# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Woolworths Ltd v Townsville City Council & Ors* [2005] QCA 207 |
| PARTIES: | **WOOLWORTHS LTD** ACN 000 014 675<br>(applicant/first respondent)<br>**v**<br>**TOWNSVILLE CITY COUNCIL**<br>(respondent/second respondent)<br>**MAKRO WAREHOUSE PTY LTD** ACN 087 578 578<br>(respondent/first applicant)<br>**DALRYMPLE TOWNSVILLE PTY LTD**<br>ACN 086 989 291<br>(respondent/second applicant)<br><br>**WOOLWORTHS LTD** ACN 000 014 675<br>(applicant/first respondent)<br>**v**<br>**TOWNSVILLE CITY COUNCIL**<br>(respondent/second respondent)<br>**THE WAREHOUSE GROUP (AUSTRALIA) PTY LTD**<br>ACN 003 038 702<br>(respondent/first applicant)<br>**LANDEL PTY LTD** ACN 010 889 193 **AS TRUSTEE OF THE LANCINI FAMILY DISCRETIONARY TRUST**<br>(respondent/third respondent) |
| FILE NOS: | Appeal No 11376 of 2004<br>Appeal No 11377 of 2004<br>P & E Appeal No 495 of 2004<br>P & E Appeal No 1007 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave *Integrated Planning Act* |
| ORIGINATING COURT: | District Court at Townsville |
| DELIVERED ON: | 10 June 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 30 March 2005 |
| JUDGES: | Williams JA, Fryberg and Holmes JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| PROPOSED ORDER: | **In Appeal No 11377/04**<br>**(i) Grant leave to appeal and allow the appeal to the following extent:** |

**(a) Set aside the first declaration made at first instance;**

**(b) Set aside the stop order made at first instance and in lieu thereof order:**

**"Direct The Warehouse Group (Australia) Pty Ltd (ACN 003 038 702) to stop the display or sale of goods other than those listed in the definition of "Showroom" in section 22.2 of the Planning Scheme for the City of Townsville as amended to 12 April 2002 on land situated at 216-230 Woolcock Street, Currajong, being the land described as Lot 1 on SP125898, and not to restart such display or sale without a development permit authorising it to do so."**

**(ii) Otherwise dismiss the appeal;**

**(iii) Order the applicants pay the first respondent's costs of the application and appeal to be assessed.**

**In Appeal No 11376/2004**

**(i) Grant leave to appeal and allow the appeal to the following extent:**

**(a) Set aside the first declaration made at first instance;**

**(b) Set aside the stop order made at first instance and in lieu thereof order:**

**"Direct Makro Warehouse Pty Ltd (ACN 087 578 578) to stop the display or sale of goods other than those listed in the definition of "Showroom" in section 22.2 of the Planning Scheme for the City of Townsville as amended to 12 April 2002 on land situated at 153-163 Duckworth Street, Garbutt, being the land described as Lot 1 on SP148252, without a development permit."**

**(ii) Otherwise dismiss the appeal;**

**(iii) Order the applicants pay the first**

**respondent's costs of the application and appeal to be assessed.**

CATCHWORDS: ENVIRONMENT AND PLANNING – Development Control – Control of Particular Matters – Commercial Uses – Interpretation – Showrooms – Whether use of premises fell within 'showroom' as defined in the Townsville City Town Planning Scheme

*Integrated Planning Act* 1997 (Qld)

COUNSEL: R Litster, with B Job for the first applicants
G Gibson QC, with J D Houston for the first respondent
M Burnett for the second respondent

SOLICITORS: Deacons for the first applicants
Mallesons Stephen Jaques for the first respondent
King & Co acting as Town Agents for Townsville City Council Solicitor for the second respondent
Suthers Taylor for the third respondent in Appeal No 11377 of 2004

[1] **WILLIAMS JA:** Each matter involved an application for leave to appeal pursuant to s 4.1.56(2) of the *Integrated Planning Act* 1997 (Qld) from a decision of the Planning and Environment Court at Townsville. The two matters had been heard together before that Court and a single judgment was handed down. The critical question was whether the activity carried on in premises by Makro Warehouse Pty Ltd ("Makro") in the one case and The Warehouse Group (Australia) Pty Ltd ("Warehouse") in the other was within the permitted use of "Showroom" as defined in the Townsville City Town Planning Scheme ("the Scheme"). There was no factual dispute as to the nature of the activity carried on by each of Makro and Warehouse, nor as to the range of goods sold pursuant to that activity. In consequence the issue between the parties was essentially one of law; was the activity carried on by each applicant such as to constitute lawful use of the premises in question as a "Showroom" as defined in the Scheme.

