



## Land and Environment Court of New South Wales

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**CITATION :** **Warnes v Muswellbrook Shire Council [2009] NSWLEC 1284**

**PARTIES :** **APPLICANT**  
G Warnes

**RESPONDENT**  
Muswellbrook Shire Council

**FILE NUMBER(S) :** 11287 of 2008

**CORAM:** Moore SC

**KEY ISSUES:** CONSTRUCTION AND INTERPRETATION -  
DEVELOPMENT APPLICATION :-  
Characterisation of development  
Consistency with zone objectives

**LEGISLATION CITED:** Environmental Planning and Assessment Act 1979  
Protection of the Environment Operations Act 1997  
Muswellbrook Local Environmental Plan 1985  
Muswellbrook Local Environmental Plan 2009

**CASES CITED:** Moore v Corowa Council [2009] NSWLEC 59  
Jambrecina v Blacktown City Council [2009] NSWCA 228

**DATES OF HEARING:** 23, 24 and 25 June and 23 July 2009

**DATE OF JUDGMENT:** 26 August 2009

**LEGAL REPRESENTATIVES:** **APPLICANT**  
Mr P Clay, barrister  
**INSTRUCTED BY**  
Thompson Norrie

**RESPONDENT**  
Mr A McKelvey, solicitor  
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**JUDGMENT:****THE LAND AND  
ENVIRONMENT COURT  
OF NEW SOUTH WALES****MOORE SC****26 August 2009****08/11287 G Warnes v Muswellbrook Shire Council****JUDGMENT****Introduction**

1 **SENIOR COMMISSIONER:** Muswellbrook, a medium-sized town in the Hunter Valley, has a number of existing or proposed coal mines in its general vicinity. These mines, particularly in their commissioning stages (but also as they expand), require significant construction workforces. These workers coming to the region for such purposes require stable but nonetheless temporary accommodation. The applicant seeks approval to construct a facility on the south-western outskirts of Muswellbrook to meet this demand for construction workers' accommodation.

2 The facility is opposed by Muswellbrook Shire Council (the council) saying that it is not permissible on the proposed site. If it is held to be permissible, the council says that the proposed facility would be a significant overdevelopment of the site. The proposed facility is also opposed, on a variety of grounds, by a number of local objectors. These objectors were either residents of the vicinity or represented St James Primary School, a Catholic systemic school near the site.

3 The proposed facility would comprise more than 400 accommodation units (in one or two storey blocks); a central mess hall; separate laundry blocks and a manager's residence. Sufficient parking would be provided on the general assumption that each accommodated worker would have their own vehicle. The proposed facility is described in more detail below.

**The site**

4 The parcel of land upon the development is proposed to be located (the site) is highly irregular in shape and has no buildings erected on it. The site is some 60 ha in area. The site has a 600 m road frontage to Skelletar Stock Route and the centre of the frontage of the proposed development is at approximately the centre of the site's frontage to Skelletar Stock Route – leaving undeveloped areas approximately 150 m wide between the proposed development and the developments immediately beyond either extremity of the proposed to be developed portion of the site along its Skelletar Stock Route frontage.

5 The site is located in the Environment Protection General (L2) (Urban Buffer) Zone (the L2 zone), under the Muswellbrook Local Environmental Plan 1985 (the 1985 LEP), at the south-western corner of that zone. This zone, as depicted on map extracts and air photos in evidence, comprises a substantial area of land, of varying but significant widths, along the southern and eastern sides of the town of Muswellbrook.

6 Immediately opposite the site is vacant land zoned Open Space. Immediately to the west of the site, Muswellbrook's sewerage treatment plant is located on the same side of Skelletar Stock Route. The council's animal shelter is also located on the western boundary of the site at the Skelletar Stock Route frontage. At the north-western corner of the treatment plant site, on the corner of Skelletar Stock Route and Sydney Road, opposite the treatment plant and extending to the east along the other side of Skelletar Stock Route, is a residential area. This residential area curves around the Open Space land immediately opposite the proposed development.

