

**THE MAC SERVICES GROUP PTY LIMITED**  
**GULGONG WORKERS' ACCOMMODATION FACILITY**  
**DA 0217/2012 TO MID-WESTERN REGIONAL COUNCIL**

**MEMORANDUM OF ADVICE**

**Introduction**

1. The Mac Services Group Pty Limited ("the Mac") has made a Development Application ("the DA") to construct and operate a large mining workers' accommodation village ("the proposed development") on land owned by the Mac in Gulgong ("the Land").
2. The Land is within the local government area of the Mid-Western Regional Council ("the Council").
3. The land is zoned Agriculture under the Mid-Western Regional Interim LEP 2008 ("the LEP").
4. By letter dated 21 November 2011 the Council advised the Mac that, notwithstanding the views it earlier expressed, the DA was for a use, to wit *tourist and visitor accommodation*, which is a prohibited use on the land pursuant to the LEP.
5. I am asked to advise on the proper characterisation of the proposed development, and accordingly whether or not in my opinion the proposed development is permissible or prohibited in the Agriculture zone.

**Summary**

6. Whilst, as frequently occurs, there may be differing opinions about the proper construction of a planning instrument, the better view is that the proposed development is not *tourist and visitor accommodation*, is an innominate use within the zone, and therefore permissible with the consent of the Council.

## **The proposed development**

7. The proposed development is described in the Statement of Environmental Effects ("SEE") as *proposed workers (sic) accommodation facility*. The following works are proposed as part of the DA:
  - On-site preparation works;
  - Construction of an internal road system and associated parking;
  - Earthworks;
  - Associated landscaping and outdoor open space areas;
  - Construction of workers accommodation facility comprising 400 rooms;
  - Ancillary amenities including central facilities building, convention centre, administration building, shed, gazebos, laundries and indoor and outdoor recreational facilities including ancillary gymnasium, lap pool and multi-purpose court;
  - Construction and provision of utility services and drainage works;
  - Entry signage.
8. Each of the rooms comprises a single bedroom and an ensuite bathroom. The rooms are not self-contained in that they do not have kitchen facilities. As identified above there are a large number of common facilities to service the occupants.
9. Whilst the DA does not provide specific information about the occupation of the rooms, it is made plain that the workforce accommodated in the accommodation will be "fly in/fly out" or "drive in/drive out". The period of time a worker will reside in the room will be generally in the order of days or weeks on each occasion, followed by a departure and a return some weeks later, over a period of years. Whilst one worker vacates a room, another worker will then occupy it when the first worker is back at his or her permanent home.
10. The provision of the accommodation facilities is expected to be for a period in the order of 20 to 25 years but each "stay" by a worker will be for a number of days or weeks, and the period of time that any individual worker will utilise the accommodation will vary obviously over a number of years.

## Mid-Western Regional Interim Local Environmental Plan 2008

11. The LEP adopts a relatively common structure but is not in the form of the standard instrument local environmental plan.
12. Clause 10 of the LEP creates the various zones within the local government area, including the agriculture zone, which is under the subheading "Rural Zones". Clause 11 provides that for the purposes of the LEP land is within the relevant zone shown on the LEP map.
13. Clause 12 identifies the zone objectives and land use table in the following terms:

**(12) Zone Objectives and Land Use Table**

- 1) *The table at the end of this Part specifies for each zone:*
    - a) *The objectives for development, and*
    - b) *Development that may be carried out without consent, and*
    - c) *Development that may be carried out only with consent, and*
    - d) *Development that is prohibited.*
  - 2) *The consent authority must have regard to the objectives for development in a zone when determining a Development Application in respect of land within the zone.*
  - 3) *In the Table at the end of this Part:*
    - a) *a reference to a type of building or other thing is a reference to development for the purposes of that type of building or other thing, and*
    - b) *a reference to a type of building or other thing does not include (despite any definition in this Plan) a reference to a type of building or other thing referred to separately in the Table in relation to the same zone.*
  - 4) *This clause is subject to the other provisions of this Plan."*
14. Clause 12 is in conventional terms in subclauses (1) and (2). Subclause (3) is less conventional and may assist in construing the table of uses for each zone.
  15. It should also be noted that pursuant to subclause (4) the clause is subject to the other provisions of the Plan. [Subclause (4) does not sit terribly comfortably with the phrase in subclause (3)(b) "(despite any definition in this Plan)" but for the purposes of this advice that curiosity plays no part.]

