

Our Ref: TM:12835

18 August 2022

Mr M Ferris

By email: michael Ferris7@gmail.com

Dear Michael

**Advice re Proposed Development Application
99 Mount Pleasant Lane, Buckaroo NSW 2850**

We refer to your request for advice regarding the permissibility of your proposed development application for serviced apartments on the above property (**Site**).

Summary of advice

1. In our view, the proposed development is appropriately characterised as serviced apartments and is permissible with consent.

Background

2. We are instructed as follows:
 - a. the development comprises 5 self-contained cabins on the Site;
 - b. each cabin comprises a separate accommodation unit. The floor plan for each cabin is arranged as a studio with an open plan sleeping/sitting/kitchenette zone and a separate ensuite;
 - c. there is no working farm on the Site or any adjacent property owned by the same registered proprietors;
 - d. the use is not secondary to a use for the purposes of primary production;
 - e. the service and cleaning of the cabins will be carried out by the manager, owner or their agents.
3. We are instructed that the service and cleaning will involve the following:
 - a. making or changing of bed linen daily at the election of the occupant;
 - b. changing of towels and bathroom consumables daily;
 - c. cleaning of the cabin at least daily (unless the occupant elects against this) or on request (additional to the cleaning that occurs prior to arrival of guests and after their departure);

- d. replenishing firewood daily (during cooler and cold seasons);
- e. setting up the outdoor campfire for cabins each night or as requested;
- f. daily laundry service;
- g. daily maintenance - garden, building, lighting and site; and
- h. Gas bottle check and top up weekly.

Zoning and Planning Controls

- 4. The Property is zoned RU4 Primary Production Small Lots under *Mid-Western Regional Local Environmental Plan 2012 (LEP)*.
- 5. The relevant Land Use Table for the RU4 zone provides as follows (our emphasis):

...

2 Permitted without consent

Environmental protection works; Extensive agriculture; Home businesses; Home occupations; Intensive plant agriculture; Roads; Water reticulation systems

3 Permitted with consent

Aquaculture; Cellar door premises; Dwelling houses; Farm buildings; Home industries; Plant nurseries; Roadside stalls; Any other development not specified in item 2 or 4

4 Prohibited

Air transport facilities; Amusement centres; Attached dwellings; Backpackers' accommodation; Boarding houses; Boat building and repair facilities; Boat launching ramps; Boat sheds; Car parks; Cemeteries; Charter and tourism boating facilities; Centre-based child care facilities; Commercial premises; Crematoria; Exhibition homes; Exhibition villages; Freight transport facilities; Group homes; Heavy industrial storage establishments; Helipads; Highway service centres; Home occupations (sex services); Hostels; Hotel or motel accommodation; Industrial retail outlets; Industrial training facilities; Industries; Intensive livestock agriculture; Jetties; Livestock processing industries; Marinas; Mooring pens; Moorings; Mortuaries; Multi dwelling housing; Passenger transport facilities; Places of public worship; Public administration buildings; Recreation facilities (indoor); Recreation facilities (major); Recreation facilities (outdoor); Registered clubs; Residential flat buildings; Respite day care centres; Restricted premises; Sawmill or log processing works; Semi-detached dwellings; Seniors housing; Service stations; Sex services premises; Shop top housing; Signage; Stock and sale yards; Storage premises; Transport depots; Vehicle body repair workshops; Vehicle repair stations; Warehouse or distribution centres; Waste disposal facilities; Wholesale supplies

6. Relevantly, development for the purposes of “*tourist and visitor accommodation*” is permissible with consent as an innominate permissible use, with the exception of “*hotel or motel accommodation*” which is a sub-category of that use that is expressly prohibited.

7. The LEP defines “*tourist and visitor accommodation*” as follows:

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,*

...

8. The proposed use is clearly not for “*backpackers’ accommodation*” or “*bed and breakfast accommodation*”.

9. The use could not be characterised for the purposes of “*farm stay accommodation*” because we are instructed that it is not intended to be a secondary business to primary production and not associated with a working farm.

10. Of the uses expressly included within the definition of “*tourist and visitor accommodation*”, the potentially relevant definitions under the LEP are “*serviced apartment*” and “*hotel or motel accommodation*”.

