20 January 2016

Legal Advice – confidential – DA by Parramatta Leagues Club for a car park – 'ancillary' – 'prohibited'

1. Instructions

1. We have been instructed to provide an advice to Council's planning division concerning the permissibility of a proposed multi-storey car park 'ancillary' to the Parramatta Leagues Club (**the Club**) which is the subject of a development application (**DA**) by the Club to the Council.

2. The extent and purpose of the proposed development requires examination to determine whether the proposed use is independent, ancillary or, both. Council officers have formed the opinion that the proposed development is not an ancillary use but a 'car park' which is prohibited in the zone. They have concluded that the development would require reduction of its size and therefore use, to bring it within the bounds of an 'ancillary' use.

2. Applicant's legal advice

3. We have been provided with a legal advice (**the legal advice**) by Hall & Wilcox, the applicant's solicitors. We do not agree with their conclusion on the central issue of 'ancillary' use,

4. The legal advice addressed the following specific questions and we have included their answers to each question and ours in red:

    - Q: Are clubs, Stadiums and recreation facilities permissible uses pursuant to the Parramatta Local Environmental Plan 2011 (LEP)?
      A: Yes.
      Our A: Yes, in the RE2 zone.
    - Q: Is the proposed car park ancillary to the Club?
      A: Yes.
      Our A: No, may be an ancillary use if the scale of the development is reduced, otherwise it is prohibited.
    - Q: Would the proposed car park be prohibited if it was used by visitors to Parramatta Park and/or adjoining 'Pirtek' Stadium (**Stadium**) (not being Club members, visitors or staff)?
      A: No.
      Our A: This is a question which depends on an assessment of 'fact and degree' if reliance is being placed upon an 'ancillary' use. There are some legal difficulties with the owner's consent which are addressed in the body of this advice.

    - Q: Is the car park able to be managed with a requirement for the payment of a fee or does the payment of a fee make the proposal prohibited?

A: Yes (to the first part), and No (to the second).

Our A: Yes (to the first part) and No (to the second),

3. Summary of this Legal Advice

5. In our view, the proposal for a car park as currently framed, is a prohibited development. The DA form lodged with Council dated 27 May 2015, seeks consent for a car park as an 'ancillary' use to the 'Parramatta Leagues Club'. The DA did not relate to land beyond that description, such as the Stadium or Parramatta Park, and this DA should be confined to the DA as framed.

6. In our view, it is reasonable to conclude that the scale of the proposed development goes beyond that which may be characterised as an 'ancillary' use. Reducing the scale of the development appropriately, could bring the proposal within the bounds of an 'ancillary' use to the Club.

7. If the assumption is made that the DA includes the Park and Stadium, there would be a strong argument (subject to its management) that the car park is 'ancillary' to those uses.

4. Documents and assumptions relied upon

8. We have relied upon the following material in providing this advice:

a) JRPP Assessment Report prepared by Council officers(**assessment report**);
b) Car Park Management Plan (Plan of Management or POM);
c) Letter from the applicant's lawyers Hall & Wilcox dated 7 December 2015;
d) The DA application form dated 27 May 2015;
e) Taylor Thomson Whitting (**TTW Report**);
f) Parking and Traffic Consultants (**PTC Report**); and,
g) Statement of Environmental Effects (**SEE**), dated 8 May 2015.

9. We have made the following assumptions:

1) The DA is accompanied with the proper owners consent.
2) The DA has not been formally amended to include land beyond the boundaries of the Lot 1.
3) The zoning of the land is RE2 Private and Recreation.
4) The facts contained in the Council officer assessment report are accurate.
5) The Club is characterised as a 'registered club' under the Parramatta Local Environment Plan 2011 (**LEP**).

5. The Land

10. There is reference in a number of DA documents, to various components of the existing and related development on various parcels of land. We provide details of each parcel in the following paragraphs. We are of the view that that not all of these parcels are part of the land to which the DA relates and have included them to assist in understanding of the application and the applicant's submissions.

a) The Leagues Club land

11. The Parramatta Leagues Club is located at No. 15 O'Connell Street, Parramatta (Lot 1 DP 128288) (**Lot 1**) at the intersection with Eels Place and Gross Street.

b) The existing and the proposed car park land

12. Part of the Club building and all of its existing ground level car park, extend beyond Lot 1 into the Parramatta Park (**Park**) as shown in the red outline of the aerial photograph in the Assessment report (**Site**).

