

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION:

Warnes v Muswellbrook Shire Council [2009] NSWLEC 1284

PARTIES:

APPLICANT

G Warnes

RESPONDENT

Muswellbrook Shire Council

FILE NUMBER(S):

11287 of 2008

CATCHWORDS:

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

CORAM:

Moore SC

DATES OF HEARING:

23, 24 and 25 June and 23 July 2009

JUDGMENT DATE:

26 August 2009

LEGAL REPRESENTATIVES

APPLICANT

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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 would be an adverse night-time disturbances caused to residents in the vicinity of the proposed development.
- 69 Further, it was the agreed opinion of the traffic engineers that such night time movements would not adversely impact residents in the vicinity so as to constitute an effect of the type contemplated by the words "significant environmental impact" in the "any purpose" use from the land use table.

Noise

- 70 I now turn to the issue of possible noise impacts from the development. A number of the written objections and some of the oral evidence of the objectors heard in the course of the site inspection related to possible noise impacts from the proposed development on residences immediately to the north – the first of which is owned by Mr and Mrs Bancroft.
- 71 The Department of Environment and Climate Change's Industrial Noise Policy applies to the site and, as a consequence, during prescribed night-time hours, the development would not be permitted to emit noise that would cause sleep disturbance in residences nearby to the site.
- 72 As a consequence of the limited range of matters canvassed in the acoustic report by Mr Bridges, an acoustic engineer on behalf of the applicant, Mr Bridges was asked to undertake an additional inspection of the site during the course of the hearing and consider a range of additional noise matters raised by the objectors.

- 73 Mr Bridges undertook that inspection during which he considered the possible impacts, if any, on residences to the east and to the north-west of the proposed development where such noises might be caused by the slamming of car doors during night-time hours.
- 74 He was also asked to consider what would be the acoustic impact if there was to be group of shouting or arguing occupants at locations within the proposed developed footprint at points closest to nearby residences. He was also asked to consider the noise impact, during evening hours, of traffic moving to and from the site.
- 75 Mr Bridges subsequently provided a supplementary expert report dealing with the issues outlined above. It was his uncontradicted evidence that the noise of all the types he was asked to consider would meet the requirements of the Industrial Noise Policy and that there would be no sleep disturbance at any relevant sensitive receiver. As this evidence is uncontradicted, there is no noise impact that constitutes an effect of the type contemplated by the words “significant environmental impact” in the “any purpose” use from the land use table.

Light spill

- 76 As to light spill, an issue raised by Mr Bancroft, a combination of the proposed landscaping between the development and Mr Bancroft’s property, on one hand, and imposition of a condition that would require the exterior lighting of the buildings at the eastern end of the proposed development to be aimed downward in a fashion which did not cause light spill amenity impacts at the Bancroft residence would resolve any such potential impact.

Conclusion on the outward element of “any purpose

- 77 I am therefore satisfied that the proposed development is not rendered impermissible when assessed against the first of the tests arising from the terms of this facultative provision.

The inward element of “any purpose

- 78 I now turn to the second of the tests. This requires me to assess whether the proposed development is one which:

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

- 79 Consideration of this test requires me to ask myself three separate questions. These are whether there is any development that:

has a significant environmental impact on the proposed development? and
is a major development (this being an undefined concept)? and
is located in another zone?

- 80 As I understand the evidence, there are only three possible developments that I need to test against these three questions. These are:

St James School
the council’s animal shelter; and
the council’s sewerage treatment plant.

St James School

- 81 I turn first to St James School. I was asked, during the course of the site inspection, to observe that we heard the sound of the St James School bell being rung, on two occasions, during the inspection. I observed it and heard it on both occasions – once when I was standing near the eastern end of the proposed residential structures and, on the second occasion, when we were close to the eastern boundary of the development allotment at a point almost directly to the south of the westernmost point of the present development of the school. A number of those with me had not noticed the sound of the bell.
- 82 It was suggested, as I understand it, that the noise of the school's bell would provide some form of disturbance to the construction workers in the accommodation units – where those construction workers were night shift workers and thus sleeping during the day.
- 83 Although I not have any evidence from Mr Bridges, the applicant's acoustic expert, on that point, I am satisfied that the intermittent ringing of the school's bell, on school days and during daylight hours, for short periods of time (the bell being a sound not immediately heard by everybody at the time this was first drawn to our attention on the view) could not be regarded as a significant environmental impact on the proposed facility.
- 84 Although the proposed facility will be occupied by shift workers (some of whom, at least, would be likely to sleep during daylight hours), the fact that the bell was not noticed by a number of those with me during the course the site inspection under circumstances where there were no intervening structures (such as insulated accommodation unit walls), means it would be unreasonable, in my view, to conclude that there would be any impact of any significance on such shift workers.
- 85 Although St James School is in a different zone and might possibly be regarded as a major development, the question concerning the significance of the potential environmental impact of the noise of the bell must be answered in the negative. As a consequence, it is not necessary to determine whether or not St James School is a major development as the negative response to second element of the “any purpose” categorisation test renders this unnecessary.