11. Those terms are defined under the LEP as follows:

hotel or motel accommodation means a building or place (whether or not licensed premises under the Liquor Act 2007) that provides temporary or short-term accommodation on a commercial basis and that—

- (a) *comprises rooms or self-contained suites, and*
- (b) *may provide meals to guests or the general public and facilities for the parking of guests’ vehicles,*

but does not include backpackers’ accommodation, a boarding house, bed and breakfast accommodation or farm stay accommodation.

...

serviced apartment means a building (or part of a building) providing self-contained accommodation to tourists or visitors on a commercial basis and that is regularly serviced or cleaned by the owner or manager of the building or part of the building or the owner’s or manager’s agents.

Characterisation task

12. In *Chamwell Pty Limited v Strathfield Council* [2007] NSWLEC 114, the Court summarised principles relevant to characterisation.
13. The Court said that:
 - a. a “*use must be for a purpose*” and that the purpose is the “*end to which land is seen to serve*” ((at [27]));
 - b. the characterisation of the purpose of a use of land must be done 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*” (at [36]); and
 - c. the characterisation of the purpose of the development must be done “*in a common sense and practical way*” (at [45]).

Advice

14. The question arises as to whether the proposed development is appropriately characterised as “*serviced apartment*” or “*hotel or motel accommodation*”.
15. The primary distinguishing features of the two definitions are as follows.
16. Firstly, hotel or motel accommodation refers to the duration of the stay (“*temporary or short-term accommodation*”) whereas serviced apartments refer to the identity and intent of the occupants (“*tourists or visitors*”). Both characteristics are equally applicable to the proposed use.
17. Secondly, serviced apartments must be “*regularly serviced or cleaned*” by the owner (or their agents) or the manager (or their agents) whereas “*hotel or motel accommodation*” need not be “*regularly serviced or cleaned*” by the owner (or their agents) or the manager (or their agents).
18. Thirdly, hotel or motel accommodation must comprise “*rooms or self-contained suites*” whereas serviced apartments need not comprise those features.
19. We have considered the distinguishing features listed secondly and thirdly above below.

Regular servicing and cleaning

20. A number of cases have made comments on the requirement for regular servicing and cleaning within the definition of serviced apartments.
21. In *Presrod Pty Limited v Wollongong City Council* [2010] NSWLEC 1257 (**Presrod**), Commissioner Brown considered respective definitions of “*hotel accommodation*” and “*serviced apartment*” which were different to the LEP but had some similarities. The Commissioner said (at [26]):

In my reading of the two definitions, there is no meaningful difference between the proposed uses (if the hotel accommodation is not a hotel

within the meaning of the Liquor Act 1982) beyond the requirement in the definition of serviced apartment for the accommodation to be serviced or cleaned by the owner or manager.

22. In *Ardill Payne & Partners v Byron Shire Council* [2019] NSWLEC 1125 (**Ardill**), Commissioner Walsh made the following observations:
- a. That “it is sometimes appropriate to go to the specifics in characterisation (eg the “servicing” aspect of serviced apartments is critical in distinguishing it from other forms of accommodation in some urban zones)” (at [24]).
 - b. That under the definition of serviced apartments the “*regularly serviced or cleaned by the owner or manager of the building*” aspect implies a regularity (eg every day or every few days) which rings true for serviced apartments (at [24]).
 - c. The term “regularly” in the context of cleaning and servicing is different to cleaning only at the end of the stay (at [24]).
23. In *Sherman v Newcastle City Council* [2019] NSWLEC 1238 (**Sherman**), Commissioner Dickson said (at [58]) that:
- a. The use of a serviced apartment “*denotes a regularity of servicing (of which cleaning is one such service)*” (at [58](1)).
 - b. The placing of waste bins out for collection by the owner is not reasonably regarded as regular servicing (at [58](2)).
 - c. Cleaning and servicing a premises at the beginning and end of a hire period are a feature of all of the subset terms under the definition of “*tourist and visitor accommodation*” and are not a feature that distinguishes serviced apartments (at [58](3)).
24. In *Griffani v Ballina Shire Council* [2021] NSWLEC 1660 (**Griffani**), Commissioner Espinosa said (at [35]) that the definition of serviced apartment connotes both a degree of regularity and a degree of service, and that such service needs to be more regular than at the beginning and end of each stay.