[2] On the basis that that was the question of law to be determined if leave to appeal was granted, the court invited the parties to assume that leave had been granted and to address the court on the merits.

[3] The Scheme contains the following relevant definitions:

> ". . .
> "MAJOR SHOPPING DEVELOPMENT" means a development or an extension of or part of a development which development, extension or part is in the form of a shopping centre and is predominantly or wholly used for retailing to the public and includes:-
>
> (a) the use, for that purpose, of land exceeding 2.5 hectares in area (or such other area as the Governor in Council may from time to time prescribe); or

(b) the erection of or the use, for that purpose, of an area of a building or structure or part thereof exceeding 6,000 square metres gross floor area (or such other area as the Governor in Council may from time to time prescribe).

For the purpose of the scheme the term includes a shopping centre that complies with (a) or (b);

. . .

"SHOP" premises comprising a gross floor area of less than 600 square metres, used for the purpose of displaying or offering goods for sale to members of the public and may comprise one or more than one retailer or occupiers. The term includes pet and pet supplies sales, hot bread shop, video hire shop, liquor sales outlet (where not on the same site as an hotel) and the incidental storage of such goods on the same premises.

The use may include, as an ancillary activity, the preparation and sale of foods for immediate consumption and the installation and use of up to three entertainment machines, but does not include a fast food outlet, restaurant, an hotel, a service station or warehouse.

"SHOPPING CENTRE" any shop or group of shops in one or more than one building, having a minimum gross floor area of 600 square metres, functioning as an integrated unit and comprising separate areas of occupation and other areas used in connection therewith where:-

(a) each of those separate areas, were it not part of a shopping centre, would be:-

(i) a shop;
(ii) an arts and craft centre;
(iii) commercial premises;
(iv) a restaurant;
(v) a fast food outlet;
(vi) indoor entertainment (theatres only);
(vii) landscape supplies;
(viii) a medical centre;
(ix) a public building or a public purpose;
(x) a showroom;
(xi) a surgery; or
(xii) part of premises used for the purpose of a service industry; and

(b) the extent to which those separate areas of occupation, where they are not part of a shopping centre, would be a shop or shops is not in the circumstances insignificant or nominal. Provided that any shop situated within a Local Shopping Zone shall be deemed to be part of a shopping centre, irrespective of its floor area;

> "SHOWROOM" means a use requiring a large floor area where the gross floor area to be used for that purpose is not less than 400 square metres, for the display or offering for sale by retail of goods being one or more of the following uses, or other uses of a like nature requiring large floor spaces as determined by Council:-
>
> (a) floor coverings and wall tiles;
> (b) furniture;
> (c) domestic appliances being washing machines, dishwashers, clothes dryers, refrigerators, hot-water systems, air-conditioning systems and the like;
> (d) domestic fittings and electric appliances;
> (e) building and construction materials;
> (f) sporting goods;
>
> Where more than three (3) showrooms exist in one or more than one building and function as an integrated unit they become a shopping centre.
> . . ."

[4] There was no dispute that in the premises in question Makro displayed and offered for sale by retail a range of goods including the following: Food and confectionery; groceries (including personal items); books; housewares; pets accessories; footwear; electrical appliances; entertainment; toys; camping equipment; sporting equipment; manchester; décor; furniture; luggage; garden supplies; hardware; automotive supplies; clothing.