7 At the eastern end of the site is a series of rural residential allotments – the first of which is separated from the site by an access handle to a large battleaxe-shaped rural allotment. St James Primary School is located to the north-east of the proposed facility with all the school's playing fields opposite the site.

### **The proposal**

8 The proposal involves the erection of a number of buildings on the portion of the site fronting Skelletar Stock Route proposed to be developed – being 14 buildings in total. These are predominantly one and two-storey buildings containing rooms to provide accommodation for the construction workers who, as earlier noted, will construct infrastructure at coal mines in the Muswellbrook local government area or elsewhere in the upper Hunter Valley.

9 Over 400 carparking spaces will be provided. The proposed facility will accommodate over 400 construction workers if completely occupied. All accommodation is to be single accommodation. A central mess building, manager's residence and two laundry buildings are included.

10 The accommodation blocks, in a typical two-storey block, will have a total of 24 units and, in a single-storey block, 12 units. Each of the accommodation units comprises a combined bed and living area with its own bathroom.

11 Each of the accommodation blocks will be surrounded by a veranda. For the two-storey blocks, access to the upper level will be by staircases at each of the narrow ends of the block. The rooms are to be located in back-to-back rows of six units on each side opening directly onto the external veranda.

12 The applicant has agreed to a condition that the accommodation will not be used to provide temporary accommodation for members of the travelling public.

13 Extensive landscaping is proposed. This is primarily (but not exclusively) for two purposes. The first is to provide odour protection for odours from the sewerage treatment plant by what has been described as shelter-belt planting along the western and part of the southern perimeter of the proposed facility. The second landscaping objective is to screen the proposed facility along its Skelletar Stock Route frontage.

### **The planning controls**

14 Although a new Local Environmental Plan for Muswellbrook was adopted in 2009 (the 2009 LEP), this application is protected by cl 1.8A of the 2009 LEP so that it is to be determined as if the 2009 LEP had not been made. However, cl 1.8A does provide that:

#### **1.8A Savings provision relating to pending development applications**

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the

application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

15 The consequence of this is that the provisions of the 1985 LEP apply to this application as the application had been made to the council prior to the making of the 2009 LEP.

16 However, cl 1.8A of the 2009 LEP does mean that some regard would need to be paid to the provisions of the 2009 LEP if I were to have found the proposal both permissible and acceptable when tested against the 1985 LEP. As I have found that the proposal is not permissible when tested against the 1985 LEP, as it fails to satisfy the zone objectives on two bases, consideration against the 2009 LEP is unnecessary.

### **The planning issues from the 1985 LEP**

17 There are a number of matters in the 1985 LEP that are relevant to the proposed development. They fall into three categories. The first is whether the proposed development is permissible within the L2 zone. The second is whether the proposed development is consistent with the objectives of the L2 zone. The third is whether or not the proposed development should be approved after consideration of a number of matters required by the 1985 LEP to be taken into account as part of a merit assessment of the proposal.

18 The 1985 LEP makes it clear, in cl 2(2) and 8(4), that that the development is to be consistent with the objectives of the zone within which it is proposed and the relevant element of Sch 1 to the 1985 LEP or it is inconsistent with the overall aims of the plan. Under such circumstances, an inconsistent proposal is not to be approved. Cl 2(2) reads:

The particular objectives, policies and strategies adopted by this plan to achieve the aims referred to in subclause (1) are set out in the Table to clause 8 and in Schedule 1.

19 Cl 8(4) reads:

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

20 The relevant element of Sch 1 does not, in my view, require separate consideration from that which otherwise follows. It reads:

#### **Schedule 1**

The particular objectives of this plan are:

(a) URBAN BUFFER—to ensure that the towns of Muswellbrook and Denman are protected from any adverse impacts of future mining.

21 There are also a number of matters that the 1985 LEP requires to be taken into account if a merit assessment is to be undertaken. These latter matters, themselves, fall into two classes. The first, contained in cl 11, are matters that not only apply to the L2 zone but also apply to a number of other zones as set out in the clause.