16. The land use tables for each of the zones appear after cl 15 at the end of this part of the LEP.

17. The objectives of the agriculture zone include:

- *To protect and maintain land for agriculture and other rural purposes.*  
...
- *To provide for other rural land uses such as mining, extractive industries, forestry and energy generation.*  
...
- *To promote the sustainable management, use and development of certain land for agriculture, mining and other primary industries.*  
...
- *To permit some non-agricultural land uses and agricultural support facilities, such as rural industries and tourist facilities, which are in keeping with the other zone objectives and which will not adversely affect agriculture capability or capability of the land the subject of the development (or adjoining land).*

18. The table for the agricultural zone adopts the scheme of identifying that development which is permitted without consent, and specifically identifying that development which is prohibited. All other development not otherwise specified is permitted with consent. The table provides:

**(2) Permitted without consent**

*Agriculture, Bio Solid Waste Application; Bushfire hazard reduction works; Drainage; Environmental Protection Works; Forestry; Home Industries; Home Occupations; Public Utility Undertakings; Restriction Facilities; Utility Installations.*

**(3) Permitted with consent**

*Any other development not otherwise specified in Item 2 or 4.*

**(4) Prohibited**

*Agricultural Machinery Showrooms; Backpackers' Accommodation; Boarding Houses; Bulky Goods Premises; Bus Stations; Business Premises; Car Parks, Caravan Parks; Childcare Centres; Dual Occupancies – Attached; Entertainment Facilities; Heavy Industries; Home Occupation (Sex Services); Hospitals, Hostels, Hotel Accommodation;*

*Industries; Kiosks; Light Industries; Manufactured Home Estates; Medical Centres; Motor Showrooms; Office Premises; Places of Public Worship; Pubs; Reception Centres (except where ancillary to an approved use); Recreation Facilities (indoor); Recreation Facilities (outdoor); Registered Clubs; Residential Flat Buildings; Restaurants (except where ancillary to an approved use); Restricted Premises; Retail Premises; Road Transport Terminals; Seniors Housing; Service Stations; Sex Services Premises; Shop Top Housing; Tourist and visitor accommodation."*

19. When considering whether a proposed development is permissible, the first enquiry is to identify whether the proposed development is properly characterised as any one of the forms of development which are permitted without consent (*Egan v Hawkesbury City Council* (1993) 79 LGRA 321). That task is easy. The proposed development is not remotely like any of the forms of development which are permitted without consent.
20. The next step is then to determine whether or not the proposed development is properly characterised as one of the forms of development which is prohibited, because those uses are also specifically identified in the zoning table. If it is not properly characterised as one of the forms of prohibited development, then the proposed development is permissible with consent regardless of what its particular characterisation may be, because all other development is permitted with consent in accordance with the table for the agricultural zone (see *Egan*).
21. Accordingly it is appropriate to consider any potentially relevant definitions in Part 4 of the table to the agricultural zone. Council for some time had formed the view that the proposed development did not fall within any of the identified forms of prohibited development and therefore was permissible with consent. Council has now formed the view that the proposed development should be characterised as "*tourist and visitor accommodation*", an identified form of prohibited development.
22. Whilst this advice predominantly addresses that question, I should point out that I have considered whether the proposal can be characterised as any of the other forms of prohibited development and, for reasons which are generally self evident and unnecessary to detail, I am satisfied that there are no other forms of prohibited development worthy of serious consideration.

23. It is appropriate to note a number of definitions from the dictionary to the LEP. The dictionary has force by virtue of cl 4 of the LEP which provides:

**"(4) Definitions**

*The dictionary at the end of this Plan defines words and expressions for the purposes of this Plan.*

24. *Tourist and visitor accommodation* is defined as follows :

***Tourist and visitor accommodation*** means a building place that provides temporary or short-term accommodation on a commercial basis, and includes hotel accommodation, serviced apartments, bed and breakfast accommodation and backpackers accommodation.

25. Some of the terms within that definition are themselves defined in the Dictionary to the LEP :

***Hotel accommodation*** means a building (whether or not a hotel within the meaning of the Liquor Act 1982) that provides tourist and visitor accommodation consisting of rooms and self-contained suites, but does not include backpackers' accommodation, bed and breakfast accommodation, a boarding house or a serviced apartment.

...

***Serviced apartment*** means a building or part of a building providing self contained tourist and visitor accommodation that is regularly serviced or cleaned by the owner or manager of the building or part of a building or the owner's or manager's agents.

...

***Bed and breakfast accommodation*** means tourist and visitor accommodation comprising a dwelling (and any ancillary buildings and parking) where the accommodation is provided by the permanent residents of the dwelling for a maximum of four guest bedrooms and:

- a) *Meals are provided for guests only; and*
- b) *Cooking facilities for the preparation of meals are not provided within guests' rooms, and*
- c) *Dormitory-style accommodation is not provided.*

...

