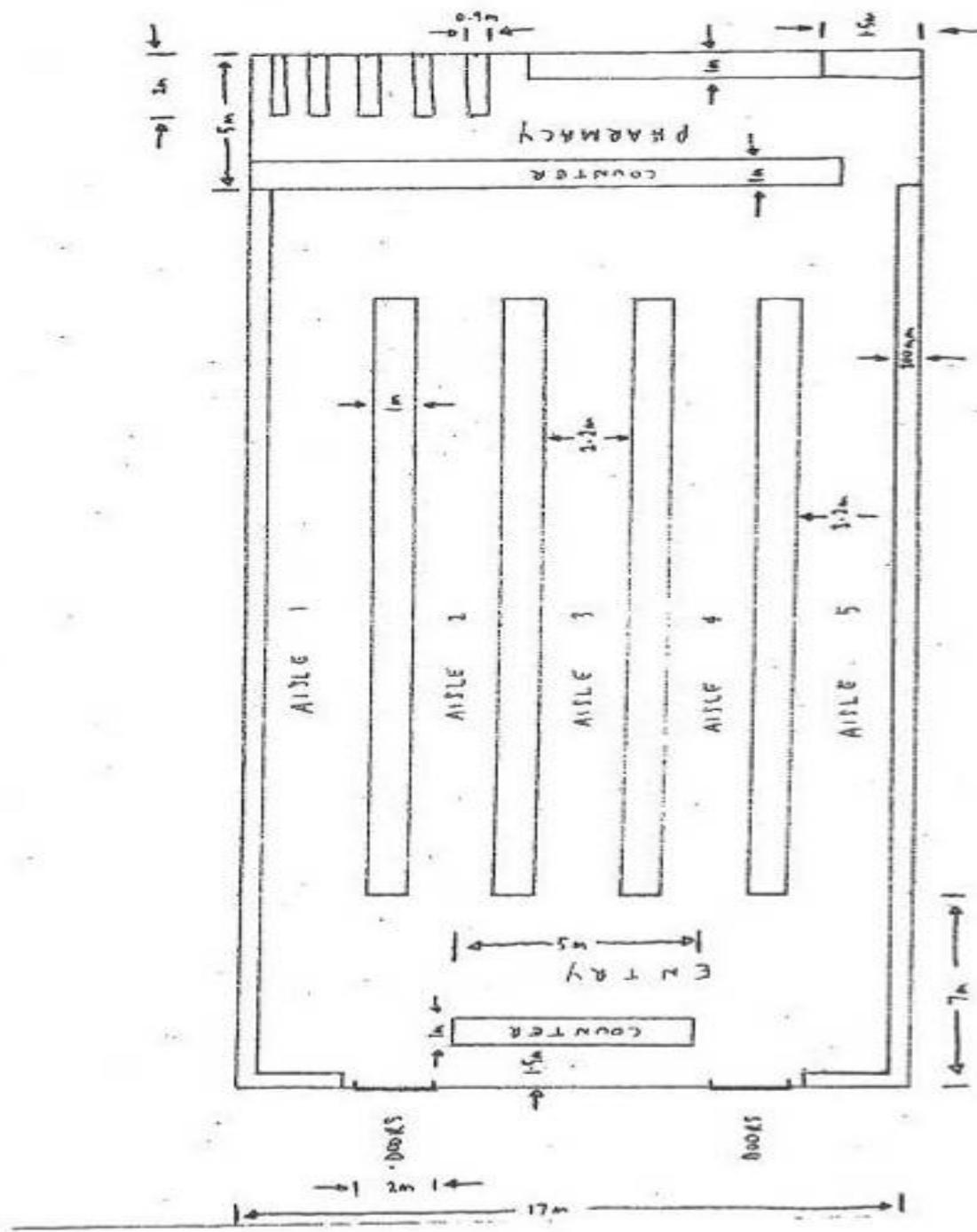
A *"bulky goods salesroom"* is defined as:

"a building or place used for the sale by retail or auction, or the hire or display, of items (whether goods or materials) which, in the opinion of the Council, are of such a size, shape or weight as to require:

- (a) a large area for handling, storage or display, and*
 - (b) direct vehicular access to the site of the building or place by members of the public, for the purpose of loading items into or onto their vehicles after purchase,*
- but does not include a building or place used for the sale of foodstuffs, clothing or petrol."*

