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In this month’s column we answer some excellent questions on the concept of ‘ancillary development’, and the vexed question of whether owner’s consent is needed from the Owners Corporation for a DA for internal works to an individual lot within a strata development.

Question: ‘What is meant, in legal terms, by ‘ancillary development’ and what is its role / relevance in the DA assessment process?’

Answer: In certain circumstances, a person who is entitled to use land for a particular legal purpose may be able to use the land for another, secondary or (as it is legally known) ancillary purpose. And that purpose may not necessarily be a legal one.

In the typical context of a use of land for a residential dwelling, an ancillary use may include accommodating a boat in a boathouse.

Put in a different context, an ancillary use may include the use of land for an industrial use where only retail uses are permitted, as was the factual circumstance in Mollica v Marrickville Municipal Council ((1969) 19 LGRA 24). Such a use can only occur if (and only if) the industrial use remains “ancillary” to the retail use and does not become an independent, dominant or separate use.

The law recognises that lawful ancillary development to a dominant use of land can be one that is otherwise prohibited in the zone.

That is, uses that would ordinarily be prohibited according to the planning controls on their own, but which are incidental or ancillary to an approved dominant purpose, can sometimes lawfully be carried out on the land. The very well known and often cited case of Foodbarn Pty Ltd & Ors v Solicitor General ((1975) 32 LGRA 157) is clear authority for this proposition. In Foodbarn it was held that the ancillary purpose must not serve an “independent purpose which does not subserve” the dominant purpose for which the land is being used (per Craig J in S J Connelly CPP Pty Ltd v Ballina Shire Council [2010] NSWLEC 128 at 59 quoting Foodbarn Pty Ltd v Solicitor-General (1975) 32 LGRA 157 at 161).

Further, the Land and Environment Court has previously found in W & C Miller v Sutherland Shire Council ([1993] NSWLEC 101) that a car port erected on another site – a separate allotment of leased land, distant from the main dwelling house - was nevertheless ancillary to the dwelling house constructed on the primary allotment, and permissible as an ancillary use, stating that:

“The physical and visual separation of the proposed car port from the existing dwelling-house does not, in my judgment, deprive the car port of its quality or character of being ancillary to the existing dwelling-house erected on the subject land. In so holding I am using the term “ancillary” either according to its acquired meaning in town planning contexts of “incidental, subordinate or subservient” or according to its ordinary dictionary meaning (e.g. the Macquarie Dictionary) of “accessory” or “auxiliary”.

Further, it is possible for a public authority or the Court to constrain the intensity of the ancillary use that is being approved in a DA by imposing conditions of consent. The Land and Environment Court adopted this approach in the recent case of The Benevolent Society v Waverly Council [2010] NSWLEC 1082. In that case, the Court approved prohibited commercial uses within a residential zone, including a convenience store and a café, as ancillary uses within a residential aged care development. The uses were ancillary as they were intended to serve the aged care community within the development, and their carers and visitors, and there would be no advertising of the uses (imposed by the Court via conditions).
Question: Is owners consent needed from the Owners Corporation for a DA seeking consent for development works that are to be carried out wholly within an individual strata lot?

Answer: This is a question that arises often and causes a lot of procedural difficulty, but the answer is surprisingly simple.

In short, the individual is the ‘owner’ of their allotment but the Owners Corporation is the owner of the common property. So where any works to common property are involved, you need the consent of the Owners Corporation (which is often given by the Executive Committee).

The catch here is that it can be extremely hard to carry out any development without interfering with the common property because generally under strata laws, you (as lot owner) own the internal cubic space, including internal walls, but floors, ceilings, original tiles or flooring, and external walls are all typically common property. Penetration of an external wall simply by screws for example, can amount to work to common property. We acted in one such matter where an approved pergola was erected on an outdoor terrace and our client – the lot owner – was nevertheless injunction in Supreme Court proceedings on the basis that the screws that attached that pergola to the walls and floor of the outdoor terrace were penetrating common property, and therefore, a special resolution of the Owners Corporation was required to approve the works. It was ironic that the pergola was the real issue but the legal problem was only the fact that its bolts and screws had penetrated the common property walls and the original tiles, for support.

The LPI has released some very useful Circulars and has a web page devoted to assisting people to identify just what is and is not common property in their strata scheme (see this weblink http://www.lpi.nsw.gov.au/about_lpi/faqs/strata_scheme/common_property)

Applying this to the DA context and the question of owners consent, there have been a few cases where this issue has arisen, the principle decision being in the Court of Appeal matter of Owners Strata Plan No 50411 & Ors v Cameron North Sydney Investments Pty Ltd [2003], where it was held that:

“In the case where a development application affecting the whole of the land is made: either all the lot owners and the body corporate can apply under clause 49(1)(a), or a lesser number can apply under clause 49(1)(b) with the consent of the others, on the basis that an application for development which has a physical impact on a particular lot or on the common property cannot be made without the consent of the relevant owners of the particular land.

On the true construction of the Environmental Planning and Assessment Act 1979 s 78A and the Environmental Planning Assessment Regulation 2000 clause 49, the owner of a lot in a registered strata plan who applies to a consent authority for consent to carry out development wholly within the boundaries of that lot is not obliged to obtain and evidence the consent of the body corporate to the lodging of that application.”

However, the key point there is that the works must be ‘wholly within the boundaries of the lot’, otherwise owners consent is needed from the Owners Corporation, allowing them to effectively veto the DA. This line of reasoning was followed in Owners - Strata Plan 37762 v Pham and Ors [2005], which related to circumstances where a DA had been granted for a car spray-booth to be set up inside a factory that was part of a strata scheme. The DA included an excavation in the floor of a chimney and air inlet and outlet above the spray booth. Ultimately, those works involved common property. The Court therefore held that the consent was invalid because of the absence of owner’s consent from the Owners Corporation, saying: “the DA involved a physical impact upon the common property and as such required the consent of the body corporate of strata plan no 37762. In the absence of such consent the Council had no power to grant consent to the DA”.

In each case, a careful examination will be needed to ascertain whether any works to common property are involved, which can be a complex and forensic exercise, and may very well require assistance from strata title specialists.

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