13. It is this Site which is the subject of the DA, although surrounding land has also been referred to in the consideration of the DA. The Site is located within the north eastern corner of the Park and in proximity to the Parramatta (or "Piretek') Stadium (**Stadium**).

14. The Park is managed by the Parramatta Park Trust (**Trust**) pursuant to the *Parramatta Park Trust Act,* 2002 establishing the Trust as an independent Government Authority (formerly part of NSW National Parks & Wildlife Service's Regional Park network).The Park has been listed as a world heritage item and as an item under the State Heritage Act.

15. The Trust has entered into a long term lease (**lease**) with the Club. The Club's solicitors have stated in the legal advice, that the lease requires part of the car park to be available to users of the Park. We have not sighted the lease.

c) The Stadium land

16. The football Stadium is located on a separate parcel of land which was formally part of the Park. It has not been included in the DA form but it is referenced by the applicant's representatives during the course of the assessment by Council officers and the JRPP.

17. In the late 1970's, there was a controversial proposal to develop part of the Park as then composed, for a football Stadium; in the same location where the Stadium is currently located.

18. Just months after the Land & Environment Court, NSW (**Court**) commenced operation in 1980, a challenge was made to the Court by a residents' action group called the "Friends of Parramatta Park" as to the legality of the proposal. The action was taken in the name of a local called Mr Hale: *Hale v Parramatta City Council*.

19. The Court ruled in favour of the applicant, a decision which was confirmed in the NSW Court of Appeal. Further appeal proceedings were to be taken but this was made unnecessary when the State Government of the day, promptly passed special legislation authorising the construction of the Stadium.

20. The parcel of land, subject to the legislation and upon which the Stadium was to be constructed, totalled approximately 8 hectares. This land was excised from the Park. The Parramatta Stadium Trust was formed in 1989 and had care control and management of the Stadium.

The Parramatta Stadium Trust was abolished on 2 March 2012, upon the repeal of the Parramatta Stadium Trust Act 1988 (Act No.86, 1988). Responsibility for management of the Stadium was then transferred to Venues NSW, under the Sporting Venues Authorities Amendment (Venues NSW) Act 2011 (Act No.57, 2011). The amending Act formed the Western Sydney Local Venues Council, as a body to provide advice to Venues NSW in relation to the authority's sporting venues in Western Sydney. This includes the Stadium.

6. The DA

21. On 27 May 2015, the Club lodged the DA seeking consent for a multi-level car park of 7 levels above ground and, 2 basement levels, comprising 1001 spaces on the Site, of the existing at-grade car park comprising 365 spaces. It is also proposed to: a) reconfigure part of the existing at-grade car park to provide a further temporary 94 spaces; b) modify Eels Place including widening of the carriageway; and, c) construct a new driveway entry and a turning circle.

22. The DA was accompanied by the Park's written owner's consent to lodge the DA.

23. The Club asserts that it requires an increase in car parking because of greater demand by the public for the use of the Club. Two traffic reports were provided to Council by the club:

    a) Taylor Thomson Whitting (**TTW Report**) and,
    b) Parking and Traffic Consultants (**the PTC Report**).

24. The traffic reports concluded that there was a need for increased parking and the proposed development would meet the existing and future demand.

25. Council was concerned about the extent of the additional parking sought in the DA and the consequent traffic generated by the development.

26. The Club submitted further traffic information and a Plan of Management (**POM**), concerning the operation of the proposed car park. The POM was amended to note the proposed car park would only be used by members and staff of the Club during sporting events at the Stadium.

27. Because of the nature of the development, the DA was referred to the Joint Regional Planning Panel (**JRPP**). Council officers prepared an assessment report (**assessment report**) and submitted it to the JRPP for its consideration. The assessment report concluded that the development as proposed is prohibited because the proposed use may be characterised as a 'car park' and not a use 'ancillary' to the existing Club.

28. In December 2015, the matter came before the JRPP for consideration and was deferred to enable the Parramatta Councillors to make their own submission to the JRPP.