The animal shelter

- 86 Next, with respect to the animal shelter, the expert evidence of Mr Bridges, in his written statement of evidence, is that there would be no impact on the proposed development from the animal shelter that could be categorised as a significant environmental impact. This expert evidence is uncontradicted and I accept it as there is no basis to do otherwise. As a consequence, although the animal shelter is also at a different zone, I do not need to determine whether or not it is a major development as its presence, too, cannot lead to an adverse conclusion for the proposed facility within the “any purpose” categorisation process.

The sewerage treatment plant

- 87 For the purposes of this provision of the zone objectives, it is agreed that there is an odour impact from the council's sewerage treatment plant on at least part of the site. It is not necessary, in my view, for this consideration, for the reasons which follow, to define (to the great degree of precision as has been done by the odour experts) the relevant odour unit contour lines and where they cross the various elements of the proposed development. It is, however, necessary to consider whether this odour impact is a significant environmental impact and, if it is, is there any basis upon which it should be disregarded.
- 88 First, it is clear that the council's sewerage treatment plant is in another zone [the 5(a) zone] and that that element of this phrase is satisfied.
- 89 Second, I do not accept that there can be any serious contest that a sewerage treatment plant (serving the whole of the population in the town of Muswellbrook – including the equivalent population [EP] from Muswellbrook's industrial, commercial and retail premises) could be seen, in the context of development within this local government area, as being anything other than a major development.

90 The matter that therefore remains to be tested is how the odour should be regarded in light of the words “significant environmental impact”.

91 Mr McKelvey, solicitor for the council, in his closing submissions, founded the council's position on the proposition that there were, in effect, three possible classes of odour impact. The first class would be odour impacts that were insignificant. The second would be odour impacts that were a “significant environmental impact” but which odours were not “offensive odours” within the relevant definition in the *Protection of the Environment Operations Act 1997* (the PoEO Act). This definition is in the following terms:

offensive odour means an odour:

- (a) that, by reason of its strength, nature, duration, character or quality, or the time at which it is emitted, or any other circumstances:
 - (i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or
 - (ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or
- (b) that is of a strength, nature, duration, character or quality prescribed by the regulations or that is emitted at a time, or in other circumstances, prescribed by the regulations.

92 The third class of odours, he submitted, would be a class of odour that satisfied this definition. As I understand it, he necessarily accepts that any “offensive odour” would also be an odour that caused a significant environmental impact (for the present interpretive context) and would, thus, be an unlawful odour.

93 The unlawfulness of such an offensive odour arises from the provisions of s 129 of the PoEO Act, a provision that is in the following terms:

129 Emission of odours from premises licensed for scheduled activities

- (1) The occupier of any premises at which scheduled activities are carried on under the authority conferred by a licence must not cause or permit the emission of any offensive odour from the premises to which the licence applies.
- (2) It is a defence in proceedings against a person for an offence against this section if the person establishes that:
 - (a) the emission is identified in the relevant environment protection licence as a potentially offensive odour and the odour was emitted in accordance with the conditions of the licence directed at minimising the odour, or
 - (b) the only persons affected by the odour were persons engaged in the management or operation of the premises.
- (3) A person who contravenes this section is guilty of an offence.

and the fact that the provisions of this section [that permits the establishment of a defence with respect to such odours by an exculpatory provision in a pollution control licence] have not seen such a provision incorporated in the licence for the council's sewerage treatment plant. The absence of such a protective licence provision is made clear by the terms of cl L 8.1 of the treatment plant's operational licence which is in the following terms:

No condition in this licence identifies a potentially offensive odour for the purposes of section 129 of the Protection of the Environment Operations Act 1997.