22 In addition, there are also a number of other matters for consideration that are specific to the L2 zone. These are contained in cl 18. A number of these matters do not relate to development of the type for which consent is sought in these proceedings but a limited number of them do so apply.

**What might the council consider acceptable?**

23 Consistent with the current approach taken by the Court in development appeals, I invited Ms Flannery, the council's town planning expert, and Mr Wasiak, the applicant's town planning expert, to confer on whether there was a development option for the site, consistent with the proposal, that would be considered acceptable by the council. Making this enquiry is consistent with the Court's approach of considering whether, if a proposal is not acceptable in its original form, some modified form consistent with the original application might be acceptable to both parties to the proceedings.

24 After the planners conferred on this issue, a joint report was provided that set out the nature of the development that Ms Flannery considered acceptable – subject to resolution of odour issues.

25 The changes that would be necessary to give effect to such a scheme would be to:

- remove at least half of the number of the buildings proposed on the site;
- reduce all the remaining buildings to single-storey buildings of a smaller configuration; and
- relocate the resultant buildings further way from the Skelletar Stock Route frontage.

26 The effect of such amendments would be to reduce the amount of accommodation provided by the development by significantly more than 50%. As I indicated during the course of the hearing, I am satisfied that to adopt Ms Flannery's position would be so significantly outside the scope of the present application as to amount to constructive refusal of it. As a consequence, I would not have considered this as a possible option to which I could grant approval within these proceedings had I concluded that a merit assessment was appropriate.

**Possible permissible uses in the L2 zone**

27 The first test that the proposal faces is whether or not it is a permissible use within the L2 zone. The zoning table for the L2 zone is drafted in the style current at the time of the original drafting of the 1985 LEP. This categorises uses into four categories. These categories are ones where:

- (a) development may be carried out without development consent,
- (b) development may be carried out:
  - (i) only with development consent but where that consent cannot be refused, and
  - (ii) subject to such conditions as may be imposed under section 91 of the Act,
- (c) development may be carried out only with development consent, and
- (d) development is prohibited,

28 The proposal does not fit within either (a) or (b) and, as a necessary consequence, unless it fits within one of the permitted uses listed in (c) in the land use table, it is prohibited.

29 There are two uses within the list of uses listed in (c) that the applicant says can be regarded as characterising the present proposal. These are:

- any purpose (other than mining referred to in clause 18 (2)) which in the opinion of the Council is unlikely to have any significant environmental impact on land within a residential, special uses or open space zone in the town of Muswellbrook or on land within this zone, and which is itself unlikely to be subject to any significant environmental impact from mining or other major development outside this zone; and
- relocatable home or hostel site.

**Is the proposal a “relocatable home or hostel site”?**

30 It is convenient, for this discussion, to consider “relocatable home or hostel site” first. The words “relocatable home or hostel site” in the list in the zoning table differs from the title of the relevant definition in cl 5 of the 1985 LEP as the word “or” appearing in the zoning table does not appear in the title of the term that is defined – the defined term appearing as “relocatable home hostel site”.

31 Given the definition of “relocatable home hostel site”, I am satisfied that this is obviously a slip in the drafting of the instrument and is not material in these proceedings.

32 The definition of “relocatable home hostel site” in cl 5 of the 1985 LEP is in the following terms:

*relocatable home hostel site* means a site used for the purpose of:

- (a) placing movable dwellings (as defined in section 289E (1) of the *Local Government Act 1919*) for permanent accommodation by tourists or construction industry workers, or
- (b) the erection, assembly or placement of cabins for temporary accommodation by tourists or construction industry workers.

33 As a preliminary observation, it is clear that the use of the word “tourists” in each of the elements of this definition necessarily requires the words “permanent”, in the first element, and “temporary” in the second element to inform and qualify the nature of the structure rather than the nature of the use of the accommodation. That is, for the first element, the structure must be permanent rather than its use being so and, similarly, for the second element, structure must be temporary rather than its use as accommodation being so.