7. The planning framework

29. The site is zoned ***RE2 Private Recreation*** (**the RE2 zone**) under the LEP.

30. The following uses are *permitted* with development consent in the zone:

> *Boat launching ramps; Boat sheds; Building identification signs; Business identification signs: Charter and tourism boating facilities; Child care centres; Community facilities; Emergency services facilities; Entertainment facilities; Environmental facilities; Environmental protection works; Flood mitigation works; Function centres; Information and education facilities; Jetties; Kiosks; Markets;* ***Recreations areas****; Recreation facilities (indoor);* ***Recreation facilities (major); Recreation facilities (outdoor)*** *;* ***Registered clubs****; Respite day care centres; Restaurants or cafes; Roads; Take away food and drink premises; Tourist and visitor accommodation; Water recreation structures; Water, recycling facilities* [**emphasis added**].

31. The relevant definitions in the LEP are:

- "***Registered club***" is defined as:

  "a club that holds a club licence under the Liquor Act 2007."

- "***Recreation facilities (major)" is*** defined as:

  "a building or place used for large-scale sporting or recreation activities that are attended by large numbers of people whether regularly or periodically, and includes ***theme parks, sports Stadiums, showgrounds, racecourses and motor racing tracks"*** *[***our emphasis added****].*

- "***Recreation area***" is defined as:

  "a place used for outdoor recreation that is normally open to the public, and ***includes:***

  a children's playground; or
  an area used for community sporting activities; or
  a public park, reserve or garden or the like,
  and any ancillary buildings, but does not include a recreation facility (indoor), recreation facility (major) or recreation facility (outdoor)"
  *[***emphasis added]**

- "***car park*"** is defined as:

  "a building or place primarily used for the purpose of parking motor vehicles, including ***any manoeuvring space and access thereto, whether operated for gain or not"*** *[***emphasis added***].*

32. The Land Use table of the LEP prohibits a "car park" within the RE2 zone. In accordance with a long line of authority, a prohibited use can only be permissible where it is 'ancillary'. In this case we have been asked to consider the correctness of the applicant's legal advice that the car park will be ancillary not only to the Club but also to the Stadium and to the Park.

8. Permissibility

33. A 'car park' is prohibited within the applicable RE2 zone. Therefore, a car park can only be permissible where it is ancillary to the Club or other related development. The resolution of this issue is key to the question of permissibility of the development; it turns on the total parking supply and the way in which the car park will be used. Is it to be used for the Club only or, may its use be ancillary to the use of the neighbouring lands namely, the Stadium and the Park?

34. The Statement of Environmental Effects (**SEE**) supporting the DA noted the car park would be used as follows:

- the primary and principle use is parking for club members;
- the secondary use is parking for patrons of the adjacent Stadium; and
- where possible, public parking for visitors to Parramatta Park and surrounding park/leisure precinct.

35. **The Club's contentions** - The Club contends the car park is a permissible use as:

- it is ancillary to a 'registered club'; a 'recreation facility (major)'; and, a 'recreation area', because those uses are permissible in the RE2 zone;
- the parking is ancillary to all of those uses, together or individually, because without the demand generated by the Club and the Stadium such parking would not be needed; and,
- the payment of a fee is not material.

36. **The Council's contentions** – The Council has noted in the assessment report to the JRPP (at page 10) that it does not agree with the Club that the proposed car park is ancillary to the Club or the Stadium (but does not address the 'recreation area' argument which was subsequently raised in the applicant's advice) for the following reasons:

- *The quantum of parking proposed is 452 spaces in excess of what would be needed to serve the club, based upon certain parking demand surveys provided by the applicant;*
- *The Stadium and the club are independent uses, and have their own parking areas;*
- *The Stadium is located on its own separate allotments, which is not part of this application;*
- *There are no existing consents which link the club use to that of the Stadium land;*
- *The fact the Stadium is within the same RE2 zone as the subject site, and is also a permitted use within that zone, is of no relevance;*
- *There is no link between those two venues other than proximity; and*
- *The Plan of Management (**POM**) provided with the application reinforced concerns the car park would be an independent use, as it included the following details:*
    - *The club will manage and operate the car park and will retain appropriate resources to do so;*
    - *Priority will be given to club members, but where there is capacity others visiting the precinct will be able to use the car park;*
    - *Car park fees are intended to help recover costs and reduce reliance on gaming revenue; and*
    - *A flexible, undefined, portion of parking spaces will be reserved for members on game days.*

37. The Council has formed the view that:

> *Given the excessive surplus of parking relative to the needs of the Club, and the way in which the parking facility was to operate, Council's position was the proposal would not be a*

component of the club, but an independent use on the same land. That independent use satisfies the definition a 'car park' which is prohibited under the LEP 2011.