- 94 In summary, the position put by the council is that the odour from the sewerage treatment plant should be regarded as a significant but lawful environmental impact that would be visited on the proposed development [being, in the council's submission, an odour in the second of the council's postulated categories of odours]. As a consequence, Mr McKelvey says, the proposal cannot be classified as fitting within the "any purpose" use and thus be permissible (subject to development consent) within for the 7 L2 zone in the council's land use table for the L2 zone in the 1985 LEP.
- 95 Mr Clay submitted that the odour from the treatment plant did satisfy the definition of an "offensive odour" and was therefore unlawful. The consequence of this unlawfulness, he said, would be that it would be inappropriate for me to rely on the unlawful impact caused by the council's own facility to refuse the development proposal.
- 96 Mr Clay's submissions, as I understood them, on this point, were also that, if I were not to agree with him on his initial proposition concerning the odour, the impact of the odour from the sewage treatment plant on the proposed facility, although impacting, should not be regarded as having a significant impact.
- 97 For the reasons which I set out below, I am satisfied that the first submission advanced by Mr Clay is correct and, as a consequence, the odour from the sewage treatment plant should be disregarded for the purposes of satisfaction of this test of assessing permissibility. I therefore do not need to consider his second submission further.
- 98 First, the odour contour modelling shows that, for the houses immediately across Skelletar Stock Route in the immediate vicinity of the sewerage treatment plant, the maximum odour exposure is between 20 and 30 odour units. Consideration of the scale of odour units to be used in assessing the severity or likely severity of the impact of an odour on surrounding populations is derived from a table in the Department of Environment and Climate Change's publication *Technical framework – Assessment and management of odour from stationary sources* November 2006 (the technical bulletin).
- 99 The table in the technical bulletin shows that the odour level that would be considered acceptable for these residences is an odour level of 2 odour units. This level is based on the assumption that the definition in the technical bulletin's table of a population density of two thousand is relevantly satisfied. If this be the case, the odour level to which these properties are exposed is between 10 and 15 times the level considered appropriate by the technical bulletin's guidelines.
- 100 Even if some higher, more permissive odour exposure were to be adopted by consideration only of the population levels within these 20 to 30 odour unit contour lines, there would be a population density leading to an acceptable odour level on the technical bulletin's table of either 3, 4 or 5 odour units (at the most reasonably permissive population [a maximum of 30 people for 5 odour units] remotely capable of being inferred within these odour contours), the odour level experienced by these houses would still be between four and six times the maximum level to which they should be exposed.
- 101 I was taken by Mr McKelvey to the decision of Sheahan J in *Moore v Corowa Council* [2009] NSWLEC 59 where His Honour considered what was sufficient to constitute "offensive odour". These proceedings were in Class 4 of the Court's jurisdiction rather than being Class 5 criminal proceedings. Relevant to my consideration, his Honour said, at para 80:

One complainant as to offensiveness would be enough in a prosecution – see *Environment Protection Authority v Cargill Australia Ltd* [2004] NSWLEC 334 – but the offensiveness must manifest itself in adverse physical symptoms to the level of, for example, an upset stomach, gagging, queasiness and excess salivation - see *Shoalhaven Starches* 2006, especially at [28]-[54], and [179]-[180], and Jagot J's sentencing judgment [2006] NSWLEC 685 at [30]-[33]. The symptoms reported in this case do not reach the levels required, and the

complaints were only occasional or spasmodic. The court has no doubt the odours the neighbours have experienced over the years have been unpleasant, irritating, even distressing, and socially unacceptable, but they were not “*offensive*” in the statutory sense.

102 An analysis of the complaints made to the council shows that, during the latter part of 2008, there were a number of complaints lodged with the council concerning the treatment plant (being complaints made by residents within the precinct most adversely affected by the odour – that is those residences within the 20 to 30 odour contour). One of them is expressly cited, in the council's complaints register, as being in the following terms:

Smell coming from STP is terrible and making them gag.

103 On the same day as this complaint was lodged, the neighbouring property to the property from which this complaint came also lodged a complaint. This complaint was in the following terms:

The STP has been extremely smelly over the last couple of days - can something please be done.

104 It seems to me that, in light of the combination of the degree of exceedence of the reasonable odour levels that are discussed in the technical bulletin and the terms of the council's own recording of at least one qualitative sufficient complaint made against it, a sole complaint also being a sufficient threshold as was discussed in *Moore v Corowa Council*, that I should be satisfied that the odour emitted by the treatment plant is an offensive odour within the meaning of the PoEO Act.

105 As there is no protective provision engaged by a combination of s 129 of that Act and the conditions of the council's pollution control licence for the sewerage treatment plant, the odour that is experienced by the residences within the 20 to 30 odour unit contour is, for the purposes of this consideration, an odour emitted unlawfully and in breach of s 129 of the PoEO Act.

106 Having reached the conclusion that the odour is emitted unlawfully when assessed on the basis described above, it does not matter, it would seem to me, whether or not the odour that is experienced on the applicant's proposed development location satisfies the test of being an “offensive odour” at that location or not.

107 Indeed, if I am correct on this point, it does not require that I determine whether or not such an odour can have a significant environmental impact without being offensive at the site. It seems to me that, once I am satisfied that the odour is offensive and the defence provisions arising from s 129 of the PoEO Act are not engaged, the odour simply becomes an unlawfully emitted odour, for the purposes of this consideration, and it does not matter where and at what level that odour is experienced – at any other location, it still remains an unlawfully emitted odour even if it may not be offensive at that location. That a prosecution might not be able to be founded on the basis of the extent to which that odour was actually experienced at some other location (such as the site of the proposed facility) is not, in my view, relevant.

108 As a consequence, as I observed in *Bailey v Oberon Shire Council* [2006] NSWLEC 815 at para 51, I do not think that an unlawfully produced impact can found a refusal of a development application or, indeed, contribute to the refusal of such an application.