“*Rooms or self-contained suites*”

25. Neither “room” or “*self-contained suites*” is defined under the LEP. The Macquarie Dictionary definition of those terms is as follows:

room **1.** *A portion of space within a building or other structure, separated by walls or partitions from other parts ...* **2.** *Lodgings or quarters, as in a house or building ...*

suite ... **3.** *A connected series of rooms to be used together by one person or a number of persons.*

26. In *Ardill*, in considering a comparable definition of “*hotel or motel accommodation*”, Commissioner Walsh considered a proposed use for “*holiday*

cabins” in separate buildings. Commissioner Walsh said (at [24]) that “*I am not convinced that they contain what would be my interpretation of the phrase “rooms or self-contained suites” as included in the definition.*”

27. In Griffani, Commissioner Espinosa considered an application for eight holiday cabins. The Commissioner determined (at [39]) that the only way to adopt a construction in which the cabins are “*hotel or motel accommodation*” would involve the characterisation of each cabin (accommodation unit) as an individual “*hotel or motel*” which would clearly not make sense to the words employed or provide for a practical consideration of the analogous definitions considered in that case.
28. At paragraph [40], the Commissioner said that there was nothing “common sense” in such an interpretation and that:

... if that construction were correct, any building which had a “room” and was used for short term accommodation on a commercial basis would be a “hotel or motel”, which would virtually result in all tourist and visitor accommodation – even cabins or caravans in a caravan park and service[d] apartments – being characterised as hotels or motels.

29. At paragraph [41], the Commissioner said that a characterisation of the proposed holiday cabins as “*hotel or motel accommodation*” would result in an “*absurd or irrational construction... which should be avoided*”.

Conclusion

30. In our view, having regard to the above authorities, we consider that the proposed use is properly characterised as “*serviced apartments*” and not “*hotel or motel accommodation*” for the following reasons.
31. Firstly, the regular cleaning and servicing of the accommodation is a distinguishing feature that separates the definition of serviced apartments from hotel and motel accommodation (see *Presrod* and *Ardill*) which need only be cleaned and serviced at the beginning and end of each stay (see *Ardill*, *Sherman and Griffani*). The proposed use involves regular cleaning and servicing which is more frequent than the beginning and end of each stay, such that the use involves a distinguishing feature associated with a serviced apartment rather than hotel or motel accommodation.
32. Secondly, each cabin comprises a separate accommodation unit. The cabins are designed with a studio layout and do not contain separate rooms that might be the subject of separate bookings.
33. In those circumstances, we do not consider that the proposed use comprises “*rooms or self-contained suites*” as would be required in order for the use to fit within the definition of “*hotel or motel accommodation*” having regard to the ordinary definition of those terms. In that respect:
- a. The subject development will not allow for the booking of separate “space”, “lodging” or “quarters” within a building but rather the booking of an entire building.

- b. The accommodation areas do not fit within the ordinary definition of “*suite*” because the units of accommodation are best described as a separate building rather than a “*connected series of rooms*”.
34. That position is consistent with the interpretation in *Ardill*, where the Court determined that cabins did not contain “*rooms or self-contained suites*”. It is also consistent with the comments in *Griffani* where the Court considered comparable definitions and found that characterising cabins as hotel or motel accommodation would lead to absurd consequences as described above.
 35. For completeness, we have considered the decision of *Gilfillan v Wagga Wagga City Council* [2012] NSWLEC 1253. In that case, Commissioner Tuor considered an application for four buildings containing a manager’s unit and 13 self-contained units that would provide temporary or short-term accommodation on a commercial basis for tourists and visitors.
 36. In that case, the Court held that the proposed development fell within the definitions of both “*hotel or motel accommodation*” (a prohibited use) and “*serviced apartments*” (a permissible use), following an agreement from both town planning consultants regarding that characterisation when giving evidence. The Court found that because the development fell within the definition of both uses, and one of those uses was prohibited, then the proposal was prohibited (in reliance on *Abret Pty Ltd v Wingecarribee Shire Council* (2011) 180 LGERA 343).
 37. Like the other case examples cited above, the decision was that of a Commissioner and, although it warrants consideration, does not have binding effect, and must be considered in the context of its own facts. In our view, based on the judgment, the decision is readily distinguishable and not applicable to the proposed development application for the following reasons:
 - a. The judgment contains limited detail regarding the uses proposed. In particular, there is no detail regarding the extent of cleaning and servicing proposed for the units. In the absence of such a reference it may be that, unlike the proposed application, there was no proposal to clean and service the units more frequently than the beginning and end of each stay. In those circumstances it may have been determined appropriate to characterise the use as “*hotel or motel accommodation*”.
 - b. In any event, unlike the proposed application, the proposal was not for individual cabins with each containing a single unit of accommodation, but for a number of buildings, at least some of which contained more than one accommodation unit. Consequently, unlike the present application, the use would fit within the definition of “*hotel or motel accommodation*” because it would contain “*rooms*” or “*self-contained suites*”.