[5] There is also no dispute that Warehouse displayed and offered for sale by retail in the subject premises a range of goods including the following: Food and confectionery; groceries (including personal items); books; reading and writing materials including gift wrapping and cards; housewares; pets accessories; footwear; clothing; electrical appliances; entertainment; toys; camping equipment; sporting equipment; craftware; manchester; furniture; frames posters mirrors etc; garden supplies; hardware; automotive supplies.

[6] In each matter there was a series of photographs effectively showing the range of goods on display and how they were displayed. In broad terms it could be said that the photographs indicated that the retail activity of each applicant was no different to that of a major broad-ranging retail outfit frequently found in a shopping centre in any sizeable town or city.

[7] The Warehouse tenancy comprises approximately 3,320 square metres and is one of four tenancies on land owned by the respondent Landel Pty Ltd at Currajong. The Makro tenancy comprises approximately 4,600 square metres and is one of six tenancies on land owned by the respondent Dalrymple Townsville Pty Ltd at Garbutt. It should be noted that Warehouse and Makro are unrelated retailers. In the proceedings at first instance it was not contended that a town planning consideration such as amenity or traffic was relevant to the determination of the matters in issue.

[8] The premises in which Warehouse carried on its activity were within the "commercial zone" under the Scheme. Given that, zoning a "Showroom" is a permitted development subject to conditions. The second respondent, Townsville City Council, has not granted a development permit for the premises in question authorising their use for either a "Major Shopping Development" or a "Shopping Centre" or "Other Development". The first respondent, Woolworths Pty Ltd ("Woolworths"), who operates four supermarkets and a discount department store in the vicinity of the subject site, contends that as a result of the range and type of goods displayed or offered for sale by Warehouse in the subject premises the use is not for a "Showroom". In consequence Woolworths applied to the Planning and Environment Court for a declaration, inter alia, that Warehouse "has and is continuing to unlawfully use premises at the Subject Site for a "Major Shopping Development", "Shopping Centre" or "Other Development".

[9] The premises in which Makro carries on its activity in question is included in the Special Purposes Zone under the Scheme. By various decisions in 2002-2003 the Townsville City Council gave approval for use of the subject premises as "Showrooms, subject to conditions." As with the case involving Warehouse, Woolworths contended that the use by Makro was not within the definition of "Showroom" in the Scheme. In consequence Woolworths in the proceeding involving Makro sought similar relief to that sought against Warehouse.

[10] As already noted the two matters were heard together in the Planning and Environment Court and one judgment was delivered dealing with both matters.

[11] Relevantly the learned judge at first instance said:

> "I think that any reasonable person looking at the relevant definition in the Scheme would conclude that the nature of the goods sold is a material factor. Having regard to the nature and variety of the goods sold, the dominant use of the floor space relates to the sale of goods which do not to my mind fit within the definition of goods of a "like" nature. To take any contrary view I think it would be necessary to ignore the classification of goods. Having regard to the use requiring a minimum of 400 square metres, and the further deeming provision which makes 3 showrooms a "shopping centre" I think the definition can only be sensibly read to mean that each defined or approved use requires a floor area minimum of 400 square metres. I am satisfied that many of the goods sold and the manner of selling them does not appropriately fall within the showroom definition. The use is best defined as innominate."

[12] In consequence the critical order made at first instance was a declaration in the following terms:

> "A declaration pursuant to S 4.1.21 that [Makro/Warehouse] has and is continuing to unlawfully use premises at the subject site."

[13] It is from that decision that each of Makro and Warehouse have sought to appeal contending that the retail activity carried on by each is covered by the definition of "showroom".

[14] It should be noted that on the hearing of the appeal counsel for the applicants expressly eschewed any reliance on a determination by the Townsville City Council that the goods being displayed and offered for sale by retail were goods "of a like nature" to those goods specified in the definition of "Showroom". Though no such determination had yet been made it was said that it was clearly open to the Council to make such a determination covering all the goods in fact being displayed and sold by the applicants.

[15] The principal submission advanced in this court by counsel for the applicants was that the use of the premises in question by each applicant was covered by the definition of "Showroom" in the Scheme. It was submitted that having regard to the context, and the general purpose and policy of the Scheme, construing "Showroom" in a way which embraced the activity in question was consistent with the language of the Scheme and achieved consistency and fairness when considered against the background of the Scheme viewed as a whole. It was submitted that such an approach avoided conflict between various definitions and provisions found in the Scheme.