Conclusion on the inward element of “any purpose

109 I am therefore satisfied that the proposed development is not prevented when assessed against the second of the tests arising from the terms of this facultative provision.

Conclusion on permissibility

110 As the proposed development does not fall foul of either of the tests that must be passed to fit within the term “any purpose” in the land use table, the proposal can be so characterised and is thus permissible with development consent.

Consistency with the zone objectives

111 I turn, now, to the issue of compliance with the objectives of the L2 zone. The 1985 LEP makes it clear, by cll 2(2) and 8(4), that the development is to be consistent with the objectives of the zone within which it is proposed or it is inconsistent with the overall aims of the plan. Under such circumstances, an inconsistent proposal is not to be approved.

112 The objectives of the L2 zone are:

- (a) to establish around the town of Muswellbrook a protective buffer of an essentially rural character, which will separate the town from future surface mining activity outside the zone and require additional protective measures in the event of expansion of existing mines within the buffer,
- (b) to accommodate development of a rural character or associated with rural uses, or development which requires a location close to the town of Muswellbrook, provided that development will not adversely affect other development within Muswellbrook or within this zone, and will not be adversely affected itself by mining development outside the buffer,
- (c) to enable the future construction of a railway and a highway deviation, and to ensure that development does not foreclose these options, and
- (d) to encourage development that will provide or maintain an appropriate rural setting for the town of Muswellbrook.

113 It is appropriate, in this context, to treat the zone objectives as four sequential hurdles. If all four of the hurdles are passed satisfactorily, the proposed development is consistent with the objectives of the zone and can then be assessed against the other relevant matters contained in cll 11 and 18 of the 1985 LEP. In addition to their Statements of Evidence, Ms Flannery and Mr Wasiak gave oral evidence on these issues.

Compliance with zone objective (a)

114 During the course of cross-examination by Mr Clay, Ms Flannery conceded that the first of the zone objectives, contrary to the opinion that she had expressed in her Statement of Evidence and in the joint expert planners’ report, required that the zone itself be of an essentially rural character.

115 She conceded, correctly in my view, that provided any proposed development was permissible within the relevant elements of the land use table for the zone, the development itself did not have to have an essentially rural character provided it did not, in itself, adversely alter the essentially rural character of the whole of the zone.

116 She agreed, in the context of this proposed development, whether or not it might, on any assessment, impact the essentially rural character of the whole or part of the allotment upon which it was proposed to be erected, it did not impact the essentially rural character of the whole of the zone in any fashion that changed the essentially rural character of the whole of the zone.

117 Consistent with the position that she adopted at the conclusion of her evidence, I am satisfied, not merely by her agreement but also by an examination of the aerial photograph appended to the joint expert planners’ report (showing the totality of the buffer zone and the minute portion of the zone that would be occupied by the proposed development) that the proposed development does not adversely impact the essentially rural character of the L2 zone and is, therefore, consistent with the first objective for the zone.

Compliance with zone objective (b)

118 The next matter to be considered arises out of objective (b) of the zone objectives. This objective is in the following terms:

to accommodate development of a rural character or associated with rural uses, or development which requires a location close to the town of Muswellbrook, provided that development will not adversely affect other development within Muswellbrook or within this zone, and will not be adversely affected itself by mining development outside the buffer,

119 As I understood it, the applicant does not rely on the first element – “development of a rural character or associated with rural uses” but on the second – “development which requires a location close to the town of Muswellbrook”. However, if I be wrong in this regard, it is self-evident from the layout and intensity of the proposal that it does not have a rural character. It is also not associated with a rural use.

120 My reading of the second element of this objective causes me to conclude that there are two separate tests embodied within it. The first is that the development must require a location close to a town and, second, that that town must be Muswellbrook.

Close to a town?

121 I turn to the first of these elements. As earlier discussed, dictionary definitions are of some use but not to the extent of setting aside ordinary considerations of use and understanding of language in the context within which it is used. To assist me to consider how I should understand the word “requires”, it is useful to set out, at some length, the competing evidence of the two expert planners on this point.

122 The evidence of Mr Wasiak on this point, in his Statement of Evidence, was in the following terms:

As to objective (b) the development proposed does have a rural charcter [sic] and also requires a location close to the town of Muswellbrook so as to utilise the urban infrastructure within the town to provide for the day to day needs of the occupants of the village and to allow them potential to integrate into the township as opposed to standing apart from it.

123 The material contained in the applicant's Statement of Environmental Effects dealing with this issue was in the following, similar terms:

As to objective (b) the development proposed requires a location close to the town of Muswellbrook so as to utilise the urban infrastructure within the town to provide for the day to day needs of the occupants of the village and to allow them potential to integrate into the township as opposed to standing apart from it.