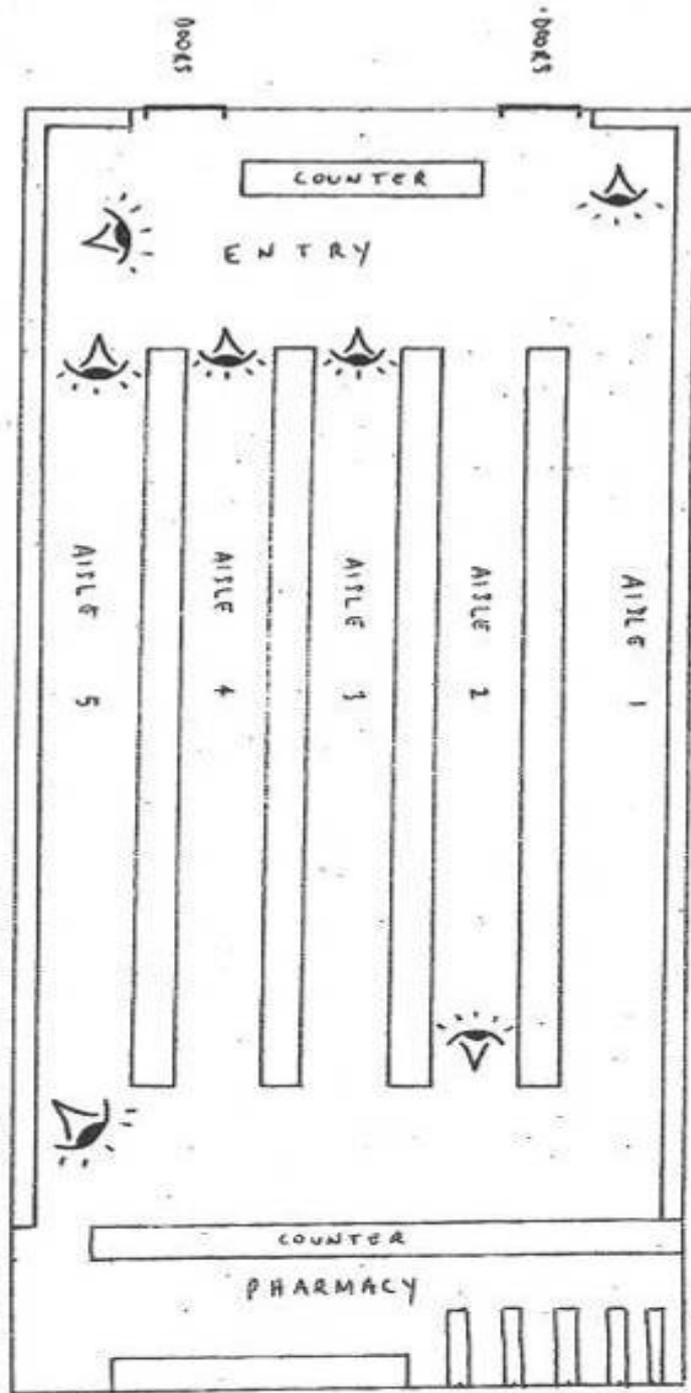
The premises are depicted in Schedule 3 of LEP 2000.