**Backpackers' accommodation** means tourist and visitor accommodation:

- a) That has shared facilities, such as a communal bathroom, kitchen or laundry; and
- b) That will generally provide accommodation on a bed basis (rather than by room)."

26. The terms *temporary, short-term, accommodation, commercial basis*, from the definition of *tourist and visitor accommodation*, are not defined terms in the LEP. Also, the phrase *tourist facilities* in the objectives to the agriculture zone is not a defined phrase.

## Discussion

27. Some general observations about construing planning instruments should be made.
28. Environmental planning instruments are a species of delegated legislation, a statutory instrument (s 3, *Interpretation Act* 1987) and should be interpreted in accordance with the general principles of statutory interpretation (*Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398). A construction should be preferred that is consistent with the language and purpose of all the provisions of such instruments (*Project Bluesky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).
29. Whilst one may also bear in mind the lament of Tobias JA that "*any attempt to always find planning logic in planning instruments is generally a barren exercise*" (*Calleja v Botany Bay City Council* [2005] NSWCA 337 at [25]), it is in the final analysis "*the context, the general purpose and policy of a provision and its consistency and fairness which are guides to its meaning and the logic with which it is constructed.*" (*Commissioner for Rail (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ).
30. In particular, it must be remembered that a definition clause is not a substantive or operative part of an instrument. In *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635, Barwick CJ, McTiernan J and Taylor J stated:

*"The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense - or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way..."*

- *The effect of the Act and its operation in relation to dividends as defined by the Act must...be found in the substantive provisions of the Act which deal with the dividends."*

31. The meaning of a definition turns on the context in which it appears, considered as a whole (*Deputy Commissioner of Taxation v Mutton* (1988) 12 NSWLR 104; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568).

32. In the High Court in *Kelly v The Queen* (2004) 218 CLR 216 at 253, McHugh J said at [103]:

*"...The function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment...once ...the definition applies... the only proper...course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error to the meaning of the substantive enactment...the true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies." [Emphasis added]*

33. It should also be recognised that even though the words "*unless the contrary intention appears*" do not appear in a definition section, they are implied: (*Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449; *Hall v Jones* (1942) 42 SR (NSW) 203 at 207-208). This also ensures that a definition is not interpreted in a manner which would defeat a meaning required by the context (*Betella v O'Leary* [2001] WASCA 266 at [13]. Both *Treloar* and



*Betella* were applied in *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379 at [40], McColl JA).

34. The definition of *tourist and visitor accommodation* is described in one sense as a “means and includes” definition. That is, the definition purports to first define the term and then give types or forms of development which fall within that defined term. A question in such circumstances can arise as to whether or not the list of included items is an exhaustive list.
35. In *YZ Finance Co Pty Limited v Cummings*, McTiernan J, writing the leading judgment in the High Court ((1963)-(1964) 109 CLR 395 at 398), quoted with approval that which Lord Watson said in *Dilworth v Commissioner of Stamps* [1899] AC 99:

*“The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause it declares that they shall include. But the word “include” is susceptible on another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to “mean and include”, and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act, must invariably be attached to these words or expressions.”*

36. That means that a definition such as the present may have one of two possible constructions. One, that *tourist and visitor accommodation* simply means a building or place that provides temporary or short-term accommodation on a commercial basis and that the sorts of accommodation which fall within that definition include, without limitation, hotel, serviced apartments, bed and breakfast and backpackers’ accommodations. That list is not exhaustive.
37. The alternative is that the four types of accommodation identified are an exhaustive explanation of the meaning of *tourist and visitor accommodation*.
38. It should be noted that none of the identified uses in the list is not within the ordinary meaning of *tourist and visitor accommodation*.

39. There is no rule of construction which requires inclusive words to be read as exclusive of any elements which otherwise fall within the meaning of the word or expression being defined (*Cranbrook* at [42] omitting citations). That means that one is not driven to one form of construction of the phrase or another by virtue only of the words in the definition itself. Lord Watson in *Dilworth* applied orthodox principles of statutory interpretation to determine the meaning of “includes” in the context of the statutory instrument as a whole. That is a proper approach and adopted in a number of cases cited in *Cranbrook* at [43].

40. As McColl JA said at [44]:

*“In some cases a definition uses the word “includes”, then recites matters which would fall within the ordinary connotation of a defined expression as well as some which do not. Again the sense in which “includes” is to be understood turns on the context...”*

41. The observation made by her Honour was in relation to a definition which was not a “means and includes” type definition, but rather one which simply used the phrase “includes”. The principle of construction, however, is the same – it is the context and purpose of the instrument as a whole, having regard to its policy and purpose, that determines the meaning of the phrase under consideration.