124 On the other hand, the evidence from Ms Flannery, in her Statement of Evidence, was in the following terms:

The nature of the accommodation is such that the occupants are provided with all meals, cleaning facilities and entertainment facilities and the premises can operate independently of the township. On this basis it cannot be concluded that the development requires a location close to the town of Muswellbrook.

125 The council's assessment report was silent on this topic.

126 Finally, for completeness, the evidence contained in the joint report of the expert planners on this aspect of the zone objectives was in the following terms:

The issue as to whether the development is one that requires a position close to town is one that remains disputed. SF believes that the development is self sufficient in terms of the services, accommodation and entertainment offered to the occupants as described in Appendix J of the SEE and that the development does not require a location close to the town of Muswellbrook. It is acknowledged that servicing in the proposed location may be easier and more economic but this issue alone does not necessitate the developments proximity to the township. SF is of the opinion that the nature of the development is such that it could be located closer to the mine sites to which the intended occupants will be working as has previously been the case within the Muswellbrook Shire. SF notes that the occupants would need to be 'construction industry workers' and not mine workers to qualify to stay in the accommodation on site, and would therefore only be travelling to mines that are either new or subject to expansion (ie this does not apply to all mines). It is further noted that the mine identified in the Statement of Environmental Effect as the driver for this development (Anvil Hill) is actually located closer to the township of Denman than Muswellbrook.

JW considers that the location is critical in terms of access to utilities such a water, electricity and sewer required for the purposes of accommodation of up to 400 persons. Provision of these basic facilities is unlikely to be readily or feasibly available in other zones where this form of development is permissible i.e. Rural 1(a) and 7(d) Environmental Protection (Scenic) zone, or within mine site. This site allows for the use of existing investment in public and private infrastructure where there is capacity, and this helps provide for an orderly and economic use of the land. JW believes that this land use is ideally located to provide access to any number of mines, not just one mine, whilst maintaining access to services, facilities and infrastructure of Muswellbrook. Therefore a location out of town undermines the intent and functionality of the land use.

127 Although, on the final day of the hearing, the planners gave concurrent evidence on aspects of construction concerning the phrase “requires a location near the town of Muswellbrook”, on the first of these issues (that is matters arising from the word “requires”), their evidence did not take the matter further than the matters that had been canvassed in the written material set out above.

128 The relevant element of the Macquarie dictionary definition of “require” is, in my view, in the following terms:

to have need of; need:

129 The relevant element of the Oxford dictionary definition of “require” is, in my view, in the following terms:

it requires, there is need for, it is necessary to have, etc.

130 It is clear to be that, consistent with these definitions and ordinary usage, mere desirability, whether economic or social, is not sufficient. The imperative inherent in the word “requires” is such that, in my view, the applicant needs to demonstrate that it is not practicable or appropriate to locate the proposed development other than close to a town.

131 In considering whether such a conclusion should be drawn, it seems to me that there are three aspects of the operation of the proposal that I would need to consider. These are:

Social infrastructure of various types that would be accessed by the occupants of the facility;
Environmental impacts that might arise from the operation of the facility if it were not located close to town; and
The provision of services to the facility to enable it to operate at its established location.

132 I also need, it seems to me, if there is anything associated with the construction of the facility that might be impacted by its location if it were not close to a town.

133 I turn, first, to the question of the provision of social services, in the broadest possible sense, to support the residents of such a facility. These social services would include the range of topics discussed by the planning experts of a recreational, commercial, retail and health services nature (not intending to this list to be an exhaustive one).

134 There is no doubt that for reasons of ease of access – having regard to considerations of time, environmental impacts of the extent of vehicle use and range of services that can be accessed quickly and conveniently – it is desirable that such a facility be located close to a town.

135 There is nothing in the nature of these services, however, that lifts that position of desirability to some position akin to an imperative for such a location. There is nothing inherently dangerous about the nature of the activities that will be undertaken at the facility (as opposed to the risks that might be associated with activities being undertaken at a mine construction site) that would create any imperative, for example, to be located close to emergency or trauma services of any type. As a consequence, I am not satisfied that the social support needs of the residents of such a facility requires a location close to a town.

136 Although a location close to a town is likely to lower the overall environmental impact of such a facility, particularly in circumstances where bus transport to and from the construction site at which occupants would be employed is proposed to be provided by the facility's operator, I do not see that the probable reduction in greenhouse gas emissions, for example, that would arise from individual vehicle movements to and from the nearest town being shorter whilst the longer vehicle movements to the workplace would be in a bus being a more environmentally friendly and less impacting development, crosses the threshold from desirability to imperative.

137 Although both the planning and the traffic engineering evidence supports the intuitive conclusion that it would be environmentally beneficial for such a location and I am satisfied that doing so would be consistent with the objectives of the *Environmental Planning and Assessment Act 1979*, I have no evidence that any additional impact of this nature (or indeed of any other possible environmental impact that might result from a location that was not close to town) would be inconsistent with the objectives of this Act. I therefore conclude that the proposal cannot be said to require a location near to a town for the second of the reasons why that this might be necessary.