Annexure A



Annexure B

 = PHOTOGRAPH



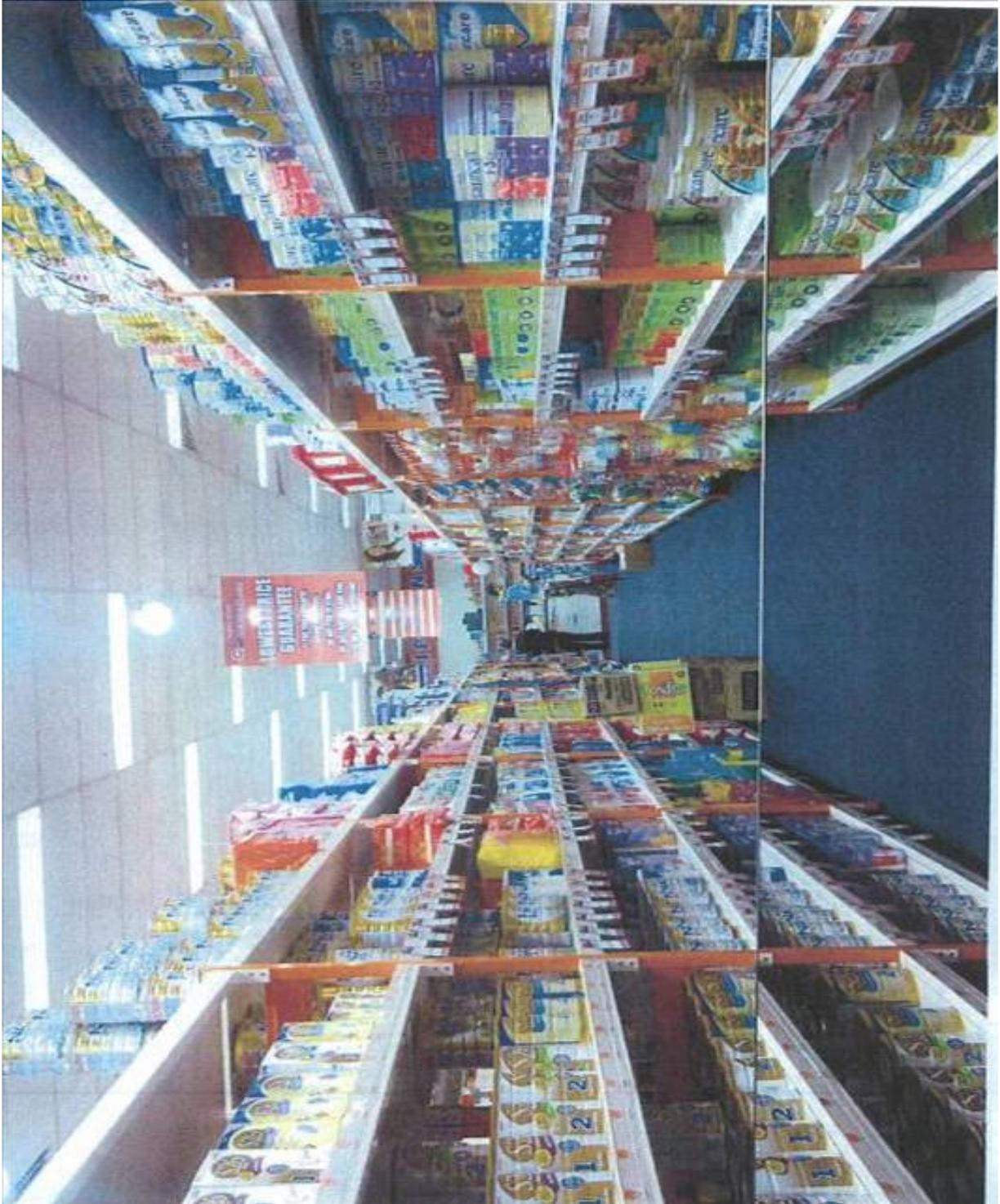














Annexure C



Original Tax Invoice
GOOD PRICE PHARMACY
150 PACIFIC HIGHWAY
COFFS HARBOUR NSW
Phone: 02 6651 1800
ABN 80136771652
Unit Name: TILL4

1 *ALLENS KOOL MINTS 150G	\$2.49
1 *ORAL B T/B STAGE 2 2 4YRS	\$3.49
1 *SAPODERM MED SOAP PACK 3X	\$4.99
1 *KLHX F/TIS X/C ALOE 95	\$1.99
1 *THP TEA TREE COND 200ML	\$4.49

