Categorisation and Permissibility of Uses

A briefing session presented for Turnbull Planning International Pty Limited
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Introduction

Development is always carried on for one or more *purposes*. Correct categorisation of the purpose or purposes of a particular use or development proposal is an essential part of properly determining a development application.

Indeed, the task of correctly categorising the purpose or purposes of a particular use or development proposal is a threshold question in determining whether a particular development application is capable of lawful determination. The task is also the second of three threshold questions or lines on inquiry in the task of determining whether an applicant has the benefit of existing use rights.[2]

In categorising the purpose or purposes of a particular use or development proposal, one ordinarily looks to the underlying *sole* or *dominant* object or purpose of the particular use or proposal.[3] However, a particular use may have a double character and thus fall within two or more separate categories of use at the same time. In addition, certain related uses (including but not limited to an otherwise ancillary use) may be 'separate and independent'.

Having determined the purpose or purposes of a particular use or development proposal, questions of permissibility of uses then arise.

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[2] See *Rose Bay Marina Pty Ltd v Minister for Urban Affairs and Planning* [2002] NSWLEC 123 (2002) 122 LGERA 255 per Pearlman J at [35]. In that case the three tasks or lines of inquiry were said to be as follows: (1) What 'land' was the subject of the claimed existing use at the date immediately before the coming into force of the instrument prohibiting that use (the 'relevant date')? (2) What was the purpose for which the land was being used at the relevant date? (3) Was that purpose lawful?'

[3] See *Foodbarn Pty Limited v Solicitor-General* (1975) 32 LGRA 157.

Categorisation of uses

Overview

The categorisation---also known as characterisation—of uses is rarely an easy task.

The principles relevant to characterisation were identified in *Chamwell Pty Limited v Strathfield Council*[4] and *Shire of Perth v O'Keefe*,[5] approved by the High Court of Australia in *Parramatta City Council v Brickworks Ltd*.[6] The need to identify the purpose of the proposed use at an appropriate level of generality was identified in the NSW Court of Appeal decision of *Royal Agricultural Society of New South Wales v Sydney City Council*.[7]

In *Chamwell Pty Ltd v Strathfield Council* Preston CJ held,[8] applying *Royal Agricultural Society (NSW) v Sydney City Council*, that the characterisation of the purpose of a use of land should be undertaken 'at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes'. The task of characterisation of a proposed development must also be done in a 'common sense and practical way'.[9]

The above mentioned judicial authorities on characterisation must also be applied in light of those ordinary meanings to distinguish between 'use' (that is, the use of land in planning terms) and 'purpose', the latter being a reference to the purpose or purposes for which the land is, or is intended to be, used. The case of *O'Keefe* held that a use must have a purpose. The use of land consists of the physical acts by which the land is made to serve some purpose.[10] The two words 'use' and 'purpose' are not interchangeable.[11]

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[4] [2007] NSWLEC 114; (2007) 151 LGERA 400 at 406.
[5] [1964] HCA 37; (1964) 110 CLR 529 at 535 per Kitto J (Owen J agreeing).
[6] [1972] HCA 21; (1972) 128 CLR 1.
[7] (1987) 61 LGRA 305 at 310 per McHugh J (Hope and Samuels JJA agreeing).
[8] At 151 LGERA 400 at 407.
[9] *Chamwell,* at 151 LGERA 400 at 408.
[10] See *Newcastle City Council v Royal Newcastle Hospital* [1957] HCA 15; (1957) 96 CLR 493 at 508.
[11] See *Codling v Manly Council* [2011] NSWLEC 57 (6 April 2011).

The case of *CB Investments Pty Ltd v Colo SC*[12] and other authorities such as *Chamwell* suggest that the identification of purpose may require more than the use of the built form to be considered. The same premises can have two or more different uses, each with different town planning incidents. In *Grace v Thomas Street Café Pty Ltd*[13] the NSW Court of Appeal held that a café was to be distinguished from a milk bar in determining the extent of an existing use. While that case was considering characterisation of use rather than purpose of use the discussion of how different uses give rise to different incidents from a town planning perspective, with the resultant need to distinguish between those, is of more general relevance.[14]

The case of *Foodbarn Pty Ltd v Solicitor-General*[15] is judicial authority for the proposition that, where there are two uses, *ordinarily* the dominant purpose can be regarded as the whole. However, as will be seen, that principle is subject to a number of other closely related principles which are discussed below.

Jurisdictional fact

One thing is perfectly clear. Regardless of how a proponent may describe the proposed development in their development application, the true question is how one *legally* characterises what is proposed.

Whether a particular use should be categorised one way rather than another is now acknowledged—despite an earlier series of cases to the contrary[16]---to be a question of

[12] (1980) 41 LGRA 270.
[13] [2007] NSWCA 359; (2007) 159 LGERA 57
[14] See Beazley JA at [2007] NSWCA 359, [88]-[90].
[15] (1975) 32 LGRA 157 at 160 per Glass JA (Samuels and Hutley JJA agreeing).
[16] See eg *Bentham v Kiama Municipal Council* (1986) 59 LGRA 94; *Leichhardt Municipal Council v Maritime Services Board (NSW)* (1985) 57 LGRA 169; *Londish v Knox Grammar School* (1997) 97 LGRA 1; *Mittagong Mushrooms Pty Ltd v Narrambulla Action Group Inc* (1998) 97 LGRA 333. See also *Hunter Valley Vineyards Association v Council of the City of Cessnock* [1998] NSWLEC 76; *Wotton v Wingecarribee Shire Council* (1989) 68 LGRA 38; *Malcolm v Newcastle City Council* (1991) 71 LGRA 376; *Taylor v Hornsby Shire Council* (1990) 69 LGRA 281; *Scott v Wollongong City Council* [1986] NSWLEC 85; *Leichhardt Municipal Council v Maritime Services Board* (1985) 57 LGRA 169. In those cases it was held that if the opinion formed by the decision-maker as to the categorisation of the purpose was not vitiated by irrelevant considerations, and was one which was reasonably open to make, the court would not review the substance of the decision as to categorisation.