138 As to the provision of services to the proposed facility, it would seem to me that the question of garbage removal services and replenishment of food and other operational supplies can be undertaken to service the facility wherever it might be located.

139 Whilst there might be additional environmental impacts caused by longer haulage routes, for the reasons discussed relating to resident vehicle movements, I do not consider that this provides an imperative for a location near to a town. Similarly, although the longer haulage routes may, over time, add to the road maintenance bill for the local roads authority responsible for roads in the vicinity of the location of such a facility, I have no evidence that could cause me to conclude that this would be sufficiently onerous to require a location close to a town and, indeed, intuitively, it would seem unlikely that such evidence was capable of being given.

140 As to the provision of communications services and power supply, the extensive network available for these services would not provide any basis for the satisfaction of this test.

141 It would seem to me that, absent economic evidence that demonstrated that the proposed development could not be economically viable on a reasonable economic modelling basis because of the cost of provision of an

on-site effluent treatment system thus requiring connection to a reticulated urban system such as that provided by the plant immediately adjacent to the site, I could not be satisfied that meeting the effluent disposal needs of the facility required it to be close to a town. A similar position would arise with respect to my consideration of whether or not the provision of potable water also required the development to be close to a town and connected comparatively directly to a reticulated potable water supply rather than having the mere desirability of that occurring. I certainly also have no evidence that a location more distant from the town would be incapable of being serviced by connection to reticulated water or sewerage services.

142 Finally, I have no evidence that there is anything relating to the construction of the proposed facility that would necessitate or require its proximity to a town.

143 As a consequence, I am satisfied that there is no basis upon which I could conclude that the proposed facility **requires** being located close to a town. As a consequence of that, the proposed facility does not satisfy this element of this zone objective and must be refused.

Close to Muswellbrook?

144 However, if I am wrong in my conclusion that the proposed facility does not require to be located close to a town and it, in fact, does require a location close to a town, I turn to consider whether or not there is a requirement that that “close to town” location must be close to the town of Muswellbrook rather than to any town.

145 There are a number of matters that are relevant, in my view, in this regard. The first is, if the facility does require to be located close to a town, can I be satisfied that there is no other town within reasonable proximity (given the purposes for which the facility is intended to operate) near to which the facility could be located as an alternative to a location near Muswellbrook?

146 As I understood the evidence and the submissions, there are only three other potential towns within what might be regarded as reasonable accessibility to the site of either the Anvil Hill coalmine (being the mine for which it is expected that the facility will first provide accommodation for construction labour) or any of the other anticipated coalmines within the nearby region for which construction labour accommodation might be provided in the future.

147 I also do not discount the possibility, although I have no evidence of any planning for such construction, that some future baseload power station might be constructed to be fuelled by coal from any of these mines and that that baseload station, like others in the Hunter or western regions, would be constructed reasonably proximate to the mines which it would provide the fuel.

148 As a consequence, it would seem to me that, on the evidence available to me and submissions made, the only other towns near to which this facility might reasonably be contemplated to be located would be the towns of Denman, Aberdeen and Singleton.

149 Aberdeen and Denman are both towns with a population no greater than 1500 or so people. Although I have no information about the zoning around Aberdeen, I do have information contained on the zoning maps for the town of Denman and the surrounding rural area. Mr McKelvey suggested that there would be land in Denman or its environs (being environs that would satisfy a test of being locations close to that town) that had zoning permitting the construction of the facility. Given the conclusions I have reached concerning these two towns, as discussed below, I do not need to undertake an analysis, site by site or zone by zone, of land in the vicinity of Denman as part of determining whether or not it would be reasonable to contemplate the facility being located near this town.

150 Although Ms Flannery gave evidence of social facilities available in Denman, to her understanding, concerning a hotel, clubs and the like and that the residents of Denman would need to access other services, potentially, such as medical services or hospital services in Muswellbrook, I do not consider that these are

the appropriate basis upon which to assess the suitability of these two smaller towns as a location for such a facility.

151 It was Mr Wasiak's evidence that he considered that the location of a facility capable of accommodating over 400 workers would not be socially appropriate and would potentially have adverse impacts on the social structure of the town because the limited degree of social absorption and coherence possible, as I understand his evidence, would be unacceptable.

152 Although there would be undoubted economic benefits to a small town such as Aberdeen or Denman brought by the location of such a facility close by, it should be noted that the facility provides no family accommodation so that those resident in it, of either gender, will necessarily be living a single life.

153 The workforce designed to be accommodated by the facility will also be one that is, at least to some extent, an itinerant one with some degree of turnover in its population (although it is not necessary for me to speculate as to what might be the level of that turnover). To locate a facility housing a single, somewhat itinerant population (a population that would constitute a population increase for either Denman or Aberdeen of the order of 25%) near either of these towns could not, in my opinion, constitute sound land planning for the reasons that Mr Wasiak advanced:

lack of social compatibility;
difficulty of any meaningful integration between the occupants of the facility and the nearby town;
and
the size of the facility's population could potentially overstretch the services available in the town, at the very least in the short term, thus adversely impacting existing residents.