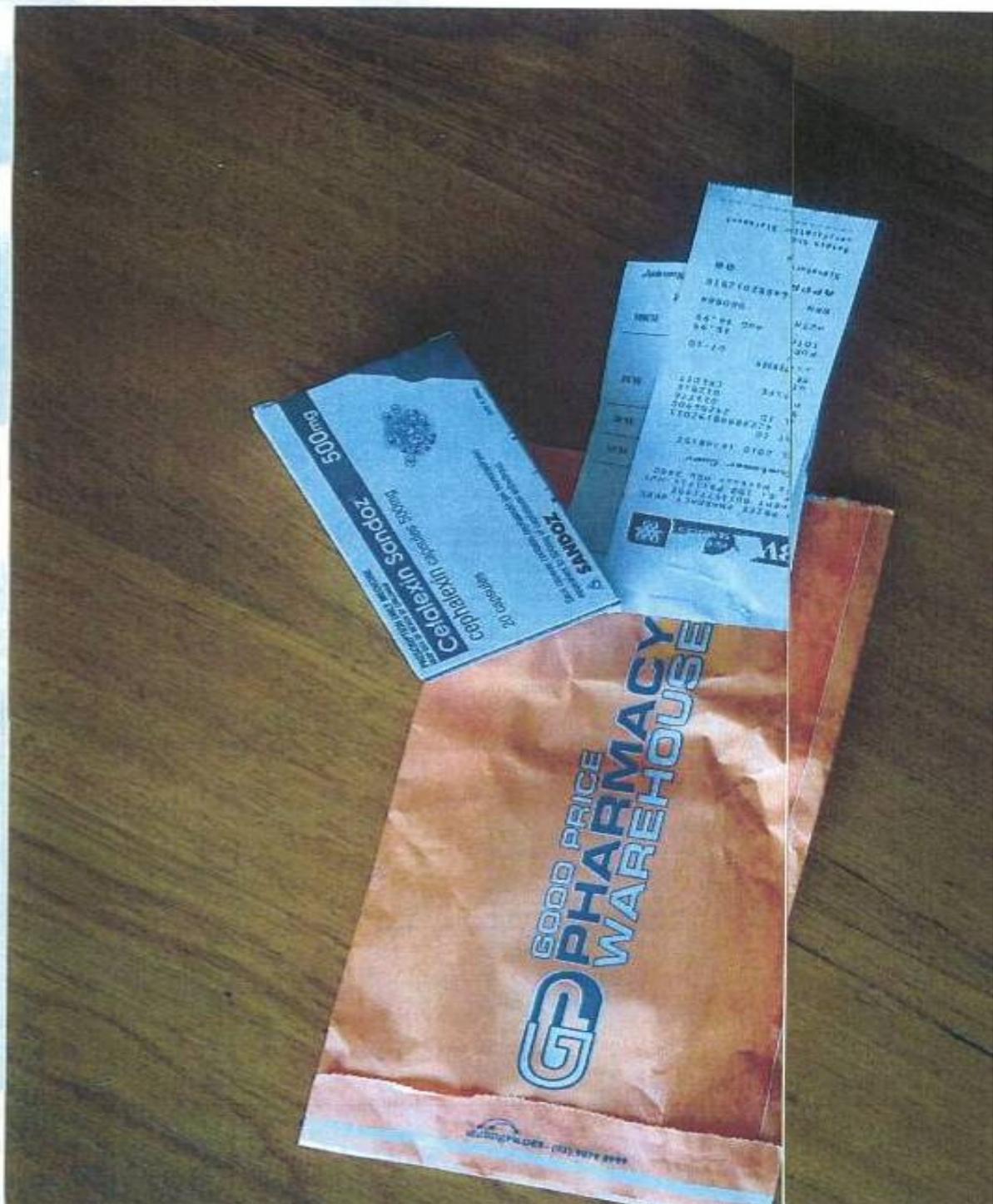
TOTAL	\$17.15
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Cash	\$20.00
Change	\$2.85
Total includes GST of	\$1.56

Served by Carol

15 Jul 2010 18:04	750490
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Please note all goods purchased must
be returned within 7 days to be
eligible for refund or exchange *conditions apply*



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Our Ref: SWH:BO:10248
Your Ref:
Mr R Thornton

28 July 2010

The General Manager
Ballina Shire Council
Regulatory Services

**RECORDS
SCANNED**

29 JUL 2010

Doc No:.....
Batch No:.....

BY HAND

Dear General Manager,

Re: Vanarey And Ors
Objection to Development Application by Ardill Payne & Partners on behalf of
Good Price Pharmacy Warehouse Pty Ltd
Development Application No 2010/628

We act for Mr B Vanarey and others.

Our clients object to the approval by the Council of the Development Application.

We enclose by way of submission:

1. Advice of Mr T Roberston SC dated 27 July 2010;
2. Planning Report by Trevor R Howse & Associates re McGraths Hill Good Price Pharmacy;
3. Planning Report by Peterson Consulting Group re Coffs Harbour Pharmacy;
4. Planning Report by Wakefield Planning re Armidale Good Price Pharmacy.

We look forward to hearing from you.

Yours faithfully

BAKER MANNERING & HART

Per: 
STEPHEN W HART
Encl

F:\Precedents\20D\Psate & Ors 10248\Correspondence\Ltr 10072801.doc

**VANAREY & ORS AND BALLINA SHIRE COUNCIL – OBJECTION TO
DEVELOPMENT BY ARDILL PAYNE & PARTNERS ON BEHALF OF GOOD
PRICE PHARMACY WAREHOUSE PTY LTD**

MEMORANDUM OF ADVICE

A. INTRODUCTION

1. On 17 May 2010, Ardill Payne & Partners lodged a DA with Ballina Shire Council ("the Council") for the use of premises at the corner of Stinson Street and Boeing Avenue, Ballina:

"... for bulky goods retail and wholesale showroom/warehouse".