'jurisdictional fact'[17] under the *Environmental Planning and Assessment Act 1979* (NSW) [the 'EPA Act'].[18] However, determining whether a particular fact or fact-situation (the latter including such things as a requirement for the existence of a specified state of satisfaction or opinion) is a 'jurisdictional fact' is fraught with difficulties.[19]

The tests to be applied

A council, when considering the characterisation of a use for which development consent is requested, is concerned with what is proposed to be done on the land. In doing so, in the various tests referred to in *Royal Agricultural Society of New South Wales v Sydney*

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[17] Or, at the very least, a mixed question of fact and law: *Codling v Manly Council* [2011] NSWLEC 57 (6 April 2011). A jurisdictional fact is some fact or fact situation which must exist in fact as a condition precedent or essential prerequisite for the primary decision maker to exercise its jurisdiction. It is therefore a fact which a reviewing court can determine for itself, as distinct from a matter at the discretion of the original decision-maker. 'Objectivity' and 'essentiality' are two interrelated elements in the determination of whether a factual reference in a statutory formulation is a jurisdictional fact in the relevant sense. They are interrelated because indicators of 'essentiality' will often suggest 'objectivity': see *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55; 102 LGERA 52 per Spigelman CJ (Mason P and Meagher JA concurring) at 63-4 [37-41]. The legislature can make any fact a jurisdictional fact in the relevant sense that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality): *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 72 ALJR 841 at 859-861153ALR 490 at 515-517.

[18] See *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* [2005] NSWCA 269, (2005) 141 LGERA 376; *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707; *Chambers v Maclean SC* (2003) 126 LGERA 7; cf *Londish v Knox Grammar School* (1997) 97 LGERA 1. In *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707 the question before the NSW Court of Appeal was whether the characterisation of the use of land for a permissible purpose, viz a drive-in takeaway, was a jurisdictional fact**,** with the consequence that it was for the Land and Environment Court itself on the evidence before it to determine whether the application was for a drive-in take-away establishment' (at [184]), as opposed to a matter left to be determined at the discretion of the consent authority. The Court of Appeal held that the characterisation of the use of land was a jurisdictional fact.

[19] For example, there is a 'special kind of jurisdictional fact' (eg the finding of satisfaction in s 96(2)(a) of the EPA Act, that the development as sought to be modified is substantially the same as the development originally granted consent) which means that in judicial review proceedings the court can review whether the facts needed to establish satisfaction of a jurisdictional fact exist but will not itself determine whether there is such satisfaction, the requirement pursuant to s 96(2)(a) being the *satisfaction* rather than the fact that the development will be substantially the same development following modification: see *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422, (2004) 61 NSWLR 707; *Wolgan Action Group Incorporated v Lithgow City Council* [2001] NSWLEC 199; (2001) 116 LGERA 378; *Lesnewski v Mosman* [2005] NSWCA 99; (2005) 138 LGERA 207; *Bechara v Plan Urban Services Pty Ltd* [2006] NSWLEC 594; (2006) 149 LGERA 41; *Casa v City of Ryde Council* [2009] NSWLEC 212; (2009) 172 LGERA 348; *Botany Bay City Council v Marana Developments Pty Ltd* [2012] NSWLEC 15; *Terranora Group Management Pty Ltd v Director-General Office of Environment & Heritage* [2013] NSWLEC 198; (2013) 200 LGERA 1. A written request under an LEP, analogous to a SEPP1 objection, is a jurisdictional fact but *not* the issue that the written request must 'justify the contravention [of the development standard(s)] by demonstrating' the specified matters: see *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52 (2 April 2015). See I Ellis-Jones, 'The "jurisdictional fact doctrine" in NSW local government and environmental planning law' (2006) 12 LGLJ 16; 'The ever elusive fact/law distinction' (2007) 13 LGLJ 66.

City Council[20] and *North Sydney Municipal Council v Boyts Radio and Electrical Pty Ltd*[21] provide guidance as to the task to be undertaken by the council notwithstanding that the tests there set out were stated in the context of existing use rights.

In the *Royal Agricultural Society* case, after referring to the test to be applied McHugh J said with respect to existing uses:

> 'Accordingly a test has been devised which requires the purpose of the use of the land to be described only at that level of generality which is necessary and sufficient to cover individual activities, transactions or processes carried on at the relevant date. Thus the test is not so narrow that it requires characterisation of the purpose in terms of detailed activities, transactions or processes which have taken place. But it is not so general that a characterisation can embrace activities, transactions or processes which differ in kind from the use which the activities, transactions or processes as a class have made of the land.'

In *Boyts* Kirby P [at 16 NSWLR 90E to F] referred to the fact that what was required was a determination of the 'appropriate genus which best describes the activities in question'. His Honour continued:

> 'In determining that genus attention should be focused on the purpose for which the determination is being made. That is a town planning purpose.'