38. **Applicant's further traffic report** - To address concerns raised by Council, the Club provided a further traffic report in relation to the parking demand and supply, and a revised Plan of Management (**POM**). Those documents provide that:

    - The parking supply is appropriate to meet the current and future demands of the club, with only 96 space available for other users;
    - The car park is for club patrons, and would not be provided otherwise;
    - The car park is within the Parramatta Park Trust lands and a lease provision requires the car park to be available to users of the park, and such use is ancillary to parking for the club;
    - Priority will be given to club members. Where there is capacity a portion of the parking will be available to others using facilities in the Parramatta Park precinct;
    - On game days at the Stadium the parking will only be provided to club members and staff. It is expected club members will be charged a parking fee on game days. Parking will not be available to the general public; and
    - Members/guests of the club using the car park will be required to validate tickets in order to exit the car park without payment.

39. **The response of Council officers** - The Council officers formed the view that the revised POM "*only goes some way to addressing the issue of permissibility*". It noted that no public parking would be available on game days at the Stadium. The POM continues its reference to parking by users not attending the Club, even though these references are qualified as being relative to capacity being available, or for the purposes of the club meeting its lease obligations with the land owner.

40. Council officers formed the view that the proposed car park would only be permissible if it is ancillary to the Club and that this could only be achieved by the imposition of appropriate conditions which would:

    - reduce the number of parking spaces;
    - limit its use to members and guests of the club; and,
    - preclude its management by a commercial operator.

41. The lease obligations of the Club to provide parking for users of Parramatta Park, were not seen to be an appropriate consideration. The POM notes however that such parking will only be made available "where there is capacity". The POM does not identify how these users could access the car park, as it also states that technology will be provided to enable members to use their membership card to obtain access and egress through the security gates of the car park.

42. Part 8.4 of the assessment report addresses access, parking and traffic impacts of the proposed development. Having evaluated the two updated traffic reports, the Council has concluded that:

    a) The parking supply associated with a possible future development application (DA2) cannot form a part of this development application because although the DA includes a master plan which references future DA2, it is not of sufficient detail to allow any meaningful assessment; and this DA is not lodged as a staged development application under section 83B of the EPA Act.
    b) Neither traffic report demonstrates that the current demand for onsite parking exceeds supply. One of the applicant's surveys identified demand in the range of 14%- 75% based upon 6 surveys over a 10 month period. Another report identified a maximum demand of 63% based on a single survey;
    c) The variation between the TTW and PTC traffic reports "*in terms of the parking demand for the current club facilities are so disparate as to warrant caution with the PTC conclusions";* and,
    d) *"I think it is reasonable for the parking provision to be based around demand during 15-25 events per year, mostly at the Stadium when visitation at the club should be high. Accordingly, my view is that neither study is appropriate."* [comments of Council's traffic engineer]

43. The final position taken by the council officers and provided in the assessment report is that:

    (1) It is not appropriate for this proposal to include parking associated with a possible future expansion of club facilities, and those 275 spaces must be excluded from any consideration;
    (2) The midpoint between the two minimum figures identified in the TTW an PTC reports is a reasonable position to adopt in terms of required parking supply for the current club facilities – being 356 spaces;
    (3) Levels B2, B1, G and 1 of the proposal contain 437 spaces, being an oversupply of 81 spaces relative to that midpoint;
    (4) A further 94 at grade space would remain possible, as proposed, until such time as DA 2 was lodged and determined;
    (5) Adopting that arrangement would provide 531 spaces – an increase of 166 spaces or 45% on the current supply of 365 spaces;
    (6) The design of the multi storey facility lends itself to construction in stages, allowing for expansion though the provision of additional levels in the future should the Club receive approval to expand its facilities as foreshadowed in this application; and,
    (7) The 94 surface parking spaces which may be lost as a result of future development application(s) are not entitled to be replaced. The parking supply for any such application(s) shall be determined based only upon demand associated with future applications.

