

23 September 2021

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Attention: Benjamin Lin

Dear Benjamin

Advice re 2-8 Pymble Avenue and 2-4 Everton Street, Pymble

You have asked us to provide legal advice in relation to the above development.

In particular, you have asked us to provide advice in relation to the following two questions:

- whether a rental management office is permissible on the above site; and
- whether any prior unauthorised use or works are relevant to the assessment of any modification application or application for a building information certificate.

Summary advice

In our opinion:

- Development for the purposes of a 'residential flat building' is expressly permitted.
- The use of Lot 94 SP97280 as a rental management office:
 - is **not** independent of the use of the site as a residential flat building;
 - **is** ancillary to that use; and
 - is therefore permissible in the R4 zone.
- The use of Lot 94 is properly characterised as being for a 'residential flat building'.
- It would not matter if the land use could also be characterised as office premises or business premises. While those expressions are defined in the LEP, they have no work to do in the context of the Land Use Table entry for the R4 zone.
- As a consequence, we consider that there is no impediment under the LEP (in terms of permissibility) to the grant of a development consent for the use of Lot 94 as the rental management office for the residential flat building.
- Any past unauthorised use or erection of works is not in itself a legal barrier to the approval of a modification consent for:
 - the prospective use of Lot 94 for the purposes of a rental management office; and
 - the prospective use of the fitout works within Lot 94.

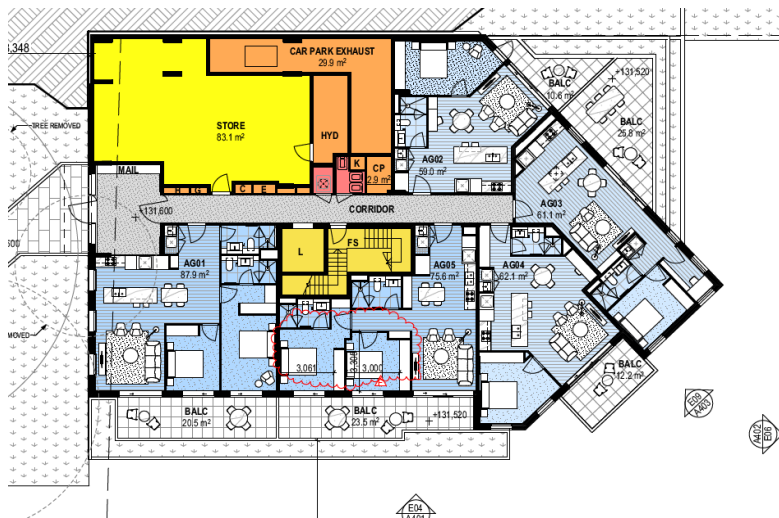
Background

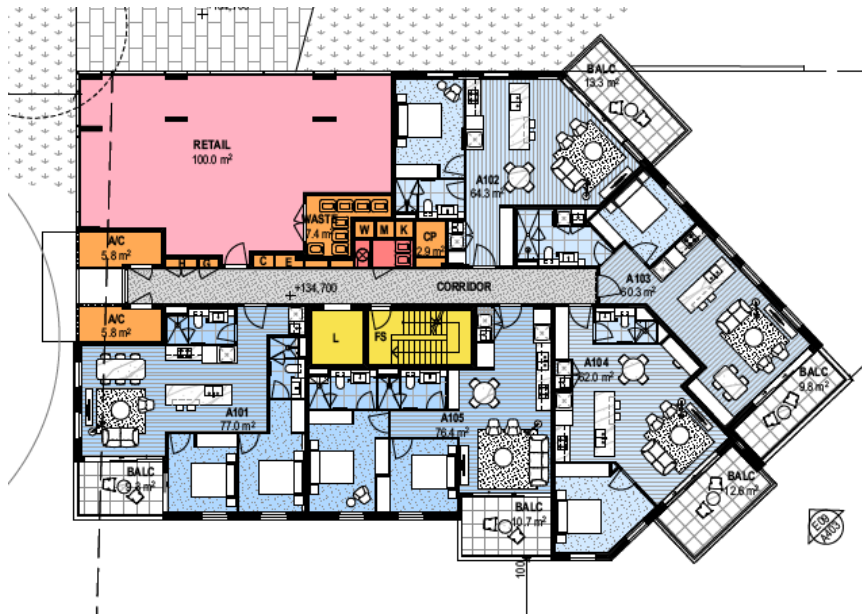
We understand and assume the relevant facts to be as follows:

- You are the developer of 2-8 Pymble Avenue and 2-4 Everton Street, Pymble (**the site**).
- Development application DA0145/15 was lodged with Ku-ring-gai Council (**the Council**) on 28 April 2015.
- Development consent was granted to that application by the Land and Environment Court on 25 July 2016 (**the development consent**). The development consent was for the:

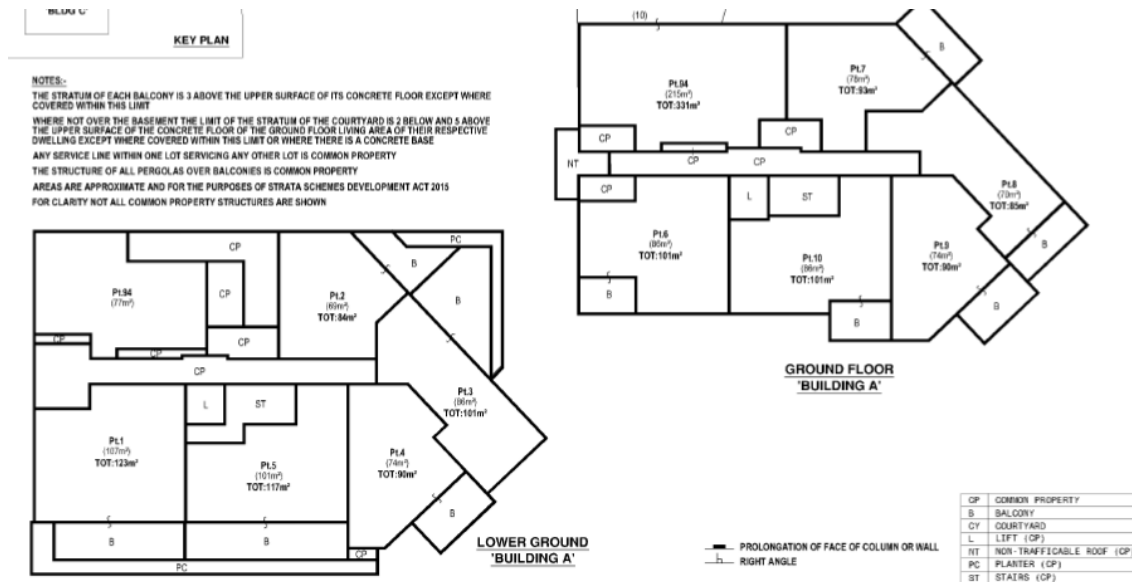
demolition of existing structures and the erection of three residential flat buildings containing 98 units, a neighbourhood shop, basement car parking and associated landscaping at 2-8 Pymble Avenue and 2-4 Everton Street, Pymble...

- The development consent was modified on 12 December 2019 by modification application MOD0198/18 (**the modification consent**). There have been no other modifications.
- No other development consent or complying development certificate applies to the development.
- You have applied for and obtained several construction certificates.
- An occupation certificate number 18000498/10 was issued by Mike Gooley on 2 October 2020.
- The site is strata subdivided and strata plan SP97280 was registered on 29 September 2020.
- The approved neighbourhood shop is shown on drawings A104 and A105, revision F, prepared by DKO Architecture and stamped on 27 November 2019 in relation to the modification consent. An extract of these drawings is below:





- The approved neighbourhood shop is Lot 94 in SP97280 (**Lot 94**). An extract of the strata plan is below:



- Fitout works have been carried out in Lot 94. These fitout works are as shown on drawings A211-A215 prepared by AGC Interior dated 23 March 2021.
- Lot 94 is used as a rental management office. This office is used as follows:
 - it is the relevant rental and sales office for the development;
 - a real estate agency that is responsible for the rental and sale of properties in the building will occupy the office space for that purpose (and any other office use by the real estate agent is only minor);
 - the building manager will be based in this office when they are on site;
 - the strata manager(s) will work generally from this office if they are on site;
 - strata annual general meetings and extraordinary general meetings will be run from these offices as required;

- the building and strata managers will be paid by the owners' corporation of the development.
- You intend to lodge the following applications to the Council:
 - a modification application to seek approval for the prospective use of the rental management office and the prospective use of the works (being the fitout of the rental management office); and
 - a building information certificate application in relation to the works.