The general approach to characterisation for planning purposes has often been stated in terms such as those adopted by Kitto J in *Shire of Perth v O'Keefe*[22] [at 110 CLR 535]:

> '… [I]t is required that a purpose be identified as the end for which it can be seen that the premises are being used at the date of the gazettal of the by-laws. Then the provision is made that the land may continue to be used for that purpose: not that the precise manner of use of that purpose may alone continue but that the use generally for that purpose may continue. The application of the by-law in a particular case has

[20] (1987) 61 LGRA 305.
[21] (1989) 16 NSWLR 50.
[22] [1964] HCA 37; (1963) 110 CLR 529.

therefore not to be approached through a meticulous examination of the details of processes or activities or through a precise cataloguing of individual items of goods dealt in but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date.'[23]

Important legal principles

The following are other important legal principles regarding the categorisation of uses. They are derived from a number of important judicial authorities discussed or otherwise referred to in this document:

1. Whether a particular use should be categorised one way rather than another is a question of 'jurisdictional fact'.

2. In categorising the purpose of a particular use or development proposal, one ordinarily looks to the underlying *sole* or *dominant* object or purpose of the particular use or proposal, with the result that where part of premises is used for a purpose subservient to the purpose inspiring the use of another part it is legitimate to disregard the former and treat the dominant purpose as that for which the whole is being used. However, these principles are subject to a number of other principles discussed below.

3. The context can be important in determining whether a particular activity falls within a particular definition.[24]

4. A use may be ancillary to some other, more dominant, use. What is 'ancillary' is a question of fact and degree.

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[23] See also *Woollahra Municipal Council v Banool Developments Pty Ltd* [1973] HCA 65; (1973) 129 CLR 138 at 145-147; *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305 at 310-311.

[24] Many cases dealing with the definitions of 'home occupation' and 'home employment' have been decided, in substantial part, on the basis of an articulated need to preserve residential amenity: see eg *Lizzio v Ryde Municipal Council* (1984) 155 CLR 211; *ES Turnbull Pty Ltd v Wollongong City Council* (1990) 71 LGRA 240; *Bertram v Warringah Shire Council* (1990) 72 LGRA 39; *Doyle v Newcastle City Council* (1990) 71 LGRA 55.

5. An ostensibly ancillary use may not be ancillary at all but may be a distinct, separate and independent use in its own right.

6. A particular use may well be ancillary but can still be a distinct, separate and independent use in its own right.

7. A particular use may have a double character and thus fall within two or more separate categories of use at the same time.

8. If, on the facts of a particular case, a use falls within a specified category that is effectively prohibited (eg ‘extractive industry’, ‘industry’) -- especially in circumstances where the prohibited use is *nominately* prohibited (i.e expressly prohibited by name) -- the use can only be carried out if it can be established that what is proposed can legitimately be seen to be *only* for a purpose that is otherwise permissible (and *nominately* permissible) in the zone.

9. Thus, the fact that the use which falls within a specified category that is effectively prohibited might also be able to be categorised under some separate otherwise permissible category is irrelevant where what otherwise would be permissible is only *innominately* permissible [eg ‘Any development not specified in item 2 or 3’]).

However, the above principles are subject to some important qualifications discussed below.

Ancillary uses

Environmental planning law recognizes the existence of what is known as an ‘ancillary use’, that is, a use may be ancillary to some other, more dominant, use, the rationale

being that a particular activity may not fall completely or literally within a specified 'purpose'.[25]

Subject to an important exception or qualification discussed below, for a use to be considered 'ancillary' to some other use, the first mentioned use must ordinarily *subserve* an otherwise permissible use.[26] In other words, for a use to be ancillary it must be 'incidental' to or be 'subserved' by the primary purpose.[27]

What is 'ancillary' is a question of fact and degree, and regard may need to be had to a number of factors *none* of which is determinative in itself (eg size, area of land used for the respective uses, the degree (if any) of integration, respective sales and income generation, and so forth) in order to determine whether a use is truly ancillary. The composite test for characterising whether a use is ancillary was identified in *Lizzio v Ryde Municipal Council*[28] where the High Court of Australia approved what Glass JA had to say about uses in *Foodbarn Pty Ltd v Solicitor-General*,[29] namely, that:

- where a part of land is used for the purpose which is subservient to the purpose for which another part is used:
    - the whole of the land is regarded as being used for the **dominant** purpose, and
    - the subservient purpose is merely incidental or ancillary to the dominant purpose;

[25] See eg *Burwood MC v Parkes Development Pty Ltd* (1964) 10 LGRA 414; *Lizzio v Ryde Municipal Council* (1984) 155 CLR 211*; Lewiac Pty Ltd v Gold Coast CC* (1993) 81 LGERA 219; *Webb v Warringah SC* (1989) 68 LGRA 105; *Berowra RSL Community and Bowling Club Ltd v Hornsby SC* [2000] NSWLEC 243 (5 December 2000); *S Wallace Pty Ltd v Sydney City Council* (1952) 18 LGR (NSW) 130; *Warringah Shire Council v Raffles* (1978) 38 LGRA 306.
[26] See *CB Investments Pty Ltd v Colo SC* (1980) 41 LGRA 270.
[27] See *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157; *Steedman v Baulkham Hills SC [No 2]* (1993) 31 NSWLR 562.
[28] (1984) 155 CLR 211.
[29] (1975) 32 LGRA 157.

