

**WOOLF
ASSOCIATES
SOLICITORS**

Our Ref: BSW 5226/08

16 April 2008

The General Manager
Wingecarribee Shire Council
PO Box 141
MOSS VALE NSW 2577
By fax no: 4869 1203

Dear Sir/Madam

DRAFT WINGECARRIBEE LEP 2007 – RECLASSIFICATION OF PUBLIC LAND

We write on behalf of the Moss Vale Action Group.

We have been provided with copies of the following documents which we have reviewed:

1. Open Space Review and Long Term Strategy prepared by the Parks & Property Branch April 2006 revised April 2007;
2. Draft Wingecarribee Local Environmental Plan 2007;
3. Land Rationalisation and Community Benefit Information Session document;
4. Letter dated 12 February 2008 from Russell McLelland Brown to Wingecarribee Shire Council;
5. Document called “Highlands Leisure Centre – A centre for everyone” frequently asked questions March 2008, Wingecarribee Shire Council;
6. Business paper for meeting 16 April 2008 with notice of motion – land sales and report of Director Environment and Planning draft Wingecarribee LEP – public submissions on reclassification of public land.

We have been requested to comment on the proposed meeting of Council on 16 April 2008 and in particular the motion to reclassify and rezone many parcels of land to change the classification from “community” to “operational” with a view to a sale of those lands and other lands already operational as referred to in the Notice of Motion.

Council’s Frequently Asked Questions document dated March 2008 states, among other things, as follows:

1. Council has resolved that a poll be held at the next election to determine public support for the construction and funding model for a leisure centre. The wording for the poll question will be determined by Council prior to 31 May (2008). (Page 3).
2. “How will the leisure centre be funded? ... Funding for this project is proposed to be provided by rationalising and selling existing land assets held by Council with (39) separate parcels under consideration to be developed and sold. Seven of the properties proposed for sale are classified as operational. The remaining (32) properties are currently classified as community land; however, it is proposed that these parcels of land will be re-classified as operational land in Council’s new LEP. The sale of these parcels of land is contingent on their reclassification to operational as community land cannot be sold.” (Page 7).
3. “Based on previous surveys and public feedback, Council believes most people in the Shire would like Council to build a leisure centre.” (Page 7).
4. “Council currently expects construction of the Centre will commence around July 2008 with an anticipated construction time of 12 to 18 months (subject to the builders construction program.” (Page 9)
5. “Does the community have any say about selling this land? ...” “Yes. As part of the LEP exhibition process the plan reclassifies some community lands. An additional program of consultation is required for this process. From 5 February 2008 until 20 February 2008 there will be a series of 9 public hearings, conducted by an independent consultant, to allow public comment on the proposed reclassification of certain community lands under the LEP. ...”
6. The report of Director Environment and Planning to meeting of 16 April 2008 discloses:
 - (a) Of 598 written submissions, 587 were against the reclassifications and 11 were in favour. In other words 98% of the responses were against Council’s proposals in relation to reclassification of the sites (in connection with the construction of the Highlands Leisure Centre). (Page 10)
 - (b) In relation to the particular sites out of all of the submissions there was one submission in favour of reclassification of one block of land (Ritchie Park) and otherwise all of the submissions particular to parks were against reclassification. The result of the public hearings between 5 February 2008 and 20 February 2008 similarly was overwhelmingly against Council’s proposed reclassifications of the lands (in connection with provision of funding for the Highlands Leisure Centre). Of 738 people, 619 were against the proposal and 119 in favour. This is an overwhelming 84% against Council’s proposal. In relation to each parcel of land there is an overwhelming majority against the reclassification.

It is abundantly clear from the above that the result of community consultation is that the community is against reclassification of the community lands (for the purpose of funding the recreation centre).

Council's document "Frequently asked questions" Highlands Leisure Centre March 2008 states explicitly that the community has a say in selling the community land. As mentioned above, Council poses the question "Does the community have any say about selling this land?" Answer "Yes". Council is representing in this document that it will take notice of community consultation i.e. not merely pay lip service to the consultation. On the evidence available, the community is overwhelmingly against Council's proposal to reclassify the community land in connection with funding purposes of the leisure centre. For Council to proceed in the face of such result renders the consultation process meaningless such that there would have been no real consultation. There can be no clearer result of consultation than the written submissions and public hearings.

In addition, a resolution in terms of the Notice of Motion would render meaningless the Council resolution referred to in the FAQ documents for the Council to hold a poll at the next election to determine public support for the construction and funding model for a leisure centre. The LEP process in relation to the reclassification of land has been expressly stated by Council to be for the purpose of funding the leisure centre. Moreover Council advises in the FAQ document that the tender process for the construction of the leisure centre will continue with construction commencing July 2008.

On the basis of the above, for Council to give any real meaning to the poll and for Council's process to be rational the LEP process in relation to reclassification of land must await the poll. Further, it is irrational to proceed with the tender process for construction of the leisure centre as this renders meaningless the public poll.

Council will be familiar with the principles in relation to administrative decision making stated in *Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1KB223. There, Lord Green MR said at pages 233-234:

"The Court is entitled to investigate the ... authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the ... authority, it may be still possible to say that, although the ... authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each case is not as an appellate authority to override a decision of the ... authority, but as a judicial authority which is concerned, and concerned only, to see whether the ... authority have contravened the law by acting in excess of the power which Parliament has confided in them."

Council will also be familiar with the principles expounded by Mason J., with whom Dawson J. agreed, in *Minister for Aboriginal Affairs -v- Peko Wallsend Ltd* (1986) 162CLR24. At page 41:

“ ... In some circumstances the Court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is “manifestly unreasonable”. ... ”

On the basis of the above information Council’s decision has the appearance of being irrational in the Wednesbury sense: Council is representing that it will seek the opinion of the community both in the community consultation to date and in the proposed poll but would be proceeding with the actions before the poll is taken and dismissing the clear and overwhelming results of the public consultation to date.

The Council is required to give proper genuine and real consideration to the public submissions particularly having regard to the express provisions in the Local Government Act (s.29) and the Environmental Planning and Assessment Regulation (clause 32) for public hearings and public notice with submissions. As Council is aware, when exercising its decision making power an administrative body must give “proper, genuine and realistic consideration” to the merit of the matter. Both in proceeding with the LEP and tender process before the proposed poll and in Council not acting on the overwhelming opposition to all of the reclassification proposals in both the public hearings and written submissions, Council does not appear to be acting rationally and nor giving real consideration to the results of the consultation.

Our clients trust that Council will not proceed with the reclassifications as proposed and will await the poll before taking further actions in relation to the Leisure Centre. Our clients have instructed that they will consider court action under s.123 of the Environmental Planning and Assessment Act 1979 and /or s.674 of the Local Government Act 2003 in the event of a Council decision which by virtue of the above or other matters is in breach of the legislation.

Yours faithfully