44. On the basis of the information supporting the DA, the Council officers have formed the opinion that the scale of the development as proposed would not be ancillary to the existing Leagues Club development.

45. In these circumstances, rather than refusing the DA, the recommendation has been made that the development be amended in design to overcome the 'ancillary use' issue by imposing a "deferred commencement" condition in any consent, requiring the plans to be revised to show only Basement 2, Basement Level 1, the ground floor and level 1, being 437 spaces, plus the 94 at grade, temporary spaces (i.e. a total of 531 spaces).

46. In light of these conclusions and the JRPP's request, our advice has been sought as to whether:

    c) the application of these facts would support a contention that the development is prohibited as a car park and is not 'ancillary' to the development; and,

    d) the position taken by Council in the assessment report would be upheld by the Court.

9. Characterisation of the use?

47. A development for the purposes of a car park in an RE2 zone is prohibited, unless it is 'ancillary' to a lawful development.

48. In order to determine this issue, an assessment must be made as to the purpose for which the development is to be carried out.

49. The 'purpose' is the reason for which the development is to be undertaken or, the end to which the development services.

50. To determine whether a development is (or will be) for a particular purpose, it is necessary to enquire how that purpose will be achieved by the development. The assessment will vary depending on the facts of each case. These principles were provided in ***Shire of Perth v. O'Keefe (1964) 110 CLR 529*** (***O'Keefe***) where it was held that in planning law, use must be for a purpose (also see the *Minister Administering the Crown Lands Act v. New South Wales Aboriginal Lands Council* (1993) 80 LGERA 173 at 175 and 188. The purpose is the end to which a use of land is to serve. It describes the character which is imparted to the land and for which the use is pursued (*O'Keefe* at 534).

51. The purpose of the use needs to be distinguished from the nature of the use. Uses of different natures can still be seen to serve the same purpose:

"merely incidental or subordinate to the permitted use of those premises as a dwelling house in circumstances where the display and sale of the flowers involved the use of the premises for the prohibited purpose of a roadside stall"

10. 'Ancillary' use and ancillary purpose - the '*hand maiden*'

52. There is a great deal of case law interpreting and applying the principle of an 'ancillary use'. Talbot J (as he then was) of the Land & Environment Court, NSW (**Court**) referred to the allusive term in a case of the mid 1990's as having the meaning of 'hand *maiden'*. The term evolved from the Latin 'ancillaris', and '*ancilla'* - a '*maidservant*'.

53. An ancillary use may therefore be defined in more current terms, as being a use which is 'subservient' to or 'subordinate' to a dominant purpose, and which can therefore be ignored for characterisation purposes in planning law.

(i) Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157 –

54. *Foodbarn* is the seminal case in relation to characterisation of an 'ancillary' *use.* The Court of Appeal held that where premises are being used for more than one purpose and one purpose is subordinate to the other, it is legitimate to disregard the subordinate purpose and treat the premises as being used for the dominant purpose.

55. Glass JA in Foodbarn made the following statement:

"Obviously a person who is entitled to use land for the purpose of a dwelling-house may use it for incidental purposes, such as garaging his car or housing his boat. No doubt in some circumstances a householder who on an isolated property occasionally used his land for the purpose of making sales from a stall might be held to be doing no more than using his land for the purposes of a dwelling-house. For instance, if a householder allowed his land to be used annually as the site for a fate to raise money for some charitable purpose, the use of the land in that way might be regarded as simply incidental to its use for the purposes of a dwelling-house. ***The question is one of fact and degree.*** *Having regard to the regularity and extent of the activities involved in selling the flowers, add to the fact that some of the flowers were grown on other land, there Is no reason to disagree with the decision reached in the courts below that the use of the land in the present case could not be regarded as merely incidental to its use for the purposes of a dwelling-house." (at 216-217)* **[Emphasis added**]

56. The last statement in the passage makes it clear that land can be used for more than one purpose. A use which can be said to be ancillary to, or related to, or interdependent with another use, is not automatically precluded from being an independent use of the land. ***It is a question of fact and degree in all the circumstances of the case*** whether such a result ensues or not.