- where the whole of the land is used for **more than one purpose**, but the other purpose or purposes s are subservient, the whole of the land is regarded as being used for the **dominant** purpose; and

- where the whole of the land is used for **more than one purpose**, **none of which subserves the others**:

    - it is irrelevant to ask which of the purposes is dominant, and
    - if any one of the purposes is operating in a way which is **independent and not merely incidental** to others and it is prohibited, it is immaterial that it is overshadowed by others.

However, there is an exception to what is set out above in that an ancillary use does not necessarily have to be 'subordinate' to another use,[30] so it does not necessarily follow that an activity is ancillary just because it is minimal in scope and overshadowed by another activity.[31] Thus, a use may be 'ancillary' but also 'independent'.[32] Indeed, on the facts of a particular case, it may well be the case that the use asserted to be ancillary:

- is *not* ancillary at all but a **distinct, separate and independent use** in its own right altogether, or

- may well be ancillary but might still be a **distinct, separate and independent use** in its own right,

it being immaterial that one use may be overshadowed by the other(s).

In *every* case, the primary consideration is the exact relationship between the uses. In some circumstances the regularity and extent of the activities involved in the minor use may also assume significance.

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[30] See *Macquarie International Health Clinic Pty Ltd v University of Sydney* (1998) 98 LGERA 218 and *University of Sydney v South Sydney City Council* (1998) 97 LGERA 186 (the 'Macquarie Private Hospital case').
[31] See *Norman v Gosford SC* (1975) 132 CLR 83; *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157.
[32] See *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404; *Ashfield Municipal Council v Australian College of Physical Education Limited* (1992) 76 LGRA 151.

If an ancillary use can be **independent**, is severable and is prohibited, it cannot become permissible by reason that it subserves a permissible use.[33]

In the NSW Court of Appeal decision of *Steedman v Baulkham Hills Shire Council (No 2)*[34] it was held that a use which is *minor*, but not merely ancillary to another use, is no less a use. In that case Stein J, the trial judge, had held that the use of the subject land for extractive industry was 'subsumed' into an 'incidental or ancillary' use to the 'dominant' use of orcharding or small farming. However, Kirby P, in the Court of Appeal, said [at 31 NSWLR 575], 'The two activities are so distinct and separate as to deny connection.'

His Honour stressed that a minor use could not be ignored simply because it was minor.

Separate and independent uses

The well-established principle that certain related uses (including but not limited to an otherwise ancillary use) may nevertheless still be 'separate and independent' is articulated in the NSW Court of Appeal decision of *Foodbarn Pty Ltd v Solicitor-General*[35] and many subsequent high level judicial authorities.

In *Foodbarn* it was held that where part of premises is used for a purpose subordinate to the purpose inspiring the use of another part, it is legitimate to disregard the former and treat the dominant purpose as that for which the whole project is being used.

However, where the whole of the premises is used for two or more purposes, *none of which subserves the other*, it is irrelevant to enquire which purpose is dominant. If any

[33] See *C B Investments Pty Limited v Colo Shire Council* (1980) 41 LGRA 270; *Baulkham Hills SC v O'Donnell* (1990) 69 LGRA 404; *Ashfield Municipal Council v Australian College of Physical Education Limited* (1992) 76 LGRA 151.
[34] (1993) 31 NSWLR 562.
[35] (1975) 32 LGRA 157.

one purpose operates in an *independent* way, it is immaterial that it may be overshadowed by the others.

Be that as it may, cases such as *Foodbarn* establish that there is no general principle to the effect that where premises are used for two or more purposes, that which is not dominant may be disregarded. Each case must be considered and assessed on its own particular facts and statutory circumstances.

In *Bob Blakemore Pty Ltd v The Anson Bay Company (Australia) Pty Ltd*[36] Clarke JA referred to *Foodbarn* and acknowledged that the 'dominant use' of certain land for coalmining did not necessarily mean that gravel extraction could not be a 'distinct and separate use' in its own right. His Honour stated:

> 'The primary consideration will be the relationship between the two uses although in some circumstances the regularity and extent of the activities involved in the minor use may assume significance'.

Ultimately, the court came to the conclusion that the evidence of extraction and use of gravel did not demonstrate that gravel extraction was a separate and independent use of the land. Nevertheless, the principle referred to above is well-established.

By way of further example, in *Baulkham Hills Shire Council v O'Donnell*[37] commercial extraction of sand and soil had continued for some time on certain land that was otherwise used for the purpose of a riding school for which latter use development consent had been granted. Samuels AP and Clarke JA agreed with the judgment of Meagher JA, who applied to the facts the leading principles from *Foodbarn*. Meagher JA made the following comments [at 69 LGRA 409]:

> 'At no stage in its nine year existence did the riding school render the land unsuitable for extracting soil and sand, and at no stage during that nine-year period did the extraction render the land unsuitable for grazing or riding. Both uses could and did

[36] [1989] NSWCA 21.
[37] (1990) 69 LGRA 404.

> physically co-exist on the same land at the same time. Neither use can be said to be either dominant or ancillary. If it be true, as it seems to be, that in 1976 some of the extraction was motivated by, and angled towards, the improvement of the riding school, that does not mean that it was not of itself an independent use.'

Meagher JA made the important point that even if a certain use be ancillary to some other use that does not prevent the first mentioned use from still being independent. It is a question of fact and degree in all the circumstances of the case. His Honour said that where 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 simply because it is 'ancillary' to or otherwise related to or interdependent with some other use. Meagher JA said (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 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 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. 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. The series of cases dealing with dual uses ... illustrate the point: they show that a "convenience store" and a petrol station are two independent uses, although the former is clearly ancillary to the latter.'

