

From Chris Gough
Email chrisgough@sglaw.com.au

Date: 27 August 2020
Our Reference CCG:BSG:200235

To
David T. Calgaro
Email
david@inthepinkconstructions.com.au

Organisation
David T. Calgaro
Your Reference

Dear David,

**Re: Milton Meadows and Shoalhaven City Council
Development Application for Seniors' Living Development
Ppty: 1001 Princes Highway, Milton**

We refer to the abovementioned matter and have been asked to provide advice in respect of a development application made for a Seniors Living development at the above property. We are instructed that the development comprises a retirement village and includes a medical centre and restaurant.

The land the subject of the application has been the subject of an amendment to the Shoalhaven LEP in the form of a 'spot rezoning' to specifically permit the proposed use as a retirement village, which would otherwise be prohibited on the land. The change to the LEP has not included an amendment to permit use of the land as a medical centre or restaurant both of which remains prohibited.

We understand that the Planning Panel has raised the permissibility of the medical centre within the village and have requested our client to provide legal advice supporting its application.

We have been asked to provide that advice.

Ancillary Development

Where one use of land is prohibited it is still possible to carry it out on land in circumstances where that use is subservient to another, permissible use. The subservient use is known as an ancillary use and the purpose of that use is properly characterised as being part of the dominant use. A common example is that of a dwelling and garage. Properly characterised, the use of land for the purpose of a garage is for 'carparking', a use which is separately defined in most LEPs and is commonly prohibited in residential zones. However, in the case of residential garages, they are "subsumed" into the residential use and are characterised as ancillary to the residential use and properly characterised as a use for residential purposes.

The use of land in planning law is identified by the process of characterisation. The leading case on the characterisation of use is *Chamwell Pty Limited v Strathfield Council* (2007) 151 LGERA 114. In that case the development proposed was for a

supermarket, access to which was by a road over a separate parcel of land where roads were permissible but supermarkets were prohibited. The applicant argued that the use of the land was not properly characterised as being for 'supermarket.'

Preston CJ found that the access road was part of the supermarket as it was designed to serve the end of enabling the supermarket to be carried on.

He said that:

"In planning law, use must be for a purpose: Shire of Perth v O'Keefe [1964] HCA 37; (1964) 110 CLR 529 at 534-535 and Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (1993) 80 LGRA 173 at 188. 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: Shire of Perth v O'Keefe

Where the use of land is for two purposes the Court is tasked with determining whether those uses are the separate or independent uses of land, or whether one use is subsumed into the other.

Where land is used for two conflicting purposes, difficult questions of construction and characterisation can arise when the environmental planning instrument permits one purpose but prohibits the other. It may be necessary to ascertain, having regard to the character, extent and other features of the uses, whether the prohibited purpose can be regarded as subsumed in the permissible purpose, so that it is legitimate to disregard the prohibited purpose and treat the permissible purpose as that for which the land is used, or whether they are independent of each other so that the land is being used for both prohibited and permissible purposes.¹

In order to characterise the development the subject of this advice, we must therefore determine whether the purpose of the use for the medical centre is properly to be understood as being for the purpose of the retirement village, in which case, it would be permissible, or whether it should be characterised as a separate, independent use. If the medical centre use is properly characterised as being the use of land for retirement village then it will be ancillary development, and despite the fact that it is a prohibited use, it would be permissible.

Characterising the Proposed Development

We note that the medical centre will be a small part of the overall development, and the retirement village use would therefore appear on first blush to be the dominant use of the land. Whilst that may be a factor in determining whether one use is dominant over the other, that that is not the test for characterisation.

In the subject development, we understand that the medical centre is proposed to only provide services to the residents of the retirement village, and that it will not be open to the general public.

¹ *Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147 (13 September 2013) at [28]

Further, we understand that the retirement village contains 89 beds to cater for high dependency residents. We are of the opinion that the proposed medical centre within the development is an essential and necessary feature of a retirement village of this nature and would properly be considered as ancillary to the village use as it would be subservient to the dominant use as a village and would not be characterised as an independent use of the land

Restaurant

We understand that the restaurant will be open to the public. If the majority of patrons to the restaurant are from the village it is arguable that the restaurant use would be ancillary to the dominant use of the village as its dominant use would be the provision of meals to the village residents. It is a question of fact and degree as a restaurant in this location would otherwise be prohibited.

Yours faithfully,

STOREY & GOUGH



Chris Gough

Senior Partner, Acc. Spec. (Loc Govt & Plan)

Email: chrisgough@sglaw.com.au