57. Of critical importance to this consideration, is the character, extent and 'other features of the use'. If these are sufficient to cause the use to be an independent use, then the use will be so characterised notwithstanding that it could also be said to be ancillary to, or related to or independent with another use.

58. Mahoney JA dissented in the result but accepted as a matter of principle that use of land can be for two purposes: see at 279.

(ii) Chamwell Pty Ltd v Strathfield Council (2007) 151 LGERA 400

59. The principle that a use of land must be for a purpose is confirmed and reflected in the case of *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400 (***Chamwell***). In *Chamwell*, the Court found that all the elements of a proposed development were for the purpose of a supermarket (including car parking areas, driveways and a landscaped forecourt) on the basis that they all served the one purpose being that of a supermarket.

60. This case provides that the task of identifying the purpose of a development, needs to be undertaken in a common-sense and practical way. It should also be at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on.

61. It was also made clear that a distinction must be drawn between the nature of different components of a land use, and the purpose. Uses of a different nature can still be seen to serve the same purpose. In our case, it must be determined whether the purpose is capable of being an independent use or, to enable the club to function on the land and therefore 'ancillary'.

***(iii) Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404) (*O'Donnell*) –**

62. In *O'Donnell*, the Court of Appeal qualified what was said in Foodbarn, and held that the fact that a land use is ancillary to another land use, it does not automatically preclude the ancillary land use from also being an independent use of the land. If it is an independent use of the land, that use is relevant for characterisation purposes, and if that use is prohibited, the entire development will be prohibited.

63. The Court held that the use of excavation and sale of soil and sand and a use of a riding school physically coexisted on the same land at the same time. Neither use was dominant or ancillary. Meagher JA, with whom Samuels AP and Clarke JA agreed, stated at 409 – 410 stated:

> *"Notwithstanding the principles laid down in Foodbarn, it does not follow that a use which can be said to be ancillary to another use is thereby automatically precluded from being an*

> *independent use of the land.* ***It is a question of fact and degree in all the circumstances of the case*** *whether such a result ensues or not. When a resident uses his land to park his motorcar at his house, he is no doubt not conducting an independent use of car parking; when an employer installs at his factory a canteen for his workers, no doubt he is not conducting an independent use of running a restaurant; and when the Clarke's grew vegetables for their table, they were not conducting an independent use of vegetable growing. When one use of the land is by reason of its nature and extent capable of being an independent use it is not deprived of that quality because it is "ancillary to", or related to, or interdependent with, another use. If a book publisher opens a sales' room at his publishing house to sell his products, the selling of books is an independent use although ancillary to the use of publishing.* [**Emphasis added**].

64. To assist in understanding this concept, Meagher JA gave a further example of a book publisher opening a sales room at its publishing house - it could be said that the selling of books would be ancillary to the publishing use, but it would also be an independent use. In the case of this DA, the purpose may be characterised as both an ancillary use and an independent one.

(iv) Further case law

65. There were a series of cases during the 1980's dealing with dual uses. At this time service stations expanded their operations to include a shop. *Warringah Shire Council v. Caltex Oil (Australia) Pty Ltd* (1989) 68 LGRA 206 is one example of many, which illustrates the point. They show that a "convenience store" and a "petrol station" are two independent uses, although the former is ancillary to the latter.

66. There have been cases where persons have garaged and parked trucks, used in a business, at a dwelling house and the Court has found that use of the land for garaging and parking the trucks was *not* ancillary to the use of the dwelling house, but rather for an independent commercial purpose, such as transport depot: see *Chesser v. Morris* (1958) 4 LGRA.175; *Franconi v. Shire of Perth* (1965) 11 LGRA 380 and *Fairfield City Council v. Mangos* [2004] NSWLEC 298J_11 June 2004).

67. In a case a little closer to home of *Parramatta City Council v Amalgamated Television Services Pty Ltd* (1979) 38 LGRA 379, the use of a portion of land within a Special Uses A - Television Station zone as a helipad for the landing and taking off a helicopter used in connection with the business of a television station, was held to be a use for a purpose ordinarily incidental or subsidiary to that indicated purpose (at 382). It was not a use for an independent purpose of a helipad.

(v) Circular PS 13-001

68. Circular PS 13-001 was issued by the Department of Planning on 21 February 2013 and provides assistance to Councils in characterising development.