34 As earlier noted, it is clear from the elements of the definition, if the development proposal is characterised as being a *relocatable home or hostel site*, it can only be used for accommodating tourists or construction workers. As the applicant has disavowed any use of the proposed development as a tourist facility, if the proposal be characterised as a *relocatable home or hostel site* and satisfies all other relevant assessment criteria for the granting of development consent, then it will be conditioned as being for the purpose of accommodation of construction workers only.

35 The first element of the *relocatable home or hostel site* definition requires consideration of the terms of the definition of movable dwelling contained in s 289E(1) of the (now repealed) *Local Government Act 1919*. The definition in this section was in the following terms:

“movable dwelling” means –

- a) any tent, or any caravan or other van or other portable device (whether on wheels or not), used for human habitation; or

b) any conveyance, structure or thing of a prescribed class or description.

36 There was no relevant “structure or thing” prescribed pursuant to (b) and these buildings are clearly not conveyances. Thus it remains to be considered whether that which is proposed to be erected can be regarded as being an “other portable device (whether on wheels or not), used for human habitation”.

37 The proposed buildings, whether single-storey or double-storey, have been described earlier. Their construction is modular. The modules are constructed in a factory away from the site; transported to the site; and assembled onto some form of footings or footing platform that has previously been constructed.

38 The Statement of Environmental Effects depicts, in several photographs, examples of single-storey versions of what are impliedly analogous structures. Another photograph showed a three accommodation unit module being lifted onto a truck.

39 The plans depict a layout of six accommodation units facing outward on each side of the long axis of each building at each level. Thus one of the proposed single-storey buildings will contain four modules plus footings and verandahs (12 accommodation units) while one of the proposed two-storey buildings will contain eight modules (24 accommodation units) plus footings, staircases and verandahs (these being at both levels).

40 Mr Wasiak valiantly supported the proposition that such structures were relocatable because, in fact, they were relocated in modules into the site, and this constituted being “portable” for the purpose of the first element of the critical phrase in the first limb of the definition in the 1985 LEP.

41 I cannot accept this proposition for two simple reasons. First, the first element of the definition in s 289E(1), if read *ejusdem generis*, does not, on any possible interpretation, extend to structures of the the size and nature proposed in this application. Tents, caravans or other vans are structures of inherently (generally) modest dimensions. Whilst a circus “big top” might be a tent, these are not used for human habitation and even the most extravagantly fitted modern car-camping multi-roomed tent is at least an order of magnitude smaller than the single-storey buildings proposed here (let alone taking account the size of the two-storey ones). The present structures, therefore, could not comfortably fit within the definition in the 1985 LEP on that basis.

42 Despite this, there remains to be considered the possibility, urged by Mr Clay, counsel for the applicant, that these structures constitute “portable devices” within the meaning of the definition.

43 I was taken to definitions of “portable” and “device” with these coming from the Oxford Dictionary (Australian Edition) and the current edition of the Macquarie Dictionary. In this regard, I am mindful of the fact that, in addition to the dictionary meanings of words, consideration may also be had of their ordinary contextual use that were to be of assistance.

44 The Macquarie dictionary definition of “portable”, relevant to buildings, is “able to be removed from its foundations and relocated”. The Oxford dictionary equivalent is “easily movable, convenient for carrying”. When used as a noun, the Oxford dictionary definition, relevantly is “a movable building, esp. a temporary classroom”. In this context, the Oxford dictionary definition of “device”, relevantly, is “a thing made or adapted for a particular purpose, especially a mechanical contrivance”.

45 A consideration of the combination of these definitional elements leads, in my view, inescapably to the conclusion that, if something was to constitute a “portable device”, in this context, it requires that the structure be able to be moved in its entirety. If I be wrong in reaching this conclusion, I am certainly satisfied that if such a structure is not required to be movable in its entirety, the concept of a “portable device” would not be encompassing of something that needed to be put together as a three-dimensional modular jigsaw as is the case with the proposed structures the subject of this application (whether one or two storey).