It will be necessary to examine the proposed use in greater detail later in this advice. Landowner's consent to lodgment of the DA was given by Council. The DA was accompanied by a Statement of Environmental Effects ("SEE").

2. I am asked to advise whether it is open to Council to grant consent to the DA, and if consent is granted, whether it is likely that the Land and Environment Court would set aside the consent in judicial review proceedings. I am firmly of the view that it is not open to Council to grant consent to the DA, and that any decision to the contrary would, if challenged, be set aside by the Court. Whatever the position may be in other States, the proper approach to bulky goods uses and warehouse style retailing is well-established in New South Wales by decisions of the Land and Environment Court and the Court of Appeal in a succession of cases. This DA flies in the face of those decisions.

B. ZONING AND PERMISSIBILITY

3. The subject land is in Council's industrial zone 4. Clause 9(7) provides:

"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 carrying out of development is consistent with the objectives of the zone within which the development is proposed to be carried out."

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The objectives of zone 4 are:

A. The primary objectives are:

- (a) to regulate the subdivision and use of land to permit its use for industrial purposes and other uses specified in clause 27 and Schedule 3,*
- (b) to allow detailed provision to be made, by means of a development control plan, to set aside specific areas within the zone for different industry types and intensities of development, and*
- (c) to ensure industrial development creates areas which are pleasant to work in, safe and efficient in terms of transportation, land utilization and service distribution.*

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

4. The development is permissible in zone 4, but before Council has power to consent to a DA the proposed development must be consistent with the objectives of the zone. Consistency with the objectives is a condition precedent to the existence of Council's power to grant consent, and compliance with it is a jurisdictional fact. It does not depend upon Council's opinion: *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 378 (*Warehouse Group* (2005 CA)) at [6] per Handley JA. Despite the apparent width of the table of permissible uses, the objectives significantly narrow the uses which would lawfully be approved by Council within the industrial zone. The use must be for industrial purposes, or a use specified in cl.27 and Sch 3 (objective A) or an infrastructure purpose (objective B). The proposed use is neither industry nor infrastructure, so it must fall within cl.27 or Sch 3. If it is necessarily outside the uses so described, Council has no power to grant consent.
5. Clause 27 provides:

"27 Retailing of bulky good within Zone No 4 and on land referred to in Schedule 4

- (1) *This clause applies to land within Zone No 4 and land referred to in Schedule 4.*
 - (2) *In this clause, **bulky goods** means large goods which are, in the opinion of the council, of such a size and shape as to require:*
 - (a) *a large area for handling, storage or display, and*
 - (b) *easy and direct vehicular access to enable the goods to be collected by customers after sale.*
 - (3) *Subject to subclauses (4) and (5), nothing in this plan shall prevent a person, with the consent of the council, from carrying out development for the purposes of the retail sale of bulky goods on land to which this clause applies.*
 - (4) *The council shall not consent to an application to carry out development referred to in subclause (3) unless it is satisfied that:*
 - (a) *suitable land for the development is not available in any nearby business centre,*
 - (b) *to grant consent would not, by reason of the number of retail outlets which exist or are proposed on land within Zone No 4, alter the predominantly industrial nature of the zone, and*
 - (c) *the proposed development will not detrimentally affect the viability of any business centre.*
 - (5) *This clause does not apply to development for the purposes of shops selling food or clothing or development for the purposes of produce stores."*
6. Before cl. 27 applies, the proposed development must be for the purposes of the retail sale of large goods which are, in Council's opinion, of such a size and shape as to require:
- a. a large area for handling, storage or display, and
 - b. easy and direct vehicular access to enable after sale collection.

Even if the proposed development meets those criteria, Council cannot consent to it unless it is satisfied that:

- (i) suitable land for the development is not available in any nearby business centre, and
- (ii) to grant consent would not alter the predominantly industrial nature of the zone, by reason of the number of existing and proposed retail outlets within the zone, and
- (iii) the proposed development will not detrimentally affect the viability of any business centre.