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. Planning controls

- 1.1 The characterisation of your proposed land use must be by reference to the particular terms of the LEP. The question is whether the development can be characterised:
 - (a) as being for a purpose that the instrument identifies as being permissible with consent; and
 - (b) not for a purpose that the instrument identifies as being permissible without consent or as being prohibited,

(*Botany Bay City Council v Pet Carriers International Pty Ltd* [2013] NSWLEC 147 at [32]).
- 1.2 The site is zoned 'R4 High Density Residential' (**R4**) under the *Ku-ring-gai Local Environmental Plan 2015 (the LEP)*.
- 1.3 Clause 2.3 of the LEP is the primary mechanism by which types of development are made either permissible or prohibited in a zone. This clause (relevantly) says:
 - (1) The Land Use Table at the end of this Part [ie Part 2] specifies for each zone: ...
 - (b) development that may be carried out without development consent, and
 - (c) development that may be carried out only with development consent, and
 - (d) development that is prohibited. ...
 - (3) In the Land Use 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 (bold added)...
- 1.4 Clause 2.3(3) makes it clear that, when considering characterisation for permissibility, it is the **purpose** of the use of the land that is important, rather than its nature (cf *Chamwell v Strathfield Council* [2007] NSWLEC 114 at [34]).
- 1.5 The Land Use Table at the end of Part 2 includes text organised under the heading 'Zone R4 High Density Residential'. Item 2 under that heading is titled 'Permitted without consent'. Nothing under that heading is relevant in the present case.
- 1.6 Item 3 under that heading is titled 'Permitted with consent'. Listed under that heading (among other things) is (relevantly):

Residential flat buildings; ...
- 1.7 Development that is prohibited in the R4 zone (by reason of the Land Use Table) is the development for the purposes listed under the heading for item 4: 'Prohibited'. This item says the following development types are prohibited:

Pond-based aquaculture; Tank-based aquaculture; Any other development not specified in item 2 or 3.

- 1.8 Importantly, item 4 expressly nominates pond-based aquaculture and tank-based aquaculture as development types that are prohibited, and otherwise the only other development types that are prohibited are the types of development that are not expressly permitted (either without consent under item 2, or with consent under item 3).
- 1.9 The chief judge of the Land and Environment Court, Preston CJ, explained how such a provision works in *Pet Carriers* at [50]:
- Because the category of prohibited development is formulated as being “any development other than development included in item 2 or 3”, **it necessarily does not and cannot include any purpose of development that is specifically nominated in item 2 or 3** (bold added)...
- 1.10 The Chief Judge went on to say (at [55]):
- if the genus is a nominate [ie expressly nominated] permissible purpose, development for that purpose will be permissible **even if** it could also come within one or more species of purposes that are innominate [not expressly nominated] prohibited purposes (bold added).
- 1.11 This means that a proposed development is only prohibited under item 4 of the Land Use Table if it is **not** a development for the purpose of a development type listed in items 2 or 3 of the table.
- 1.12 This approach was recently re-affirmed by the Chief Judge of the Land and Environment Court in *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41. In that matter Preston CJ had to decide whether a commissioner of the Court had correctly characterised an access way that was to serve a seniors housing development. The Land Use Table provisions were similar in structure to the present case. Development for a ‘road’ was listed in item 3 and item 4 prohibited ‘[a]ny other development not specified in item 2 or 3’.
- 1.13 Preston CJ said at [63] – [66]:
- The Commissioner correctly first considered whether the access way could be characterised for the nominate permissible purpose of “road”. If so, the access way could not be prohibited, even if it could also be characterised as being for the innominate prohibited purpose of seniors housing. This flowed from the structure of the land use table for the RU2 Zone. Prohibited development includes “any other development not specified in item 2 or 3”. One of the developments specified in item 3 as being permissible with consent is “roads”. Hence, if the access way can be characterised as the specified development of “roads”, it cannot fall within the category of prohibited development of “any other development not specified in item 2 or 3”.
...
- The Commissioner’s approach to determine first whether the access way could be characterised as being for the nominate permissible development of road (a development specified in item 3 of the land use table for the RU2 Zone) was correct. **If the access way could be characterised as being for the nominate permissible development of road, it would be permissible, irrespective of whether it could also be characterised as being a seniors housing development** (bold added).
- 1.14 This means the question that must – as a matter of law – be considered is whether the proposed development is for one of the purposes in items 2 and 3. Item 2 does not list any relevant development types. In our opinion, the relevant development type in item 3 is ‘residential flat building’.
- 1.15 Furthermore, in our view no issue of permissibility can arise even if the land use was also characterised as office premises or business premises. While those expressions are defined in the LEP, they have no work to do in the context of the Land Use Table entry for the R4 zone.
- 1.16 As a consequence, we consider that there is no impediment under the LEP (in terms of permissibility) to the grant of a development consent for the use of Lot 94 as the rental management office for the residential flat building.