154 For these reasons, I am satisfied that if a location close to a town is required, such a location would be inappropriate if close to either Denman or Aberdeen.

155 I am not satisfied, however, that I could draw the same conclusion with respect to Singleton. Singleton is some 30 minutes away by car, a not unreasonable commuting distance, whether by bus or personal conveyance, from a place of residence to a workplace.

156 I do not have any information on zoning in the vicinity of Singleton and thus on the possibility or otherwise of locating such a facility close to that town. However, the onus of demonstrating that it could not be so located, given the nature of the test in this zone objective, falls on the applicant in these proceedings.

157 During the course of the hearings in Muswellbrook, I indicated to the parties that the various elements of this phrase – “requires a location close to the town of Muswellbrook” (including the express question of proximity to Muswellbrook), was a matter with which they would be required to deal in the resumed the hearing in Sydney. As a consequence, there can be no suggestion that the applicant was not on express notice that this was a matter of potential concern to me.

158 Absent any evidence about zoning or land use restrictions and permissibility in the vicinity of Singleton, I can only conclude, given what I understand to be the size of Singleton (knowledge, at the very least, gleaned from my driving through Singleton on various occasions during the course of these proceedings), that Singleton, in general terms, is comparable in size to Muswellbrook.

159 As a consequence, I do not see that I have any basis upon which I would conclude that the facility, if it required to be located close to a town, could not be located close to Singleton and still fulfil the functions that it is intended to serve.

160 The necessary consequence of the above is that, if I be wrong in my conclusion about locations **close to a town**, I am, separately, satisfied that the applicant has not demonstrated to me that that proximity to a town could only be satisfied by **proximity to the town of Muswellbrook**.

161 It follows that the proposed facility is not consistent with the objectives of the zone for this second reason. The result of this finding is that the appeal must also fail on this second ground of contravention of zone objective (b).

162 Before departing from my consideration of zone objective (b), for completeness I should deal with compliance or otherwise with the proviso to this zone objective. The proviso is in the following terms:

provided that development will not adversely affect other development within Muswellbrook or within this zone, and will not be adversely affected itself by mining development outside the buffer

163 The first element of the proviso essentially encompasses, perhaps with a lower threshold than “significant”, the matters dealt with in my discussion of the “any purpose” use in the land use table. For the reasons discussed earlier in the context of permissibility, I do not consider that the proposal falls foul of the first element of the proviso.

164 The proposed facility, itself, will not be adversely impacted by any mining development outside the L2 zone. As a consequence, the second element of the proviso is also satisfied.

Does my approach to the second element of objective (b) render it ineffectual?

165 However, it seems to me that my conclusion of impermissibility because of non-compliance with the zone objectives arising out of the expression “requires a location close to the town of Muswellbrook” also prudently needs to be tested by asking myself whether or not there is any one or more of the permitted uses in the zoning table that:

would not satisfy the first limb of objective (b) of zone objectives; but
would satisfy this restrictive second limb of zone objective (b) as I have construed it.

166 It would seem to me that, if my construction of this element of zone objective (b) was so restrictive as to render it incapable of being used to permit any development within the L2 zone that did not meet the first of the elements of this objective but was otherwise permissible from the land use table, my interpretation might have the effect of rendering the second criterion for permissibility entirely ineffectual. If this was the necessary result, that would demonstrate my construction to be an incorrect approach to take and I would need to reconsider it.

167 Ironically, perhaps, given topics necessarily dealt with elsewhere in this decision, an example of why my approach to this requirement is not so restrictive as to render it of no functional utility can be found over the fence to the site, immediately to the west, in the council's sewerage treatment plant.

168 One of the uses in the zone, permissible with development consent, is “utility installations”.

169 “Utility installations” is a term which is not expressly defined in the 1985 LEP but is so defined in the *Environment Planning and Assessment Model Provisions 2000* (the Model Provisions). This definition is imported into the 1985 LEP by virtue of the provisions of cl 6 of this LEP.

170 The relevant definition from the Model Provisions is in the following terms:

utility installation means a building or work used by a public utility undertaking, but does not include a building designed wholly or principally as administrative or business premises or as a show-room.

171 “Public utility undertaking” is expressly defined in the 1985 LEP in the following terms:

public utility undertaking means any of the following undertakings carried on by or by authority of any Government Department or under the authority of or in pursuance of any Act or any Act of the Commonwealth:

- (a)
- (b) undertakings for the supply of water, hydraulic power, electricity or gas or the provision of sewerage or drainage services,
- (c)

and a reference to a person carrying on a public utility undertaking shall be deemed to include a reference to a council, county council, Government Department, corporation, firm or authority carrying on the undertaking.