Commercial Premises

38. In coming to our conclusion above, we have considered whether the proposed use, which we consider constitutes “*serviced apartments*”, is prohibited on the basis that “*serviced apartments*” within the genus of “*commercial premises*”, which is a nominate prohibited use in the zone.

39. That term is defined under the LEP are as follows:

commercial premises means any of the following—

- (a) business premises,
- (b) office premises,
- (c) retail premises.

40. The use clearly does not fit within the definition of “*retail premises*” or “*office premises*”. Paragraph (b) of the definition of “*business premises*” however warrants further consideration (our emphasis):

business premises means a building or place at or on which—

(a) ..

- (b) *a service is provided directly to members of the public on a regular basis, and includes funeral homes, goods repair and reuse premises and, without limitation, premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, betting agencies and the like, but does not include an entertainment facility, home business, home occupation, home occupation (sex services), medical centre, restricted premises, sex services premises or veterinary hospital.*

41. It is necessary to consider whether the regular cleaning and service of rooms in a serviced apartment constitutes a “*service that is provided directly to members of the public*”.

42. On our interpretation, the use for the purposes of serviced apartments does not fit within that description. The Macquarie Dictionary definition of “*service*” is as follows:

“1. An act of helpful activity ...

43. While the cleaning or servicing of accommodation could arguably be described as an act of helpful activity, we do not consider that such an activity is being provided “*directly*”. Rather it is an indirect act which flows from the primary purpose of the activity, which is to provide accommodation.

44. In that respect, although considering different definitions, the reasoning in *Kingdom Towers 1 Pty Ltd v Liverpool City Council* [2021] NSWLEC 1074 (**Kingdom Towers**) is relevant by analogy. In that case, the Court considered whether “*hotel or motel accommodation*” fit within the definition of “*business premises*”. At paragraph [66] the Court said:

... While the nature of the use may include individual services (or “acts of helpful activity”) provided to those staying at the hotel on occasion, this is not the purpose of a hotel accommodation use (mindful of Chamwell at [34]). The purpose of the use is the relatively generic and static accommodation of people, itself. Central is the provision to the user of a hotel room or suite, a tangible item ...

45. In addition, the serviced apartments use, and the “*service*” associated with cleaning accommodation, is very different in nature with all of the examples that

are expressly included within the definition of “*business premises*” which are restricted to some extent by the reference to “*and the like*” in the definition. The reference to “*without limitation*” in the definition does not change that position because it relates to the subset list of uses at the end of the definition and does not relate to the earlier examples of “*funeral homes, goods repair and reuse premises*”.

46. While the definition in Kingdom Towers differed in some respects, the reasoning in that case is also relevant by analogy where the Court said (at [66]):

... Each of the nominated uses in the definition of business premises ... were seen to “involve the provision of services to individual customers in accordance with their particular requirements” ... or, provide a service “in a planning sense”. I agree with Council that hotel accommodation is distinguishable here and that it does “not involve the provision of services to individual customers in accordance with their particular requirements” ...

47. We trust that this advice is of assistance. Should you have any queries, please do not hesitate to contact us.

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