46 As a consequence, these structures do not satisfy the first limb of the definition of “relocatable home hostel site” in cl 5 of the 1985 LEP.

47 To satisfy the second limb of the definition of “relocatable home hostel site” in cl 5 of the 1985 LEP, these structures would need to be regarded as “cabins”. The Macquarie Dictionary definition of a cabin is, relevantly “a small house; hut, esp. a temporary structure, as on a building site”.

48 Mr Wasiak’s written evidence in support of these structures satisfying this limb of the definition was in the following terms:

The Macquarie Dictionary describes a cabin as being "*1 a small house; hut, esp. a temporary structure, as on a building site. 2 an apartment or room in a ship, as for passengers.*"

The structures proposed are temporary structures in that they are prefabricated elsewhere offsite and transported to the site and erected, and the individual rooms or apartments will be used for the accommodation by construction industry workers.

The only definition in the Council LEP 1985 which gives some reference to the concept of a cabin is the term **holiday cabin**, which means:

*a dwelling used, constructed or adapted to be used for the provision of holiday accommodation only, being one of a group of similar dwellings erected on an allotment of land or allotments of land in the same ownership.*

An exercise that may be useful in understanding the term **construction industry workers cabin** would be to substitute the term *construction industry workers* in place of *holiday* in holiday cabins to see how this relates to an understanding of the terms. This would therefore read as follows:

**construction industry workers cabin** means *a dwelling used, constructed or adapted to be used for the provision of accommodation only, being one of a group of similar dwellings erected on an allotment of land or allotments of land in the same ownership.*

With the definition of dwelling arising from the *Environmental Planning and Assessment Model Provisions 1980* as being (underline for emphasis):

*dwelling means a room or suite or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.*

Each of these definitions amply describes the purpose to which the rooms are to be put.

The buildings themselves are not of a rudimentary type as is often seen on building sites i.e. ATCO sheds. They have been designed to have a more pleasing rustic rural appearance, which includes iron roofs, bull nose veranda's that stretch around the full perimeter of the building, colour scheme reminiscent of early Victorian era buildings, creams, deep red and deep green and are laid out in clusters similar to rural buildings in the countryside so that the amenity of the occupants is improved by being housed in more aesthetically pleasing structures and so that the appearance of the development is similarly more aesthetically pleasing when viewed from the public domain.

49 Despite Mr Wasiak's written and oral evidence and Mr Clay's (also valiant) submissions in support of this position, I do not accept that there is any rational way that these structures should be considered in any way equivalent to a small house or hut. As with the first limb, there is at least an order of magnitude difference between the single-storey buildings proposed here with each having 12 accommodation units in it (let alone taking account the size of the two-storey buildings with double that number). The present structures, therefore, could not comfortably fit within the definition on that basis.

50 To suggest that each of the accommodation units could be regarded as a cabin, in the maritime senses used in the Macquarie Dictionary definition, and thus, in aggregation, fit within the scope of the definition is to extend a flexibility to this use of language that would be, in a Sir Humphrey sense, "courageous" and is rejected.

51 As a consequence, these structures do not satisfy the second limb of this definition.

52 The effect of these findings is that the proposed facility cannot be characterised as involving the permitted use of a "relocatable home or hostel site" contained in the land use table for the L2 zone.

53 Although I have not had regard to this in my decision (as my decision has been based solely on the matters discussed above), I am comforted in my conclusion concerning the first element of the definition by the recent remarks (although *obiter* and made in a decision delivered after this decision was reserved) of Sackville AJA in *Jambrecina v Blacktown City Council* [2009] NSWCA 228 (31 July 2009) where His Honour remarked, at para 44:

In any event, while the sheds were apparently prefabricated and presumably capable of being dismantled and reassembled, they were not "portable" in the same sense as tents, caravans and vans, which are specifically designed to be readily and frequently moved from place to place.

