Short Term Residential Accommodation

Case Note: *Graincorp Operations Ltd v Liverpool Plains Shire Council and The MAC Services Group* [2013] NSWCA 171

Introduction

Characterisation of a proposed development for the purposes of permissibility under an environmental planning instrument is a fundamental first step in the assessment of a development application under Part 4 of the *Environmental Planning and Assessment Act 1979*. Permissibility of proposed development is a precondition to the subsequent steps in the assessment process.

Failure to properly characterise a proposed development is an error of law reviewable by the Land and Environment Court in judicial review proceedings. This type of error opens the door to third party challenges to the validity of a development consent.

In the following article I review a recent decision of the NSW Court of Appeal where characterisation was considered. The decision, *Graincorp Operations Ltd v Liverpool Plains Shire Council and The MAC Services Group* [2013] NSWCA 171, deals with development for the purpose of short term residential accommodation. The leading judgement was delivered by Ward JA.

Proposed workforce accommodation

In *Graincorp* the Court of Appeal considered the characterisation of a use described in a development application as a "workforce accommodation facility". The proposed facility consisted of 1500 relocatable accommodation units and associated facilities intended to primarily house “fly in fly out” workers servicing a nearby mine.

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1 *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422.
The relocatable units each contained between 4 to 6 bedrooms, each with a small ensuite bathroom. There were no cooking or laundry facilities in the units. The units were clustered into precincts, each of which contained a number of "recreational pavilions" and laundries. The overall facility also contained a commercial kitchen and restaurant, with seating for up to 250 persons; a "crib" room, where occupants could prepare and eat their own meals; a TV room; a gymnasium; tennis courts; pool; and "dedicated green space" for outdoor recreation.

The evidence before the Court was that mine workers would stay in a particular accommodation unit for the duration of a rostered shift, which was generally between 5 and 14 days. Then the workers would generally leave the facility at the conclusion of that rostered shift period, before returning for their next shift.

The site was zoned 1(b) general agriculture under the Parry Local Environmental Plan 1987. Within that zone development for the purpose described as “residential buildings (other than dwelling-houses and units for aged persons)” was listed in the zoning table as a prohibited use. The expression “residential buildings” was not defined in the Parry LEP.

GrainCorp challenged the validity of the approval granted by Liverpool Plains Shire Council on the basis that the proposed development was prohibited. Graincorp contended that the accommodation units were properly characterised as residential buildings other than dwelling-houses and units for aged persons. Graincorp argued that the units were residential buildings because they were to be used for the purpose of human habitation.

MAC contended that the temporary or transient nature of the proposed use of the accommodation units was such that they lacked the necessary element of permanence or settled abode to bring the use of the buildings within the ordinary English meaning of the term "residential buildings".

**Meaning of the expression “residential buildings”**

The expression “residential buildings” was not defined in the Parry LEP. As a general rule of statutory interpretation, where a word or expression is not defined in statutory instrument it has its ordinary English meaning. After consulting several dictionaries, the Court held that:

"...on the ordinary meaning of "residential" it is sufficient that structures are used as the usual abode of people or as their abode "for a time" (in the sense of more than a fleeting stay) or even, in some of the older usages of the expression "in residence", for the purpose of abode for a stated function."

The Court also considered various authorities dealing with short term accommodation. These included *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd* (1990) 21 NSWLR 532, a case concerning the use of apartments in the Blues Point Tower at North Sydney. Other cases considered were *Dooralong Residents' Action Group v Wyong Shire Council* [2011] NSWLEC 251, *KJD York Management v Sydney City Council* [2006] NSWLEC 218 and *Sydney City Council v Waldorf Apartments* [2008] NSWLEC.
The Court found little assistance in these earlier authorities because each turned on definitions contained in the particular planning instruments under consideration in each case.

**Proposed accommodation units were residential buildings**

The Court of Appeal held that the proposed workforce accommodation facility was a residential building, and thus prohibited in the 1(b) zone. The Court agreed that the purpose of the facility, in a planning sense, was to accommodate the residential needs of mine workers. These workers were likely to come and go on a regular basis and spend a “not inconsiderable time” at the facility. The Court held that it was entirely legitimate that “one might have a residence (or might reside) in two different places”.

The Court was not persuaded that the temporary or transient nature of the proposed use was a defining feature of the development. As Ward JA so aptly put it, “fly in fly out” is not synonymous with “fly by night”, when it comes to town planning controls.

The Court listed a number of features of the facility, such as the legal basis under which the workers occupied the units, that were irrelevant to the characterisation of a facility as a residential building. The full list of irrelevant features is set out at paragraphs 104 to 111 of the Court’s judgement.

**Conclusion**

This decision turns on its own facts and statutory context. It does not overturn earlier accepted decisions such as *Sydney Serviced Apartments Pty Ltd*, referred to above.

However, the decision in Graincorp may provide guidance in dealing with semi-residential uses such as serviced apartments, motels and tourist accommodation where the prevailing environmental planning instrument uses the term “residential” use.

Perhaps the penultimate paragraph of Ward JA’s decision may also provide guidance in other circumstances. In that paragraph Her Honour says that, in effect, the accommodation provided at the workforce facility did have the necessary degree of permanence to be a “settled abode”, despite the alleged transient and temporary nature of the worker’s use of the facility.

**Next Article**

In my next article I propose to review the recent decision of the NSW Court of Appeal in *K and M Prodanovski Pty Ltd v Wollongong City Council* [2013] NSWCA 202, a decision dealing with the lapsing of a development consent.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact the writer.

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