[16] Counsel for each applicant conceded that it "may be accepted that although Warehouse and Makro sell some goods that fall within the broad product descriptions identified in items (a) to (f) of the "Showroom" definition, the range of goods displayed and offered for sale is not confined to those broad product descriptions or goods of a like nature." Indeed in the course of oral submissions it was put to counsel for the applicants from the bench that "there is no difference between a showroom and a large shop. . . so far as your definition is concerned", to which counsel replied: "That's precisely my point that there is no - this scheme does not accommodate large shops."

[17] Given all that it is not surprising to note that the submissions by counsel for the applicants concentrated on what was referred to as the "second limb" of the definition: "or uses of a like nature requiring large floor spaces as determined by Council." Counsel referred to the fact that the definition of "Shop" limited that use to premises with a floor area "of less than 600 square metres". He then submitted, understandably, that many retail outlets required or in fact occupied large floor areas and such retail outlets did not display or offer for sale only goods within the broad product description identified in items (a) to (f) of the "Showroom" definition.

[18] Counsel for the second respondent, Townsville City Council, supported the submission of counsel for the applicants and actively participated in the hearing before this court.

[19] One can accept the force of all of that, but it does not assist in properly construing the definition of "Showroom". Town planning permission may be given for a shop selling a wide range of goods and having a floor area in excess of 600 square metres subject, of course, to appropriate conditions being satisfied. To get such approval the applicant would have to obtain, for example, an impact assessment statement or the like and the application would be subjected to greater scrutiny by the local authority. But one cannot avoid those consequences of a town planning scheme by extending the meaning of a use defined therein beyond what is its proper meaning in the context.

[20] In consequence one must return to the definition of "Showroom" quoted above. It must be conceded that the definition in question is oddly worded. The Scheme contains a definition of the term "use" in terms not dissimilar to definitions of the word found generally in town planning schemes; generally it relates to the purpose to which land or premises is put. That definition cannot be used to designate a category of goods. It seems clear that the terms "use" "used" and "uses" when used in the definition of "Showroom" do not have the meaning attributed to the term "use" in the definitions in the Scheme. Where the word "use" first appears it would seem to carry its ordinary dictionary meaning namely the "application of something to some purpose"; here that is applying the large floor area for the purpose of displaying of goods and offering them for sale by retail. The term "used" would have similar meaning. To my mind one cannot attribute to the term "uses" where it first appears a meaning separate from the meaning to be attributed to the expression "being one or more of the following uses". That expression is linked back to the term "use" where it first appears. The reference is to the application of a floor area for the purpose of displaying goods and offering them for sale; that general proposition is then particularised by the use of the expression "being one or more of the following uses". That can only sensibly mean that displaying and offering for sale by retail floor coverings and wall tiles is one use, displaying and offering for sale by retail furniture is another use, and so on with the categories of goods specified in paragraphs (a) to (f).

[21] When looked at in that light each use does seem to focus on a type of goods or product which requires a large floor area for its display. As counsel for Woolworths submitted the definition so construed relates to "a specialised retail outlet, which offers for sale goods appropriate for that specialised use".

[22] Considering the scheme as a whole, and given the definitions of the various "uses" contained therein, it is clear, in my view, that a "Showroom" must be something other than a "Shop" having a floor area of more than 600 square metres. Given the wording of the definition of "Showroom" the learned Judge at first instance was correct when he said that "the nature of the goods sold is a material factor" in distinguishing a "Showroom" from a "Shop". A "Showroom" use is to be contrasted with a use for a "Shop", and given the terms of the definition that distinction must be because the former refers to a specialised retail outlet dealing in goods which need a large area for display. To use the words of counsel for Woolworths, a "Showroom" is a specialised retail outlet offering for sale goods appropriate for that specialised use. In other words the goods in question must be of a bulky nature or have some other feature which requires a reasonably large floor area for their display. Some confirmation for that approach is found in the use "Vehicle and Machinery Showroom" as defined in the Scheme. There the premises are to be used "for the display of motor vehicles, caravans, mobile homes, boats, construction equipment, general and agricultural machinery, vehicle and machinery accessories, swimming pools or other items."