Council could not determine these questions without first examining the availability of alternative sites on land within nearby business centres, assessing existing and proposed retail outlets in the industrial zone and determining whether the predominantly industrial character of the zone would change, and undertaking a viability analysis of all business centres likely to be affected by the proposed development. If, for example, competing businesses are likely to lose custom (a foreseeable and perhaps inevitable consequence of a new entrant on land with lower psm rents), Council must address the question whether those competitors are likely to fail, and if so whether the viability of the centre where they carry on business will be detrimentally affected by their failure (eg by increased vacancies, lower rents, customer loss etc). The test is not whether the centre will fail but whether its viability would be detrimentally affected. In *Almona Pty Ltd v Newcastle City Council* [2005] NSWLEC 55, the Newcastle LEP prohibited retail development in an industrial zone unless it was "unlikely to prejudice the viability of existing commercial centres". Pearlman J said that the provision permitted:

"... only those developments which did not negatively affect the maintenance of the life or existence of existing commercial centres ... No higher threshold is required ... than that a development may disadvantageously or detrimentally affect the viability of existing ... centres ... that does not require ... [their] demise A proposed development is permissible if there is no real chance or possibility that it will disadvantage or detrimentally affect the life or existence of existing commercial centres ..."

This assessment calls for a detailed analysis of the kind considered in *Almona* that takes into account the expected turnover of the new entrant and compares it with the turnover of existing businesses, having regard to trade areas and total retail expenditures in the pharmaceuticals and chemist products trade. The DA is not accompanied by a retail study, and I am unaware of any study to the point conducted by or on behalf of Council. Without such an assessment, it would be difficult if not impossible for Council to have discharged its obligations under s.79C of the Act, were it to grant consent.

7. Schedule 3 provides:

Schedule 3

Newsagency.

Shops used for the sale of:

Hardware,

Medical and surgical supplies and equipment.

Smallgoods and sandwiches.

Other premises used for:

Banking facilities,

Brothels,

Accounting and computing facilities,

Refreshment rooms.

Any other use which closely resembles a use identified above.

Relevantly, the proposed development must be a shop used for the sale of medical and surgical supplies and equipment and any other use which closely resembles such uses to fall within Sch 3 and hence the objectives of the industrial zone. It is uncontroversial that the proposed use includes the display and sale of large items, such as wheelchairs, walkers and other equipment for adaptive living by persons with post-operative conditions or

disabilities. These are obviously a category of goods the sale of which is a separate use to the kind of general pharmaceuticals, hair care products, toothpastes, deodorants, food supplements and other health and beauty products which are sold by the proponent. These small consumer items could not conceivably fall within the description "medical and surgical supplies and equipment" or any like description. While prescription medicines or bandages might arguably be medical supplies (although I think that they are confined to the class of goods which would be required for the replenishment of "supplies" in the sense of a stock of goods which doctors, hospitals and nursing homes must have on hand for medical and surgical purposes), there is a whole range of other goods which have nothing in common with medication, but are sold by the proponent. What is proposed does not, in my opinion, fall within a Sch 3 shop.

C. DESCRIPTION OF USE

8. The development application was lodged on behalf on behalf of Good Price Pharmacy Warehouse Pty Ltd (SEE 1.5). The tenancy has a gross floor area of 790m². The description of the use was as follows:

"Similar type operations exist in bulky goods centres in:

...

- *Castle Hill NSW*
- *McGraths Hill NSW*
- *Tamworth NSW*

...

Outlets are situated in both rural and metropolitan areas. These operations require large floor areas ranging in size from 500-1,000m² with convenient access to loading facilities. These type of operations are also often referred to as 'large format retail chemist premises'.

The proposed operations will offer a unique range of products and services not ordinarily offered by traditional pharmacies. Many of these products and services are sold in bulk and/or require large storage, handling and display areas. Traditional

pharmacies are generally small in size and do not offer the physical and spatial attributes required.

The proposed operation will offer a broad range of products and specialist services, many of which are specifically designed and tailored for the aging and disabled population. A large proportion of these products and services are not available in traditional pharmacies.

The proposed outlet will offer the following services and products:

- Display and sale by retail and wholesale of bulky goods consisting of home health care and sports equipment, medical and invalid aids, home care equipment and ancillary health care products – due to the provision of a large amount of floor stock, customers are also able to trial such equipment in the store under the supervision of trained staff.*
- Warehousing of pharmaceutical and cosmetic products.*
- Dispensing of Pharmaceutical Benefits Scheme ("PBS") prescriptions and ancillary products.*
- Sale of traditional pharmaceutical and related products.*
- On-line ordering ... of all of the above products and picking, packing and distribution of such to customers (public and trade).*

A large proportion of the health, sports, invalid and medical aids and home care equipment that are kept and displayed in the tenancy (being 'kept on the floor') comprise large and bulky items such as:

Wheelchairs

Walking frames

Commodes

Exercise bikes

Walking machines

Gofers

Easy lift lounge chairs

Treadmills, etc

These products are all large and bulky and require large floor areas for display. The existence of a broad range of these products "on the floor" also provides people with the ability to trial/test such within the store prior to purchase under the supervision of trained staff."