The principle that a use may be 'ancillary' but also 'independent' was applied in *Ashfield Municipal Council v Australian College of Physical Education Limited*.[38] In that case the issue of characterisation concerned the distinction between 'boarding house' and 'dwelling house', and the use of particular houses to provide residential accommodation for students at a nearby educational establishment. Pearlman J gave consideration to the use of the accommodation as an ancillary use to the educational establishment and relied on *O'Donnell* to indicate that such use did not automatically preclude the boarding house from being an independent use. Her Honour found that the houses, which were located on the other side of the street and were not used for teaching, were used only for residential accommodation and some private study. Her Honour concluded that although the boarding house use *was* ancillary it was nevertheless independent and was prohibited under the principles in *Foodbarn*.

Further, a use which is *minor*, but not merely ancillary to another use, is no less a use: see the NSW Court of Appeal decision in *Steedman v Baulkham Hills Shire Council (No 2)*.[39] Stein J, the trial judge, had held that the use of the subject land for extractive industry was 'subsumed' into an 'incidental or ancillary' use to the 'dominant' use of orcharding or small farming. However, Kirby P said [at 31 NSWLR 575], 'The two activities are so distinct and separate as to deny connection.' His Honour stressed that a minor use could not be ignored simply because it was minor and he referred again at 575 to *Foodbarn* where Glass JA had said:

> '… [I]t is immaterial that [one use] may be overshadowed by the others whether in terms of income generated, space occupied or ratio of staff engaged.'

In *Belcrib Pty Limited v Baulkham Hills Shire Council*[40] the subject land was zoned Rural 1(a) under *Baulkham Hills Local Environmental Plan 1991* and an aged persons housing facility was proposed for the site. By reason of the apparent instability of at least part of the site it was proposed to stabilise roadways, pathways and provide appropriate foundations for the proposed buildings. McClellan CJ, without actually determining the

[38] (1992) 76 LGRA 151.
[39] (1993) 31 NSWLR 562.
[40] [2004] NSWLEC 733 (22 November 2004).

question, opined that, by reason of the extent of the proposed disturbance, the applicant might have considerable difficulties in seeking to pursue the application in the form presented to the court, given that development for the purpose of an extractive industry was prohibited in the relevant zone.

In *Codling v Manly Council*,[41] which was an appeal under s.56A of the *Land and Environment Court Act 1979* (NSW), Pain J was called upon to consider, among other things, whether the commissioner had erred in finding that a certain proposed use, or alternatively part of that use, was for a restaurant. The appellant's development application, for the use of a function and conference centre on level 1 of the Manly Bathers Pavilion, had been refused.[42] The commissioner had held that the conference use was permissible with consent and that the function centre use was prohibited. As the Commissioner found these were *separate, independent uses*, so that *neither was subservient or ancillary to the other*, she had dismissed the appeal.

On appeal to Pain J, the appellant argued that the commissioner fell into legal error concerning characterisation[43] where she considered the proposed use of level 1 was for two uses, namely, conference facility and separately a function centre (ground 1). The second alleged error of law was in finding that the function centre use was a restaurant, and therefore prohibited as a 'water-based restaurant and entertainment facility' (ground 2). The third alleged error of law, in the alternative to grounds 1 and 2, was that having determined that the proposed use comprised two uses for the purposes of characterisation, the commissioner erred in then treating the two uses as a single use for the purposes of determining the appeal and in dismissing the appeal with respect to the permissible use.

It was accepted for the purposes of the appeal that only if the proposed use fell within the description 'water-based restaurant and entertainment facility' was it prohibited. The expression 'water-based restaurant and entertainment facility' was relevantly defined to mean 'a vessel or structure that floats on, or is fixed in, the waterway, that is used as a

[41] [2011] NSWLEC 57 (6 April 2011).
[42] See *Codling v Manly Council* [2010] NSWLEC 1299.
[43] See [2010] NSWLEC 1299 at [42]-[44].

club or restaurant or for entertainment (on a commercial basis) and that has a direct structural connection between the foreshore and the waterway'.

The appellant:

- submitted that the purpose of the proposed use was *not* that of a club or restaurant or for entertainment, and therefore was not prohibited as a 'water-based restaurant and entertainment facility',
- argued that the proposal had *two separate uses*, a convention centre and function centre undertaken for the *single purpose* of *commercial premises*, and
- accepted that his proposal met the other parts of the definition of water-based restaurant being a structure in a waterway with a direct structural connection between the foreshore and the waterway.

The Council:

- submitted that the purpose of function centre and the purpose of the provision of conferences amounted to *two separate independent uses* of the land,
- accepted that the use for a conference facility was a permissible innominate use, and
- argued that the function centre use was a restaurant as the service of food was an essential component.

On appeal for error of law, Pain J made a number of important points:

1. In considering how to characterise the purpose as understood from the amended development application, the issue was whether the proposed uses as a conference facility and a function centre were for a *single purpose*, namely as 'commercial premises' as contended by the applicant, or for *two separate purposes* as contended by the Council.

2. The identification of purpose may require more than the use of the built form to be considered. The same premises can have two different uses which each have different town planning incidents The need to differentiate between the use of a site which meets a physical description of restaurant, defined broadly as a place which serves meals, and a function centre does not take into account the evidence before the Court of the intended purpose of the use of level 1 as a function centre.