**Does the proposal fit the "any purpose" use in the land use table?**

54 The second category within which the proposed development might fall and be permissible is a general "any purpose" category in the list of uses permissible with development consent. It is clearly a facultative descriptor. It appears in the list of uses in the following terms:

any purpose (other than mining referred to in clause 18 (2)) which in the opinion of the Council is unlikely to have any significant

environmental impact on land within a residential, special uses or open space zone in the town of Muswellbrook or on land within this zone, and which is itself unlikely to be subject to any significant environmental impact from mining or other major development outside this zone

55 This category clearly poses two quite different tests requiring to be addressed. The first is an outward-looking one contained in this element of the term:

which in the opinion of the Council is unlikely to have any significant environmental impact on land within a residential, special uses or open space zone in the town of Muswellbrook or on land within this zone.

56 The second is an inward-looking one contained in this element of the term:

which is itself unlikely to be subject to any significant environmental impact from mining or other major development outside this zone

### **The outward looking element of “any purpose”**

57 To assess whether or not the proposed facility meets the first of these tests, it is necessary to examine what matters have been raised as potentially giving causing significant environmental impacts on other properties in the vicinity. Each of those potential impacts is discussed below.

58 The objectors raised the issues of traffic and road safety, noise and light spill. None of these were supported by expert evidence provided by the objectors nor did the council press them. Indeed, on the issues of traffic and road safety, the expert evidence, as discussed below, expressly comprised agreed positions between Ms Adam, the council’s traffic engineer, and Mr Keating, the applicant’s traffic engineer, that such traffic matters that arose as a consequence of the proposed development could be dealt with satisfactorily.

### **Road and traffic issues**

59 Skelletar Stock Route itself will require significant future upgrading (partly as a result of this development proposal [if it is approved] and partly as a result of other development of an urban residential nature to occur further to the east.

60 Skelletar Stock Route, Ironbark Drive (which merges into Skelletar Stock Route) and Rutherford Road comprise an informal southern bypass for the urban area of Muswellbrook for traffic from the New England Highway to Sydney Road leading to the township of Denman.

61 The traffic engineers were in agreement on the nature of the redesign that was necessary for the intersection of Skelletar Stock Route and Sydney Road as well as on the nature of the works that would be required to be undertaken at the entrance of the proposed development.

62 They were also in agreement on the overall volume of traffic and the volume of traffic that would travel in either direction along Skelletar Stock Route as a result of the development, if it were to be approved.

63 Traffic was an issue in the proceedings being raised:

- by the council to a limited extent concerning the Sydney Road and Skelletar

- Stock Route intersection; and
- by a number of the objectors who were concerned about road safety issues for St James Primary School; for residents in the vicinity of the proposed village and for other users of Skelletar Stock Route.

64 Although I can understand these objectors' concerns, the uncontradicted expert evidence is that, although future upgrading of Skelletar Stock Route will be required and the applicant will be required to make a contribution to the cost of that (if this development were to be approved), there is no safety issue arising from the present design of this road and the increased traffic levels that constitute an effect of the type contemplated by the words "significant environmental impact" in the "any purpose" use from the land use table.

65 The traffic experts also agreed that any endeavour to contain movements from the site by seeking to confine access to the site or exiting from the site to the direction of Sydney Road via Skelletar Stock Route would be doomed to failure.

66 I certainly have no evidence to support (nor any rational basis upon which I could order) a closure of Skelletar Stock Route at some point to the east of the site. On the traffic engineers' evidence, this would appear to be the only effective way of preventing such additional traffic from the development as might pass through the residential area along Skelletar Stock Route.

67 Although it is possible that there will be over 400 individual motor vehicles at the development at peak occupancy, it was the agreed position of the traffic engineers that many of the vehicle movements that would be undertaken would not be by a single driver alone in a vehicle as the development is to operate on the basis where the construction workers would be transported by bus to and from whatever construction site employed them.

68 As a consequence, it was the opinion of the traffic engineers that the number of vehicle trips generated by the development would be likely to be significantly less than the number of person movements generated by the development. Given that construction shift changes are likely to occur during the night hours when the disturbance risk is at its greatest, this uncontradicted and agreed evidence is of significance in considering whether there