172 As a consequence, a new sewerage treatment plant, if that were a necessity either to replace the present plant (if its present odour impacts on surrounding residences were to render that necessary, for example) or if a second treatment plant were to be required because of expansion to the town caused an increase of the EP incapable of being treated by the present plant, such new treatment plant would be permissible, with development consent, in the zone.

173 Although I do not need to undertake any detailed analysis to demonstrate this, I am satisfied that an examination of the boundaries of the L2 zone shown on the plan tendered as Exhibit J together with the more complete depiction of the extent of the zone shown on the marked aerial photograph appended to the planning experts’ joint report shows that a new sewerage treatment plant could be located in the L2 zone and would be compliant with objectives (a), (b), (c) and (d).

174 As with the proposed facility being considered in this appeal, a new treatment plant would not meet the first of the two criteria in objective (b) – namely on being a development that was “development of a rural character or associated with rural uses”.

175 However, although the word “close” in the second criterion of objective (b) is undefined as to distance, there can be no doubt that a sewerage treatment plant designed to collect the effluent of a town requires a location close to that town. It necessarily follows from that conclusion that, if a new sewerage treatment plant were required for Muswellbrook, it would require a location close to the town of Muswellbrook.

176 It therefore follows that my interpretation of this objective is not so restrictive as to render it without practical effect in the context of the permitted land uses in the zone’s land use table.

Compliance with zone objective (c)

177 There is nothing in this proposal that would impact on or foreclose “the future construction of a railway and a highway deviation”. As a consequence the proposed facility satisfies this zone objective.

Compliance with zone objective (d)

178 Zone objective (d) is “to encourage development that will provide or maintain an appropriate rural setting for the town of Muswellbrook”. This objective, effectively, in my view, engages a merit assessment of any development that satisfies the earlier three zone objectives. This follows, in my view, from the provisions of clauses 11 and 18 that are engaged for merit assessment of developments proposed in the L2 zone. As I

have concluded that the proposal is inconsistent with zone objective (b) on two distinct but interlinked bases, I do not propose, as discussed below, to undertake a merit assessment of the proposal. As a consequence, I express no view as to whether or not this zone objective is satisfied.

Overall compliance with the zone objectives

179 It follows from the discussion above that the proposed facility is, in my view, contrary to and fails at two separate tests arising from zone objective (b).

Merit Assessment

180 At the conclusion of the hearing, I asked Mr Clay and Mr McKelvey whether, if I were to conclude that the proposed facility failed on one or more of the issues of permissibility (being findings which, if successfully appealed pursuant to section 56A of the *Land and Environment Court Act 1979* would require a merit assessment of the project), they wish to me to proceed to undertake that merit assessment.

181 They both indicated that they considered that undertaking such an assessment was a desirable course for me to follow if I considered that appropriate.

182 However, having concluded that the proposal cannot satisfy the zone objectives and should be refused on that basis I have concluded that it is not appropriate to undertake a merit assessment. I have reached this conclusion for two reasons. First, obviously, I am satisfied as to the correctness of my earlier reasoning as to why the proposed facility should be rejected as inconsistent with zone objective (b). Second, however, if I be wrong in this regard, it is possible that the matter might otherwise fall to be determined by another Commissioner of the Court and, if this were to be the case, it would not be appropriate for me to have expressed views on the merits of the proposal as to do so would be gratuitous.

The 2009 LEP

183 Having reached the conclusions set out above that result in the proposal failing when assessed against the 1985 LEP, it is unnecessary to undertake any consideration of the extent to which the 2009 LEP would act as an impediment to the proposal.

Conclusion

184 I have concluded that proposal does not satisfy the definition of “relocatable home or hostel site” amongst the permissible uses within the L2 zone but does fall within the scope of the facultative “any purpose” use in the land use table for the L 2 zone and is thus permissible with development consent.

185 However, I have also concluded that the proposed development neither requires a location close to a town or, if I am wrong and it does require a location close to a town, it does not require a location close to the town of Muswellbrook – being two elements necessary to satisfy zone objective (b) for the L 2 zone. As the proposed development does not satisfy the objectives for the L 2 zone, cl 8(4) of the 1985 LEP requires that the proposed development be rejected.

186 I also note that, although I indicated at the conclusion of the hearing that I would consider undertaking a merit assessment if I did reach the conclusion set out above, after having considered the matter further, I did not consider it appropriate to do so.

Orders

187 It therefore follows that the orders of the Court are:

The appeal is dismissed;

Development Application 58/2008 for the construction of an accommodation facility for construction industry workers (including mess hall, manager's residence, laundries and off street parking for occupants' vehicles) at Skelletar Stock Route, Muswellbrook, is determined by the refusal of development consent; and

The exhibits, other than Exhibit 1, are returned.

Tim Moore
Senior Commissioner