3. The function centre purpose will include the serving of meals and alcohol to an extent that will have similarity to a restaurant use applying the ordinary meaning of that term according to the judgment. However, the two uses do not coincide. Providing a meal does not make a use of land that of a restaurant. Contrary to the Council's submissions it is relevant to consider the differences in terms of town planning incidents between the two in relation to why persons attend a restaurant in contrast to those attending a function centre.

4. The different incidents arise in large part because of the differing purpose of function centre compared to that of a restaurant use.

5. There may be many cases where a proposed activity or erection of a building cannot be characterized without reference to the intention or motivation of those concerned and other cases where it is of little or no relevance.

6. The fact that the physical use of land may fit more than one description of activity, here restaurant and function centre, does not render the purpose of the use able to be described as a restaurant that of a restaurant.

7. The commissioner appeared to equate ‘use’ with ‘purpose’. The purpose of the proposed development was that of function centre.

8. The Court was considering a development application which identified the intended purpose of the development for which consent was being sought.

9. The specified purpose was not that of a restaurant, and an application for a function centre purpose was not in this case an application for a restaurant use.

Ground 2 of the appeal (the alleged erroneous finding of a restaurant use) was upheld. As respects ground 1--the alleged wrongful identification of two separate uses (conference facility and function centre)—her Honour found that it was not necessary to consider the ground as both identified uses of conference facility and function centre were permissible following her decision to uphold ground 2 and the commissioner's finding that the provision of food was secondary or ancillary to the purpose of the gathering.[44] Her Honour found that it was also unnecessary to consider ground 3 as the two uses were permissible with development consent regardless of whether they were independent uses.

It is very important to distinguish between what on the one hand are **separate and independent uses** and what on the other is **a single use involving two purposes which are inextricably bound up** and are not two independent uses. In *University of Sydney v South Sydney City Council* (the 'Macquarie Private Hospital Case'),[45] the University of Sydney sought approval of a development application for the construction of a private teaching hospital partly on land owned by the University and partly on land owned by the Central Sydney Area Health Service. South Sydney Council refused the application on the basis that it had no power to approve the proposal which straddled the boundary between education and hospital special purpose zones, in one of which the alternative secondary ancillary use was prohibited. The Macquarie Health Clinic company ('Macquarie'), which was the second respondent in one appeal, and the applicant in another, appealed to the NSW Court of Appeal challenging a decision of Sheahan J in the Land and Environment Court.

Macquarie had an arrangement with the Central Sydney Area Health Service to lease a surplus carpark on the opposite side of Missenden Road to the University of Sydney, and had a development consent from the council to erect on that land a private hospital. It

[44] See [2010] NSWLEC 1299 at [43].
[45] (1998) 97 LGERA 186.

was expected that the two private hospitals would be competitors, but Macquarie's would not be a teaching hospital. The competitor's appeal is reported under the name *Macquarie International Health Clinic Pty Ltd v University of Sydney*.[46] Stein JA delivered the major judgment. Meagher JA agreed with no additional comment, and Mason P also agreed (at 219), but stressed:

> '... [T]he importance to me of the unchallenged finding that the proposal can be characterised as a "teaching hospital". This finding turns upon detailed factual bases, including the contiguity of the site to the University campus, the University's involvement in establishing the hospital, and aspects of the design of the hospital such as the location of the medical faculty library. I lay emphasis upon these facts. The mere addition of educational activities to an enterprise will not enlarge its character. Thus, an office that takes in students for work experience or a factory whose work force includes apprentices would be unlikely to be characterised as devoted to educational purposes in the normal course.'

Stein JA rejected many of the criticisms made of the judgment of Sheahan J, including a submission that the twin purposes of a teaching hospital were mutually exclusive. Sheahan J had found that the use involved two purposes which were inextricably bound up and not two independent uses. Stein JA said (at 222) a teaching hospital was necessarily a mixed purpose which cannot be severed:

> 'In my opinion there is but one use as a teaching hospital, with two purposes as its end. These by their very nature cannot be severed into two independent uses.'

Although Stein JA upheld the decision of Sheahan J on its primary basis, he considered the alternative submission that the hospital could not be seen to be ancillary to the education use in the education zone, the major use of the building being as a hospital. His Honour said (at 223):

> 'However, an ancillary use does not necessarily need to be a subordinate or subservient one. It may be more than a minor use. It seems to me that an ancillary or

[46] (1998) 98 LGERA 218.

> incidental use is not capable of being reduced to a mathematical formula. It may also be noted that among the relevant dictionary meanings of 'ancillary' are auxiliary and accessory.'

Uses with a 'double [*or* dual] character'

The legal position as to the categorisation of uses is even more complex. In that regard, the NSW Court of Appeal decision of *C B Investments Pty Limited v Colo Shire Council*[47] establishes that a particular use may have a 'double character' and that if a use is of that kind it must be permissible in both capacities.[48]

The case of *C B Investments* involved land which, being affected by flooding, could only be used with the consent of the Council, for certain limited purposes, which included 'agriculture' but not 'extractive industry'. The intention was to remove sand and silt which had been deposited on the land by floods over the years and the proposal was to have it removed by a contractor who would pay royalties.