42. The broader context of the definition is principally the various land use tables in the LEP, including the objectives of the zones, and to a lesser extent the objectives of the LEP itself.

43. Before considering that context and purpose, however, an observation should be made about one aspect of the definition itself, upon which the Council appears to have total reliance. A proper understanding of the meaning of the definition can first be considered within its own terms.

44. The Council appears to have formed the view that if a building or place provides temporary or short-term accommodation on a commercial basis, then it is *tourist and visitor accommodation*. That is, it is the provision of accommodation, upon conditions, which is the development. The conditions are that the accommodation is temporary or short-term, and provided on a

commercial basis. But as to the actual activity, it is the provision of accommodation which Council says is the use of the land, the development.

45. In planning law, use must be for a purpose. The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued. In determining whether land is used for a particular purpose, an inquiry into how that purpose can be achieved is necessary. The use of land involves no more than the physical acts by which the land is known to serve some purpose. (*Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400 at [27] and [28] and the cases cited therein).
46. In my view, the provision of accommodation is a physical act by which the land is made to serve some purpose. The purpose needs also be identified.
47. The provision of accommodation does not of itself impart the necessary character of the use. Accommodation can come in many forms, and for various purposes. From a domicile to a hotel room.
48. Further examples are that temporary or short-term accommodation on a commercial basis is provided by hospitals, nursing homes, shearers' quarters, mining companies, schools and potentially a range of other types of uses.
49. The breadth of possibilities is unimportant, it is simply to identify the fact that accommodation of itself is not a purpose, but a physical act which serves some other purpose. Even taking account of the conditions of the provision of accommodation, there are a number of purposes capable of being served by such accommodation.
50. It is therefore necessary to consider whether within the terms of the definition itself a purpose can be ascribed to the provision of accommodation.
51. The purpose being served in the definition is *tourist and visitor accommodation*, in a number of potential forms, probably all the possible forms. The accommodation is for tourists and visitors. (There is probably no relevant distinction between a tourist and a visitor and it is not suggested that in planning terms there is any distinction to be made).

52. It is appropriate to construe the definition itself by applying a purpose to the provision of accommodation, being the purpose provided by the terms of the definition itself.
53. But it is not the end of the task, as to construe the definition without reference to the context and purpose of the substantive provisions of the LEP is to risk falling into error. That task must be undertaken.
54. Within the Agricultural zone the objectives of the zone assist in understanding the context from which to construe the defined *term tourist and visitor accommodation*. In doing so one remembers that one construes the phrase in the relevant substantive part of the instrument and not in isolation.
55. A number of objectives of the zone promote mining, which is a permissible land use in the Agriculture zone. The provision of accommodation for mining workers is a land use ancillary to mining, but of a size and scale in present circumstances such that it constitutes a separate and independent use of land. But nevertheless the objectives of the zone promote such a use and say nothing of discouraging short-term and temporary accommodation.
56. The objectives do not explicitly address tourist and visitor accommodation, but implicitly, consistently with the prohibition, do not mention it as a land use to be encouraged.
57. In the broader context it is to be noted that *tourist and visitor accommodation* is permissible in the village zone, the neighbourhood business zone, the mixed use zone and the commercial core zone. The use is prohibited in the other zones.
58. That context drives one to the construction of the phrase that the accommodation must be for the purpose of tourist and visitors. Each of those zones are zones in which one would ordinarily expect to find various forms of tourist and visitor accommodation. They are not zones where one would expect to find the provision of a short-term accommodation on a commercial basis for other sorts of purposes, including for mining employees.