2. Ancillary development to a residential flat building

2.1 The LEP defines 'residential flat building' as follows:

a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing

2.2 The development consent approved a residential flat building.

2.3 Accordingly, the use of the site is properly characterised as being for a residential flat building.

2.4 In our opinion, the use of Lot 94 as a rental management office is ancillary to the use of the land as a residential flat building, and therefore permissible with consent in the R4 zone.

2.5 To explain why we say this, it is necessary to briefly touch upon the seminal decision of *Foodbarn v Solicitor General* (1975) 32 LGRA 157. In that decision (at 161) the Court of Appeal said:

It may be deduced that where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, **it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used** (bold added).
...

2.6 This is commonly thought of as 'ancillary' development. However, the flip side of 'ancillary' development was also considered by the Court:

Where the whole of the premises is used for two or more purposes none of which subserves the others, it is ... irrelevant to inquire which of the multiple purposes is dominant. If any one purpose operating in a way which is **independent and not merely incidental to the other purposes is prohibited**, it is immaterial that it may be overshadowed by the others whether in terms income generated, space occupied or ratio of staff engaged (bold added).

2.7 This is further explained in *Baulkham Hills Shire Council v O'Donnell* (1990) LGRA 404 by Meagher JA (at 409-410):

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 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 motor car 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**; when the Clarks grew vegetables for their table they were **not conducting an independent use of vegetable growing**. But 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 (bold added).

2.8 In the present case, we consider the following factors relevant:

- (a) the rental management office will be the rental and sales office for the properties on the site;
- (b) real estate agencies who manage the rental properties within the development and/or the sale of properties in the development will occupy this office space (and not undertake any other activities in the office of significance);
- (c) the building manager will be based in this office when they are on site;
- (d) the strata manager will work generally from this office when they are on site;
- (e) strata meetings will be held in this office as necessary (including annual general meetings and extraordinary general meetings);
- (f) the building and strata managers will be paid by the owners' corporation; and

- (g) the office is integrated into the residential flat building and is not a separate structure.

2.9 Accordingly, in our opinion, the use of Lot 94 as a rental management office:

- (a) is **not** independent of the use of the site as a residential flat building;
- (b) **is** ancillary to that use; and
- (c) is therefore permissible in the R4 zone.

3. Relevance of any prior unauthorised use or works

3.1 In *Mirvac Projects Pty Ltd v Ku-Ring-Gai Council* [2007] NSWLEC 540, it was held by Commissioner Hoffman and Talbot J (at [35]-[36]) that a consent authority has the power to entertain an application made under the former section 96 (now section 4.55) irrespective of whether the development has been carried out.

3.2 More recently, the Court of Appeal in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177, Preston CJ of the Land and Environment Court stated at [41]:

Consider the example of a building that has been erected not in accordance with the development consent that authorises the erection of the building. Just as another development consent could not be granted to authorise the erection of the already erected building, so too the existing development consent cannot be modified to authorise retrospectively the erection of the already erected building. However, **another development consent could be granted or the existing development consent could be modified to authorise the use of the already erected building in the future**. The grant of another development consent or the modification of the existing development consent would not cure the breach of s 4.2(1) of the EPA Act of carrying out the development of the erection of the building not in accordance with the development consent, but **either approval would authorise the development of the use of that building in the future** (bold added).

3.3 It is open to a consent authority to approve an application for a development that is dependent upon works carried out unlawfully in the past: *Hooper v Lucas* (1990) 71 LGRA 27, 34; *Dennis Foster Insurance Brokers Pty Ltd v Sydney City Council* [1999] NSWLEC 53 at [26]-[27].

3.4 Past unlawful use is not in itself, grounds for the refusal of development consent for the prospective use of the land (*Jonah Pty Limited v Pittwater Council* [2006] NSWLEC 99 at [35]).

3.5 Accordingly, we consider that any past unauthorised use or erection of works is not in itself a legal barrier to the grant of the development consent for the prospective use of Lot 94 as a rental management office that is ancillary to the residential flat building use.

Please do not hesitate to contact Stella Zhao (02) 8035 7905 or me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely




Aaron Gadiel
Partner

Accredited Specialist — Planning and Environment Law