9. Several statements in this passage are incorrect and others such as "ancillary health care products", "cosmetics products", "dispensing of ... ancillary products" and "sale of related products" are imprecise, perhaps deliberately so in light of the evidence of retailing at "similar type operations ... in bulky goods centres in Castle Hill, McGraths Hill and Tamworth", as our analysis of the operation of those stores reveals.

D. COMPARABLE GOOD PRICE PHARMACY OPERATIONS

10. I have been briefed with a report by Trevor R Howse & Associates Pty Ltd which describes the operations of the Good Price Pharmacy at McGraths Hill. The Good Price Pharmacy at McGraths Hill does not display or sell bulky goods. It sells medicines, health products, vitamins, skin care products, cosmetics and toiletries. Figure 4 of the Howse report shows the wide range of small consumer items of display for sale at the pharmacy. The pharmacy is not permissible at McGraths Hill because it is a bulky goods warehouse. On the contrary, its development consent is for use of its premises as a chemist, and it is permissible pursuant to cl.51 of the Hawkesbury LEP 1989 which permits chemist shops within the 4(b) industrial zone.
11. The next property cited as comparable is the Good Price Pharmacy at the Bailey Centre, Coffs Harbour. The Petersen Consulting Group has inspected the store. It estimates that less than 1% of the premises accommodates "bulky" goods. Almost the entire range of goods are small consumer items of the kind available from pharmacies, convenience stores and discount department stores. The site is zoned 3B Business City Support in the City of Coffs Harbour LEP 2000. In that zone, shops in areas defined in Sch 3 to the LEP are permissible. The subject land is within Sch 3. As the pharmacy does not sell bulky goods, it must rely for permissibility upon

its character as a shop. The layout of the store, together with the photographs of the shelves, closely resemble the internal layout and goods displayed for sale in the McGraths Hill Good Price Pharmacy.

12. Wakefield Planning has investigated the Good Price Pharmacy Warehouse at Armidale. This was not one of the cited pharmacies said to be comparable to the subject development in the SEE. However, it is branded as a Good Price Pharmacy Warehouse, which is how the SEE describes the subject development. Once again, the internal layout and the range of goods displayed for sale closely follows the other stores. Wakefield reports that there are no goods that could be described as bulky goods in the display areas. The range of goods are those which are ordinarily sold in convenience stores, discount department stores and pharmacies. The store is not located in a bulky goods zone but in zone 3 (business) in the Armidale LEP 1988. It was permissible as complying development because it is classified as a shop.
13. Finally, I have made direct inquiries in relation to the Good Price Pharmacy which is located in a shop unit in the Tamworth Homespace Centre at the corner of the New England Highway and Greg Norman Drive, Tamworth. Under the draft Tamworth LEP, which is about to be made, this site will be zoned mixed use B4. That is not a bulky goods zone but permits a wide variety of uses including general retailing. The existing business and industrial zones in the Tamworth LEP permit shops serving local needs.
14. The Good Price Pharmacy Warehouse website depicts its stores where goods are displayed, notes "this month's specials" and includes a catalogue of its goods. There is nothing on the website to suggest that it sells bulky goods. It describes its operations as:

"One of Australia's leading retailers in health, beauty and medicinal products. Each store carries all of your favourite brand names in vitamins, skin care, hair care, sun care, cosmetics, perfumes, prescriptions and medicines all at everyday low prices."

It claims that its brand "is constantly evolving to find better ways of delivering health, beauty and medicinal products and services to all our valued customers". By clicking through the highlighted items, it also appears that the Warehouse sells toiletries, pet care products, greeting cards, stationery and baby products, including foods, nappies, clothes and so on.

15. The photographs of the Pharmacy Warehouses show that, as the investigation of the New South Wales Pharmacy Warehouses confirm, each pharmacy is branded and designed in the same way. There are four or five bays which are stacked with small consumer items. The linear metres of shelving far exceed any area in which bulky goods could be displayed. There is a pharmacy at the rear of each store where PBS and prescription medicines are dispensed. No doubt the pharmacy section is staffed by a properly qualified chemist. Otherwise, the shop is designed as warehouse retailing where thousands of different items are crammed on high shelves with a view to volume retailing of low cost products.