59. That is, by truly attaching the purpose to the physical act of provision of accommodation, accommodation for tourists and visitors, the context commands an appropriate construction. Absent ascribing that purpose to the provision of accommodation, then simple provision of accommodation would sit uncomfortably in the zones in which the use is permissible.
60. The corollary of that proposition is that, even ignoring the separate construction of the definition referred to above, the context of the provision means that the provision of accommodation is limited to tourists and visitors.
61. Perhaps the commercial core zone is the most obvious example where if the Council's construction is correct then a proposal such as the present would be permissible in a zone where such a land use would be antipathetic to virtually all of the objectives of the zone. That is not a logical and sensible outcome, and does not best meet the purposes of the provisions of the LEP.
62. It may be said that in such a case when the consent authority is considering the objectives of the zone pursuant to cl 12(2) of the LEP then development application for mining workers' accommodation would be refused. That is undoubtedly the case, but in considering the context in which a land use is considered in order to derive its proper meaning, if a land use is permissible in a zone it is expected that one form or another of that land use is appropriate within that zone.
63. An individual development application may not meet the objectives of the zone and so be refused on its merits. But when considering for the purpose of construing a phrase in the context in which that phrase appears, it is the appropriate course to give the phrase the meaning which best serves the objects and purposes of the instrument. That leads to the conclusion that the purpose of the accommodation must be for tourists and visitors.
64. I should note that tourist and visitor accommodation is not an identified prohibited use in the light industrial and general industrial zones, but each of the elements of the definition being hotels, backpackers' accommodation, bed and breakfast and serviced apartments are prohibited uses. Whilst one might initially consider that is an expression by the drafter that there are other forms

of tourist and visitor accommodation which are not prohibited, such a conclusion is entirely antipathetic to the objectives of the zones.

65. The more appropriate conclusion is that, as a matter of drafting, the LEP identifies each of the possible forms of tourist and visitor accommodation to be prohibited rather than use the overarching term tourists and visitor accommodation. There is nothing in the objectives of either zone, unsurprisingly, which would suggest that any part of the land is appropriate for any form of residential use. Each of the zones are established to provide land for light industrial and general industrial uses. Nothing else.
66. This is another contextual indicator of the true meaning of *tourist and visitor accommodation*.
67. The heavy industrial zone has a different structure in the LEP. *Tourist and visitor accommodation* is a prohibited use but the individual elements of the definition are not separately identified as prohibited uses. It is not particularly clear as to why the drafter has adopted that method of drafting.
68. However it is important to note that one of the only four objectives of the zone is:

*"To promote development in Ulan that is associated with, or ancillary to, mining."*

69. There is no doubt that the provision of accommodation for mining workers is development that is associated with, or ancillary to, mining. Insofar as the LEP reflects the intentions of Council, the village of Ulan is an area in which associated and ancillary uses to the mining in Ulan and surrounding area are to be promoted. It is an absurd result to suggest that the prohibition on *tourist and visitor accommodation* is also a prohibition on the provision of accommodation for mining workers in that zone.
70. That is another contextual indication of the true meaning of the definition.
71. The overall context in the substantive provisions of the term *tourist and visitor accommodation* leads to its proper construction meaning the provision of

accommodation for tourists and visitors in the forms identified in the definition – hotel, bed and breakfast, serviced apartments and backpackers' accommodation.

72. It is that context which leads to the conclusion that the definition is of the type referred to in *Dilworth* of "mean and include" such that the identified land uses are an exhaustive explanation of the meaning of tourist and visitor accommodation. It is in truth unnecessary to reach that conclusion once one understands that the purpose of the provision of accommodation must be ascribed to the definition in the context in which it appears in the substantive provisions, but nevertheless the proper exercise of construction leads one to the conclusion that the list is exhaustive. There are no other possible forms of tourist and visitor accommodation on a proper understanding of that term.

73. It remains to consider whether the provision of mining workers' accommodation is nevertheless the provision of accommodation for tourists and/or visitors. It is undoubtedly accommodation provided on a commercial basis and on a short-term or temporary basis.

74. In my opinion there is little doubt that a mineworker is not a tourist or visitor.

75. The ordinary meaning of those terms applies, and dictionaries can provide some assistance. In the Australian Oxford Dictionary "tourist" is defined as:

- 1) *A person making a visit or tour as a holiday; a traveller, especially abroad (often attrib: tourist accommodation).*
- 2) *A member of a touring sports team...*

76. Mining workers are certainly not there for a holiday.

77. A *visitor* is described in the same dictionary as:

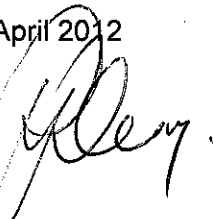
*"A person who visits a person or place."*

78. *Visit* is defined as:

*Go or come to see (a person, place etc) as an act of friendship or ceremony, on business or for a purpose, or from interest.*

79. Mining workers are not visiting. They have come for a purpose, that is, to work. Whilst their stay may be temporary, nevertheless they are not visiting a place to see it; they have come to provide the labour and earn the remuneration therefrom.
80. It follows therefore that the provision of accommodation for mining workers is not the provision of accommodation for tourists and visitors.
81. In my opinion the proposed development is not *tourist and visitor accommodation* as that term is properly understood in the LEP. Therefore the proposed development is permissible with the consent of the Council as an innominate use.

18 April 2012



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