The appellant contended that the effect of the removal would be to improve the land's suitability for agriculture but the respondent council contended that as the use was an extractive industry it was prohibited. Hope and Reynolds JJA (with Mahoney JA dissenting) held that the proposed physical activities also fell within the definition of 'extractive industry' and could *not* be described as being *merely* for the purpose of improving the agricultural quality of the land. In that regard, Hope JA said [at 41 LGRA 271-272]:

> 'I will assume, without deciding, that the proposed activities could properly be regarded as the carrying out of a work for the purpose of agriculture … This circumstance would not entitle the Council to give its consent to the activities, if, as well as having that character, they were also a use of the land for a non-agricultural

[47] (1980) 41 LGRA 270.
[48] See eg *Penrith City Council v Waste Management Authority* (1990) 71 LGRA 376; *Glenpatrick Pty Ltd v Maclean Shire Council* (1989) 72 LGRA 205; *Malcolm v Newcastle City Council* (1991) 73 LGRA 356.

purpose. I see no reason why, in a particular case, an activity cannot have such a double character. I do not think that the activities of man upon land are always required to, or always do, fit exclusively into one only of the various categories which planners devise.'

'… the removal from agricultural land of soil and other material within the definition of 'extractive material' may in some cases be regarded as an activity which is subsumed in the agricultural use of land. … the character, extent and other features of activities which involve the removal of extractive materials from agricultural land may be such that, as a matter of fact, and no matter what is to result or to be done when the activities cease, it is proper to regard them as constituting a use of the land in themselves, not subsumed in any other use of the land, and thus a use for the purposes of extractive industry.'

Permissibility of uses

The task of correctly categorising the purpose or purposes of a particular use or development proposal is the threshold question in determining whether a particular use is permissible with or without consent or prohibited.

Nominate and innominate uses

A use may be:

- a *nominate* use -- that is, a use that is *nominately* [by name] described (eg 'tourist and visitor accommodation', 'residential flat building') or
- an *innominate* use -- that is, a use that is *innominately* [not specifically named or referred to] described (eg 'any other development not specified in item 2 or 3').

When it comes to the permissibility of uses, slightly different rules apply as respects nominate uses and innominate uses. Here are the more important of those rules:

1. The fact that a particular development may fairly and properly be classified as falling within two defined purposes -- one permissible and the other prohibited -- does not necessarily mean that the development is impermissible.[49]

2. However, even if a particular development can fit within a definition of a permissible use, that will not save it from being prohibited if it otherwise falls squarely and properly within a *nominate* prohibited use.[50]

3. Further, if a particular development fits within a specified category of use that is effectively prohibited (eg 'extractive industry' or 'industry') -- especially in circumstances where the prohibited use is *nominately* prohibited -- the proposed development can only be carried out if it can legitimately be seen to be *only* for a purpose that is otherwise permissible in the zone (eg 'agriculture').[51]

4. In addition, even if the development is capable of being categorised under some separate otherwise permissible category (eg 'rural industry'), that is irrelevant where such a purpose is only *innominately* permissible (eg 'Any development not specified in item 2 or 3').[52]

5. Be that as it may, the category of prohibited purposes cannot include any *nominate* permissible use.[53] For example, a nominate permissible use of

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[49] See *CB Investments*; *Friends of Pryor Park Inc v Ryde CC* (L & E Ct, Bignold J, No 40100/95, 25/9/95, unreported).
[50] See *Wernax Pty Ltd v Marrickville Cl* (L & E Ct, Talbot J, No 10281/97, 13/8/97, unreported).
[51] See *Egan v Hawkesbury CC* (1993) 79 LGERA 321. In *Egan* the purposes for which development was prohibited in the particular zone included 'industries', whilst extractive industries were *innominately* permissible with consent. By a majority, the NSW Court of Appeal upheld the appellant's submission that the defined term 'industry' constituted a genus and that the various kinds of industries that were relevantly *nominated* and defined by the environmental planning instrument were a species of that genus with the result that the proscription of the genus necessarily proscribed all of the species.
[52] See *Elf Farm Supplies Pty Ltd v Hawkesbury CC* [1999] NSWLEC 261 (15 December 1999); *Hawkesbury CC v Sammut* (2002) 119 LGERA 171. In *Sammut* it was held that if, as was ultimately found to be the case, the subject development – a tractor repair business – could be fairly characterized as an 'industry' (a prohibited use in the zone) then it was prohibited under the relevantly applicable environmental planning instrument notwithstanding that the use could also have been categorised under the separate permissible category of 'rural industry'.
[53] See *Egan v Hawkesbury CC* (1993) 79 LGERA 321. In *Egan* 'extractive industries' were asserted to be *innominately* permissible with consent, but it was held that the *nominate* prohibition on the genus 'industries' necessarily proscribed each of its species including, relevantly, 'extractive industries'.

'brothel' would prevail over an innominate, prohibited use of general 'commercial premises' which would otherwise subsume the brothel use, and thus ensure the permissibility of the brothel in the zone.[54]

6. In particular, an *innominate* prohibited use (eg 'industry') will not exclude a *nominate* permissible use (eg 'road').[55]

7. Where a particular development has both a dominant and a subservient or subordinate purpose, it would *appear* that:

   a. an *innominate* prohibited use can be disregarded if it is subordinate or subservient to a *nominate* permissible dominant use; and

   b. a *nominate* prohibited use cannot be disregarded if it subordinate or subservient to an *innominate* permissible dominant use.[56]

Finally, in considering the permissibility of a particular use or proposal, it should be noted that where part of premises is used for a purpose subservient to the purpose inspiring the use of another part it is legitimate to disregard the former and treat the dominant purpose as that for which the whole is being used.[57]

The era of the Standard Instrument

The NSW Department of Planning and Environment started the Standard Instrument LEP program in 2006 to create a common format and content for the plans. On 31 March 2006 a standard instrument was put into place by the State Government for preparing new LEPs. When deciding on the need for the Standard Instrument, consideration was made