[23] The learned Judge at first instance concluded that the definition required that the floor area for the display of each category of goods should be at least 400 square metres. That conclusion is perhaps debatable, but it is not necessary to finally determine that issue in order to conclude that the use of the premises in question by each applicant was not for a "Showroom".

[24] In the course of his reasons the learned Judge at first instance said: "It is not essential to this determination to decide whether either of the Second Respondents' businesses should have been classified as a shopping centre. I do not think they should have been so classified or that "best fit" principles apply after considering the extent of incompatibility with the definition." But the judge then went on to also make a declaration in each case in terms that "pursuant to section 4.1.21 of the *Integrated Planning Act* 1997, that the Second Respondent has started assessable development (being uses under the planning scheme for the city of Townsville being another use under column 4 in Section 7.3 of the scheme) on land situated at . . . without a development permit." The making of that declaration, particularly the classification of the assessable development, arguably went beyond what was litigated and what was necessary for the decision on the issues raised at first instance. The existence of that declaration could raise complications if there were further applications to the local authority with respect to the use of the land by the applicants; counsel for the second respondent made a specific submission to that effect. Counsel for Woolworths did not actively seek to support the making of that declaration. In the circumstances that declaration should be set aside.

[25] The critical question raised by the applications brought by Woolworths was whether or not the use of premises made by each of the applicants was within the permitted use of "Showroom". If not, the use by the applicants was unlawful and Woolworths was entitled to a declaration to that effect. The consequences flowing from that unlawful use, and the question whether or not the user could be rendered lawful by the obtaining of some appropriate approval pursuant to the Scheme, fall to be determined in other ways and proceedings.

[26] In the circumstances it is sufficient for this court to say that the learned Judge at first instance was correct in declaring that each applicant "has and is continuing to unlawfully use premises at the subject site".

[27] In addition to making the declarations referred to the learned Judge at first instance also made an order in the following terms: "Pursuant to Sections 4.3.25 and 4.3.26 of the *Integrated Act* [sic] the Second Respondent be directed to stop its use of premises at the subject site for the purposes of other development until further order." I agree with Fryberg J that the order is unclear because of the use of the expression "for the purposes of other development". In the circumstances I agree with Fryberg J that the stop order should be amended so that it provides that the respondent should stop the display of goods other than those listed in the definition of "Showroom", and not to restart such display or sale without a development permit authorising that use.

[28] For those reasons leave to appeal should be granted in each matter and the appeals allowed to the limited extent indicated. The second respondent supported the submissions of the applicants, and in the circumstances it should bear its own costs associated with the hearing in this court. The applicants should pay the first respondent's costs of the application and appeal to be assessed.

[29] The orders should therefore be:

<u>In Appeal No 11377/04</u>

(i) Grant leave to appeal and allow the appeal to the following extent:

(a) Set aside the first declaration made at first instance;

(b) Set aside the stop order made at first instance and in lieu thereof order:
"Direct The Warehouse Group (Australia) Pty Ltd (ACN 003 038 702) to stop the display or sale of goods other than those listed in the definition of "Showroom" in section 22.2 of the Planning Scheme for the City of Townsville as amended to 12 April 2002 on land situated at 216-230 Woolcock Street, Currajong, being the land described as Lot 1 on SP125898, and not to restart such display or sale without a development permit authorising it to do so."

(ii) Otherwise dismiss the appeal;

(iii) Order the applicants pay the first respondent's costs of the application and appeal to be assessed.

In Appeal No 11376/2004

(i) Grant leave to appeal and allow the appeal to the following extent:

(a) Set aside the first declaration made at first instance;

(b) Set aside the stop order made at first instance and in lieu thereof order:
"Direct Makro Warehouse Pty Ltd (ACN 087 578 578) to stop the display or sale of goods other than those listed in the definition of "Showroom" in section 22.2 of the Planning Scheme for the City of Townsville as amended to 12 April 2002 on land situated at 153-163 Duckworth Street, Garbutt, being the land described as Lot 1 on SP148252, without a development permit."