E. WAREHOUSE RETAILING IN NSW

16. For some years in New South Wales the dominant warehouse retailer was The Warehouse Group. Despite devoting a substantial part of its floor space to bulky goods, The Warehouse group was restrained from selling ranges of small consumer items on sites in industrial zones where bulky goods retailing was permissible but shops were otherwise prohibited: *Woolworths Ltd v Warehouse Group (Australia) Pty Ltd* (2003) 123 LGERA 341 (*Warehouse Group* (2003 LEC)); *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2003) 137 LGERA 115 (*Warehouse Group* (2003 CA)); *Woolworths Ltd v The Warehouse Group (Australia) Pty Ltd* [2003] NSWLEC 350; *Woolworths Ltd v The Warehouse Group (Australia) Pty Ltd* [2004] NSWLEC 698; *Warehouse Group* (2005 CA).
17. Unlike other States, the introduction of warehouse retailing into New South Wales did not lead to any change in the interpretation of permissible uses within industrial zones, and this form of retailing has not led to any significant change to the policies which have been adopted in regional and district

centres throughout New South Wales to strengthen centres and discourage out-of-centre retailing: see cl.39(a), cl.47(1)(a), North Coast Regional Environmental Plan 1988 (now a SEPP).

18. In attachment 5 to the SEE, Mr Curtis discusses the evolution of what he calls "discount pharmacy warehouses". He observes:

"There have been some difficulties at town planning levels where the relevant planning schemes do not contain updated revisions or amendments to accommodate a particular classification for the emergence of the now common 'discount pharmacy warehouse' concept" (para 5.00).

He describes these warehouses as "providing the public with access to the widest possible range of pharmaceutical and health care products and services at the lowest possible prices 'under one roof' [where] traditional shopping centres were unsuitable, particularly in regard to size of available premises, high occupancy costs defeating the low cost objective and the difficulties associated with the multi-operational uses of the businesses if located in shopping centres" (p.3). In other words, a discount pharmacy warehouse retailed a wide range of "health care" products at low cost but could only survive by avoiding traditional shopping centres and therefore by establishing out of centre retailing in industrial zones. That is precisely what the centre policies that have been adopted throughout New South Wales are designed to avoid. The argument that economic benefit to traders should trump planning laws was rejected by the Court of Appeal in *Gazcorp Pty Ltd v Westfield Management Pty Ltd* [2004] NSWCA 63 when it closed down what was described as a "warehouse clearance outlet" comprising 63 tenancies in a bulky goods industrial zone (which had been opened with champagne and cake by the Minister for Planning):

"His Honour ... [was] rightly mindful that planning control depends on the orderly enforcement of the planning law and that economic benefit cannot be allowed to prevail over planning control" [26].

In *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2003) 137 LGRA 115, the Court of Appeal described the kind of out of centre retailing which the proponent in this case seeks to achieve as:

"... contrary to the obvious policy of the zoning, which was to keep out of industrial areas businesses of this kind, which were appropriate to ordinary shopping centres" [41].

19. Mr Curtis relies on three cases in Victoria where planning permits have been granted for chemist warehouses. That is interesting, but irrelevant. The planning schemes are different and *The Warehouse Group* decisions reject the proposition that "warehouse retailing" is permissible in a zone permitting bulky goods retailing.
20. This is the nub of the problem. There is no doubt that a substantial part of the use to which these premises are proposed to be put will involve the retail sale of non-bulky items, which could not be described as medical and surgical supplies and equipment, nor as ancillary to them. This kind of equipment and supplies are listed and depicted in photographs in the SEE. I defy anyone to construct an argument that this week's specials at the Good Price Pharmacy Warehouse of Radiant laundry powder 650gms, Cussons pure hand wash 250ml and Treasures Giggles nappies crawler 20 toddler 16 and walker 14 pack are ancillary to wheelchairs, walkers and treadmills. The proposition invites derision

F. SEE'S DISCUSSION OF PERMISSIBILITY

21. The SEE argues that the development is permissible as the use of the warehouse format (the storage and sale of goods in bulk) is bulky goods retailing, or else the display of a few bulk items (wheelchairs, treadmills etc) using a large floor area subsumes the use of the premises as a pharmacy and for the sale of thousands of small consumer items. Each argument deployed by the SEE has been rejected by the Courts or is predicated upon facts that are contrary to the description of the use in the SEE.