[54] See *Friends of Pryor Park Inc v Ryde CC* (L & E Ct, Bignold J, No 40100/95, 25/9/95, unreported) and *Pilley v Maitland CC* (L & E Ct, Pearlman J, Nos 20058/96, 20088/96, 21/10/96, unreported).
[55] See *Argyropoulos v Canterbury MC* (1988) 66 LGRA 202. In *Argyropoulos* the use of residentially zoned land, being an access handle to a battle-axe lot, for an otherwise industrial use was held to be lawful as the access handle could be used, with consent, for the *nominately* permissible purpose of a road.
[56] See *Ku-ring-gai MC v Geoffrey Twibill & Associates* (1979) 39 LGRA 154.
[57] See *Foodbarn; Lizzio v Ryde MC* (1983) 155 CLR 211.

that, at the time, there were across the State over 5,500 local planning instruments, on average 300 LEP amendments per year, over 3,100 different land use zones, over 1,700 land use definitions and, over 3,000 concurrence requirements in LEPs, REPs and SEPPs.

Further, before the era of the Standard Instrument, there was no consistent approach to LEP preparation, LEPs were difficult to understand and used different planning language, and created diverse approaches to address often similar issues, resulting in a very complex, cumbersome and often contradictory local planning system. For example, a person wishing to build a residential flat building in Manly may be faced with a different definition, zones and approval systems to say, that required in, say, Bathurst. In a more metropolitan context, developers were dealing with a completely different set of controls, zones, definitions and requirements from one street to another along local government area boundaries.

Additionally, many LEPs predated the introduction of the EPA Act and were in serious need of review. There were some councils in the State still operating under interim development orders gazetted in the 1960s.

The introduction of the Standard Instrument means that local plans across the State now use the same planning language, making it easier for local communities to understand what is proposed in their local areas. Councils are able to use their own local objectives, zones, heritage items and development standards such as minimum lot size, height and floor space ratios.

The Standard Instrument, with its underlying philosophy of 'one-size-fits-all', contains standard zones, standard clauses, standard definitions, a land use table in the now standard form—and all in a standard format.[58] The result? Well, some would say—and

[58] See s.33A of the EPA Act. Section 33A(1) empowers the Governor to prescribe the standard form and content of local environmental plans or other environmental planning instruments (a 'standard instrument'). See also the *Standard Instrument (Local Environmental Plans) Order 2006*, which was published in NSW Government Gazette No 42 of 31 March 2006, on p 1879. The order commenced on gazettal.

do in fact say—that we now have a sub-standard system for the micro-management of land.

The Standard Instrument, with its mandated permissible (or prohibited, as the case may be) uses and mandated 'directions' as to the types of uses that may only be included in a land use table, poses special challenges as respects the categorisation and permissibility of land uses. For the most part, broad, general, omnibus-type land uses, in a considerably reduced number of zones, have replaced what were generally much more narrowly defined uses in the era before the Standard Instrument. Instead of more flexibility and greater simplicity, the opposite has occurred.

Here are just a couple of defined uses extracted from the Standard Instrument:

> **'residential accommodation'** means a building or place used predominantly as a place of residence, and includes any of the following:
>
> (a) attached dwellings,
> (b) boarding houses,
> (c) dual occupancies,
> (d) dwelling houses,
> (e) group homes,
> (f) hostels,
> (g) multi dwelling housing,
> (h) residential flat buildings,
> (i) rural workers' dwellings,
> (j) secondary dwellings,
> (k) semi-detached dwellings,
> (l) seniors housing,
> (m) shop top housing,
>
> but does not include tourist and visitor accommodation or caravan parks.

> **'tourist and visitor accommodation'** means a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following:
>
> (a) backpackers' accommodation,
> (b) bed and breakfast accommodation,
> (c) farm stay accommodation,
> (d) hotel or motel accommodation,
> (e) serviced apartments,
>
> but does not include:
>
> (f) camping grounds, or
> (g) caravan parks, or
> (h) eco-tourist facilities.

When uses are described or defined at a high level of generality, albeit that any such use may encompass a number of more specific sub-uses (irrespective of whether or not those uses are separately defined), inevitably there will be a number of consequences. Here are three of them:

1. Existing use rights are more likely to accrue to a particular use, especially when that use is described in any development consent that issues in broad terms consistent with this broadly defined use in the Standard Instrument (eg a backpackers' establishment described as simply being 'tourist and visitor accommodation').

2. Proponents are now much more likely to describe their proposed development in broad, general terms as opposed to highly specific terms.

3. The important distinction between 'use' and 'purpose' is now of even greater importance than before. Always identify the *end* for which the land is proposed to be used, *not* the use itself.

Council, when the relevant consent authority, should:

- seek to delineate and describe the intended use with as much particularity and specificity as possible, notwithstanding broadly defined uses; and

- (wherever possible) describe in the notice of determination the use consented to in specific terms that are known to planning law, without of course doing violence to the description of the proposed development in the development application itself and its supporting documentation (eg the statement of environmental effects).

However, when Council is considering a development application which clearly and unambiguously states the intended purpose of the development for which consent is being sought and the stated purpose, albeit narrowly defined, is:

- not a sham purpose, and

- entirely consistent with the purpose identified by Council by means of a proper, objective determination on the facts of the particular case,

there is little or no room for Council, as consent authority, to depart from the proponent's description of the proposed development.

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