(ii) Otherwise dismiss the appeal;

(iii) Order the applicants pay the first respondent's costs of the application and appeal to be assessed.

[30] **FRYBERG J:** In 2004 Woolworths Ltd made two separate applications to the Planning and Environment Court for declarations and consequential enforcement orders. The Townsville City Council was a respondent in both applications. The other respondents in each application were two competitors of Woolworths and their respective landlords. The other respondents had no other connection with each other, but every one was agreed that identical issues arose in each application. The Planning and Environment Court delivered one judgment dealing with both applications. In both of them Woolworths won. Both competitors now apply for leave to appeal. The respondents are Woolworths, the Council and the landlords[1]. For the sake of simplicity it is convenient to discuss one of the applications; the determination of one effectively determines both. In the one to which I shall refer the competitor is The Warehouse Group (Australia) Pty Ltd ("Warehouse").

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[1] The landlords did not appear on the hearing of the applications, although the solicitors for the applicants held instructions from one of them.

[31] Warehouse operates retail premises in one of four tenancies on land at Woolcock Street, Currajong, a suburb of Townsville. It has done so since June 2002, when the Council approved a development permit for a material change of use - code assessment for showroom purposes.[2] Unless restrained it intends to continue its operations. The conditions of approval included the following:

> "The use of the premises is restricted to a showroom as defined in the City of Townsville Planning Scheme. Where it is intended to use the premises for purposes other than a showroom, then the development must comply with the requirements of the Planning Scheme."

Its operations are described in the reasons for judgment of Williams JA.[3] The Planning and Environment Court held (in effect) that the use of the premises in this way went beyond use as a showroom as defined in the relevant planning scheme. It was therefore not lawful. It was common ground that if the use did not fall within the definition of showroom, that decision was correct. The Court also held that Warehouse had started assessable development, being another use under column 4 in s 7.3 of the scheme, without a development permit for the development. There seems to be no doubt that if the use did not fall within the definition of showroom, Warehouse started assessable development without a development permit.

[32] The Court made declarations and orders intended to reflect these findings. Its orders were:

> "IT IS DECLARED THAT:
>
> 1. Pursuant to Section 4.1.21 of the *Integrated Planning Act* 1997, the Second Respondent has started assessable development (being uses under the planning scheme for the city of Townsville being another use under column 4 in Section 7.3 of the scheme) on land situated at 216-230 Woolcock Street, Currajong as described as Lot 1 on SP 125898, without a development permit.
>
> 2. Pursuant to Section 4.1.21 the Second Respondent has and is continuing to unlawfully use premises at the subject site.
>
> IT IS ORDERED THAT:
>
> 1. Pursuant to Sections 4.3.25 and 4.3.26 of the *Integrated Act* the Second Respondent be directed to stop its use of premises at the subject site for the purposes of other development until further order.
>
> 2. The further hearing of the application be adjourned and the above order be suspended until such hearing."

The jurisdiction to make those orders was unchallenged.[4]

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2 Because "showroom" was a permitted use under the relevant planning scheme, the application would not have required advertising under the *Local Government (Planning and Environment) Act 1990*: see *Integrated Planning Act 1997*, s 6.1.28. Consequently, code assessment rather than impact assessment was appropriate.

3 Paragraphs [5] and [6].

4 *Integrated Planning Act 1997*, ss 4.1.21(5), 4.3.25.

[33] The planning scheme (or the relevant parts of it) came into force in 1994 under the *Local Government (Planning and Environment) Act 1990*. At a superficial glance it appears to contain a number of provisions carried forward from earlier schemes. It was not well drafted. It continued in force as a transitional planning scheme under the *Integrated Planning Act 1997*.[5] It was still in force last year when this matter was before the Planning and Environment Court. It was replaced with effect from January this year. It is not suggested that what Warehouse is doing is lawful under the new scheme other than as an existing lawful use under the superseded planning scheme.[6]