69. The Circular restates the principles of characterisation of development in the terms espoused by the courts. It provides that when determining whether a component of a development is ancillary or independent, consideration should be given to what area of land is used for the different components as of the development.

70. The Circular notes that an ancillary use may be more than a minor use and whether a use is ancillary or not is not capable of being reduced to a mathematical formula (*Macquarie International Health Clinic Pty Ltd v University of Sydney* (1998) 98 LGERA 218 and Bardsley-*Smith & Anor v* Penrith City Council & Others [2012] NSWLEC 79).

71. Although the Circular is instructive, it is not a document upon which the Court would place a great deal of reliance. The Court would consider case law which has established precedent. The Circular does however highlight the concept which has often been repeated in these cases, that it is always involves 'questions of fact and degree'.

11. Consideration

72. ***The Club*** – We have had regard to the legal authorities together with the character; extent; and, features of the proposed development, and have formed the opinion that the Court would be likely to find that the characterisation of the use of the car park as proposed, would be for an independent purpose on the Site and not ancillary to the Club. The proposed 'car park' may serve the Club, but as configured, would not be subservient to the existing registered Club.

73. It is likely that the Court would characterise the proposed development as 'ancillary' if its scale was reduced such that it would be 'subservient' to the existing Club development.

74. We have provided this advice in relation to the DA lodged with Council relating to the land identified in the DA form. There has been representations made in the SEE and during the course of the assessment, that the car park is ancillary to the Club; the Park (beyond the boundaries of the site); and, to the Stadium.

75. We have been instructed that the DA has not been formally amended to include the Stadium or the Park. The proposed 'car park' does not appear to us to relate to the Stadium or the Park. It relates to the land upon which the Club is located.

76. ***The Park*** - Although the Part Trust has given its owner's consent to the DA as originally proposed, it was for the land identified in the DA and does not appear to have been extended to the balance, or portion of the Park. The Club has not provided any, or any adequate, documentation in support of the Park, in its entirety (or portion), being included in the DA. We

are of the opinion that there is inadequate detail to support the proposition that the car park will be 'ancillary' to the Park.

77. As a matter of general principle, it is foreseeable that a multi-level car park could be ancillary to the Park but that would require a merit assessment on its own facts.

78. ***The Stadium*** - the Stadium is an independent use on a parcel of land which was excised in the 1980's. The land is managed by Venues NSW and a related Committee. We have assumed that Venues NSW, or its related entity, is the owner of the land.

79. Regulation 49 of the Environmental Planning & Assessment Regulation 2000, provides that a DA may be made by the owners "*of the land to which the development relates*" or, another person with the owner's written consent. If the DA was to relate to the Stadium land, the DA should be formally amended and the owner's written consent to the DA being lodged (or amended) must be given, to enable that land to be included in the consideration.

80. We respectfully adopt the reasoning of the Council officers in the assessment report to which we have referred in paragraph 35, that the Stadium is an independent development to which this DA does not relate as it is on its own land; has no consent which would link the Stadium to the Club; has not been included in the DA; and, the owner of the Stadium land has not given its written consent to the DA.

81. The applicant's representatives (including their lawyers) have submitted that there is a link sufficient to draw the Stadium into the assessment of this DA, because the Stadium and the Club lands have the same RE2 zoning. In our opinion this conclusion is not correct. The zoning of the two parcels is of no relevance to the question of whether there is a link of the land uses for the purposes of assessing this DA. It is only a matter for notation that the existing developments on those parcels of land are permissible.

82. In our opinion, the Stadium land does not form part of the DA and therefore the proposed car park is not ancillary to the use of that land. In the same way we considered a car park could be ancillary to the use of the Park, a car park could be ancillary to the Stadium but those circumstances do not exist here.

83. As emphasised in the case law, the characterisation of a use is a '*question of fact and degree*'. Our conclusion is based on the facts and the degree of use as presently instructed. We have relied upon the expertise of the Council officers and the conclusions expressed in the assessment report, for the preparation of this advice.

84. If the character, extent or features of the use changes then a different characterisation may be possible.

85. Please feel free to contact us if you have any question

Ian Woodward
Lawyer | *Legal Services Manager* | *Parramatta City Council*
Accredited Specialist | *Local Government & Planning Law*