

From: IGA Kaleen
Sent: Friday, 10 August 2012 12:17 PM
To: Le Couteur, Caroline
Subject: ACT Supermarket Inquiry
Importance: High

Dear Madam Chairperson

RE: ACT SUPERMARKET INQUIRY

You will recall that I appeared before the committee and made representation on behalf of Canberra's IGA supermarkets. Since this representation you will no doubt be aware that Justice Burns handed down his decision in regards to the Giralang case. This case is now being appealed and will more than likely continue on for years to come. This comes at great expense to all of those involved including the Government and still the residents of Giralang do not have their local centre.

You may also be aware that the Woolworths supermarket at Bonner was subject to a Controlled Activity Order where the Government has now issued orders for the developer to reinstate walls and stairs. We believe that despite this Order rectifying some of the issues, this supermarket is still greater than the 1,500sqm allowed in the Crown Lease and accordingly will now test this in ACAT.

All of the above circumstances could have been avoided if the Territory Plan Local Centre's Development Code was to include the following mandatory requirement:

The maximum Gross Floor Area (GFA) for any supermarket is 1,000sqm gross floor area. For the purpose of assessing GFA, the definition in the Territory Plan should be applied and for the avoidance of doubt, this is to include any associated loading docks and storage areas, whether shared or not, and any commercial or other shop premises within the same building or centre associated with or related to the supermarket or the operator of the supermarket (for example offices, bakeries or liquor stores).

This clause should also apply to direct sales involving local centres.

Below I have outlined a summary of the Giralang case and in particular draw your attention to the comments made by experts engaged by the developer.

- The Canberra Times article about the Court decision on 7 July said that the owners of the Kaleen and Evatt IGA supermarkets, joined by local residents, "went to court to appeal against the decision of Planning Minister Simon Corbell to "call in" the re-development of Giralang shops". That is not correct. The calling in of the DA by the Minister removed the opportunity for anyone to "appeal" against his decision. These proceedings were brought in the ACT Supreme Court in an effort to make the Minister comply with the requirements of the Planning and Development Act when determining the DA.
- The plaintiffs have pointed to serious errors in the determination of the development application. For example, the Territory Plan (at C33 of the Local Centres Code) requires that any proposal to carry out development in a local centre "must have regard to" any significant

adverse economic impact on other commercially viable local centres. While poorly drafted, it seems obvious that this was intended to ensure that development in one local centre does not cause a significant adverse economic impact on other commercially viable local centres.

However, the practical effect of the Court's decision is that, so long as the impact of a proposed development in one local centre on another viable local centre is "considered", it does not matter how significant the impact might be. On this basis even the total obliteration of an existing viable local centre could occur provided that the impact has been "considered" in deciding to approve the application. Surely this cannot have been what was intended.

- Another significant issue raised by the plaintiffs related to the failure by ACTPLA to allow members of the public to see and comment on the developer's economic impact assessment during the public consultation period. Earlier applications had been accompanied by an economic impact assessment and this had been made available to members of the public. While an economic impact assessment was prepared in relation to this application, it was not included in the copy of the application that was made available for public comment. It is not clear whether this was done deliberately or by oversight. It was argued by the plaintiffs that natural justice required that they be given an opportunity to read and comment on the developer's economic impact assessment as this was one of the most significant issues involved in the application. On this point the Court accepted that the Planning and Development Act required ACTPLA to make available information that was required to accompany a development application. It also accepted that the legislation required a development application to be accompanied by information or documents addressing the relevant rules and criteria and that those rules and criteria included a section on economic viability. However, the Court held that, because there was no express requirement to produce a document called an economic impact assessment, there was no obligation to make an economic impact assessment available - even though one had been prepared. Again, it could not have been intended that an assessment of economic impact is required to be made available if it forms part of the "Statement Against Relevant Criteria" in the development application form but that no such requirement exists if the assessment of economic impacts is contained in a separate document. Yet that is what the Court has decided.
- The Court's restrictive ruling on the standing issue means that it will be extremely difficult for a resident group, small business or community group to challenge the Minister's decision to use his calling powers. In other jurisdictions the relevant legislation allows "any person" to bring proceedings to remedy a breach of the planning legislation. Why should the ACT be different? Adopting a narrow view of who can challenge Government decisions effectively means that the legality of such decisions will often be beyond challenge. That cannot be a good thing in a democracy like ours.
- This case is not about mere competition. The proprietors of supermarkets in nearby local centres have made an investment in their businesses based on what the Territory Plan says is appropriate development in a local centre. They are happy to compete with a supermarket at Giralang that is a genuine local centre supermarket. By definition, a local centre should not be attracting business from other local centres, let alone a Group Centre. They should at least have the opportunity to hold the Minister to account in complying with the requirements of the legislation that he himself is responsible for.

During the court case experts witnesses engaged by the developer made the following comments:

- Claire Middleton – town planning expert for the developer conceded that the dock which was marked on their plans as a shared facility is likely to be controlled by the Woolworths supermarket. The dock was not included in the 1,500sqm area for the supermarket, therefore making the supermarket far greater than 1,500sqm.
- Gavin Duane economic expert for the developer confirmed that he did not check the areas on the plans for the supermarket, he accepted them as a given to him by the developer and further on page 212 of the transcript, he admits that the 1,500sqm he used in his report was the gross leasable area

not the gross floor area method of measurement defined in the territory plan. Gross Leasable Area is significantly less.

- Expert economic witness for the developer, Adrian Hack, confirms on page 196 of the transcript that the development could be categorised as a group centre, he also goes on to confirm that the other local centres in the area are significantly smaller.
- **Of course none of the above dot points mattered when Justice Burns found that there was no mandate for a retail hierarchy!**

In summary, we now have Woolworths undermining the Local Centres Development Code putting full line supermarkets in local centres (Giralang, Dunlop, Bonner) whilst Coles have sought to use the ACTPLA masterplanning process to put second full line supermarkets at Kambah, Erindale, Weston Creek and Dickson and of course their new superstore at Gungahlin.

This will only result in increasing the market share of the duopoly and destroying local centres, independent supermarkets and the opportunity for an independent warehouse. This contravenes the Supermarket Implementation Plan and Policy and the Martin Report. Canberra residents want their local centres, they want the convenience of a top up shop. The elderly, the disabled and those without vehicles also need this service. Again, we impress upon the committee to stop second full line supermarkets in group centres and limit the size of local centres to 1,000sqm so all Canberra residents can have access to convenience shopping.

There is currently 41,800sqm of new supermarket space in the ACT being proposed by the major supermarket chains!

Should you require any further information please do not hesitate to contact me.

Chris Haridemos

on behalf of

Independent Supermarkets Group

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