[34] In this Court the written outlines of argument focused on the question whether the use was one "of a like nature requiring large floor spaces" within the meaning of the definition of "showroom" in the superseded planning scheme. Williams JA has set out the terms of that definition.[7] Not until toward the close of the applicant's oral submissions did it emerge that there was a problem with another part of the definition, "as determined by Council". That had been a problem in the Court below. The judge recorded:

> "It has been noted that the definition includes reference to "other uses of a like nature as determined by Council". The determinations had been by an officer of the Council. That was evidently recognized as potentially problematical and, during the course of the hearing, the Council made a determination with respect to both applications in terms shown in exhibit 25. The determination in each case was "that the use … is a use requiring a large floor area for the display or offering for sale of goods like the uses listed in the showroom definition at items (a) to (f)". It appears the determination was made, without the competing arguments being highlighted, on the Director of Planning's recommendation."

Evidently Woolworths did not challenge the efficacy of the "determinations" in that Court. That is surprising, but it explains why his Honour gave them no further consideration. In a masterpiece of understatement Mr Litster, for the applicants, conceded that "they are not entirely satisfactory". It is unnecessary to explain why this is so. Mr Litster did not seek to uphold them; in that he was plainly correct. His purpose was, he said, to establish that there is a capacity for the Council to determine the uses to be showrooms. But as Mr Gibson QC for Woolworths submitted, if the determinations are not upheld, that disposes of the matter. The uses are unlawful. The declaration to that effect was rightly made.

[35] Mr Litster submitted that we should nonetheless determine the principal issue argued by the parties. He submitted that there was utility in deciding that question because it is still open to the Council to make a determination. To support that submission he referred to the provisions of the *Integrated Planning Act 1997* which permit applications to carry out development under a superseded planning scheme to be made within two years of the replacement of the scheme.[8] In my judgment those provisions are irrelevant. A determination for the purposes of the definition

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5 Sections 6.1.2 - 6.1.4.

6 *Integrated Planning Act 1997*, s 1.4.1.

7 Paragraph [3].

8 See for example ss 3.2.5, 3.5.4(4), 3.5.5(4) and the definition of "development application (superseded planning scheme)" in Schedule 10.

would have to be made by resolution of the Council; but that resolution would not be a decision on an application under ch 3 of the Act. Any determination would have to be of general effect and made for the purposes of the definition in all cases. It could not be made for a particular person or a particular block of land. That is true whether the determination is required to relate to goods of like nature to those in the lettered list (as Mr Gibson contended) or to uses of a like nature to the display or offering for sale by retail of goods (as Mr Litster contended).

[36] No other basis was suggested upon which the Council might make a determination under a superseded statutory provision. (I note in passing that no such determination could be made under the new definition of "showroom":

> "**Showroom** – premises used for the retail sale of goods which generate a purpose specific trip, are vehicle orientated rather than pedestrian orientated (ie. a vehicle is usually required to be able to transport purchased goods sold) and are predominantly of a bulky nature. Where goods include nonbulky items, they have a nexus with the bulky goods and do not occupy more than 30% of the gross lettable area. Bulky goods offered for sale may include the following:
> (a) floor coverings, wall tiles, soft furnishings or bedding;
> (b) furniture and décor;
> (c) non-portable domestic appliances being washing machines, dishwashers, clothes dryers, refrigerators, hot-water systems, air-conditioning systems and the like;
> (d) building and construction materials, fixtures and fittings; or
> (e) BBQs, camping goods or outdoor recreation goods.
> The term may include ancillary customer conveniences such as a small catering shop or children's play area.")

It follows in my judgment that it is no longer open to the Council to make a determination under the definition of "showroom" in the superseded scheme.

[37] One other matter touched on in argument was whether a provision in the superseded scheme conferring power on the Council to make a determination effectively amending the scheme was valid. It is unnecessary to consider whether the conferral of power in the definition of "showroom" constituted an unlawful delegation of power; but the question might arise if the main point argued were resolved in favour of Warehouse.

[38] There is another reason why I prefer not to rest my decision on the question whether the use being made of the premises by Warehouse is a use "of a like nature" within the meaning of the definition. An important aspect of Mr Litster's argument, founded upon the decision of the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*[9], was that if the use by Warehouse were not as a showroom within the meaning of the superseded planning scheme, there was no other defined use permitted or permissible in the Commercial zone which covered the case. Consequently the case fell under the "other development" item (described by Mr Litster as an "innominate use") in column 4 of the table of uses in the Commercial zone, making it a prohibited use under the superseded scheme. That, he submitted, was an absurd outcome for such a use in a Commercial zone. For

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9 (1980) 147 CLR 297.

Woolworths, Mr Gibson countered the argument by submitting that the use was as a "major shopping development" as defined in the superseded scheme and was therefore a permissible use under column 3 of the table. That submission gave rise to a problem.

[39] The problem is that if Mr Gibson be correct, it follows that back in 2002 Warehouse should have sought a development permit for a material change of use - impact assessment.[10] Consequently its code assessment permit is void, or, at least, does not cover its present operations. Woolworths initially raised that argument in the Planning and Environment Court. In some way which was not explained to us, a determination on that basis would have affected other tenants in the same complex who had not been joined in the proceedings, contrary to r 8(1) of the *Planning and Environment Court Rules 1999*. On the hearing below Woolworths (not then represented by Mr Gibson) expressly confined its argument to the tenancy occupied by Warehouse and abandoned its contention that the term "major shopping development" had any application.

[40] I would not think that Woolworths would be precluded from raising the point as a shield in the manner described above by reason of the fact that it had abandoned the use of the point as a sword. Parties cannot define the terms of their dispute so as to require an artificial decision by the court, made on a basis that assumes a legislative provision does not exist. If the interests of other persons were truly exposed to potential injury by the outcome of the case, the hearing ought to have been adjourned and the persons joined. It is difficult to see how other persons would in fact have been affected by a decision which related only to the tenancy occupied by Warehouse. However, as the appeal can be determined without deciding where in the table of uses the present operations of Warehouse would fit, that is the preferable course.

[41] For these reasons I do not propose to embark upon a discussion of this and the other arguments addressed to us on the question of uses "of a like nature". As a matter of courtesy to the parties I record my firm view that the use being made of the premises by Warehouse is not a use of a like nature within the definition of "showroom" in the superseded planning scheme. Because I do not rest my decision on that view I do not state my reasons for it.

[42] If that were all I would refuse leave to appeal on the ground that the applicant has demonstrated no arguable question of law. However there remains to be considered the first declaration made by the Planning and Environment Court. It seems to me that the inclusion of the words "being another use under column 4 in Section 7.3 of the scheme" is potentially embarrassing, may have gone beyond what was necessary for the decision below and is not warranted by any of the reasons for judgment in this court. Indeed, in the absence of the argument abandoned below, no declaration regarding the commencement of development without a permit is appropriate. Mr Gibson addressed no argument to us in relation to this declaration. I agree with Williams JA that it should be set aside. The first order (the "stop" order) is defective because it is unclear what is meant by "for the purpose of other development" and because it is otherwise imprecise. I agree with the reformulation proposed by Williams JA.

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[10] *Integrated Planning Act 1997*, s 6.1.28(2).

[43] I agree with Williams JA that the Council should bear its own costs.

[44] I agree with the orders proposed by Williams JA.

[45] **HOLMES J:** I have had the advantage of reading the judgment of Williams JA and agree with his reasons and conclusions.

[46] I would only add that the construction for which the applicants contend entails reading the definition of "showroom" as if it came to an end after the words "for the display or offering for sale by retail of goods" and ignoring everything appearing thereafter. The effect is that any floor area of more than 400m$^2$ to be used for the display or offering for sale by retail of any goods at all is a showroom, and the references to the six specific classes of goods or "other uses of a like nature requiring large floor spaces" have no significance. To regard, in that way, most of the definition as otiose is not, I think, an attractive construction. Rather, the classes of good identified in the definition convey what is intended to be included, and what goods are to be regarded as "of a like nature". In each case the goods are of a distinct kind which invites comparison shopping, and requires display; in each case the class includes some items of bulk which require ample floor room. The applicants' varied merchandise was neither within the specified classes, nor "of a like nature".