

Practice Note

How to characterise development

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Related Replaces Planning Circular PS 21-008

Introduction

This practice note provides guidance in characterising development for the purpose of determining permissibility.

The Standard Instrument for Principal Local Environmental Plans (LEPs) includes a Dictionary of standard definitions. Definitions in the Standard Instrument LEP Dictionary can be divided into:

- terms that describe land uses which can be included in the Land Use Table of a Standard Instrument LEP ('land use terms'); and
- other explanatory terms that are important for interpretation purposes.

The Land Use Table of a Standard Instrument LEP specifies for each zone:

- development that may be carried out without development consent,
- development that may be carried out only with development consent and
- development that is prohibited.

Permitted and prohibited land uses in zones

All proposed development will fall into one of the three categories – permitted with consent, permitted without consent, or prohibited. Whether a development is permitted (with or without consent) or prohibited will depend on the purpose for which the development is being carried out.

A reference to a type of building, structure or other use in the Land Use Table is to be interpreted as a reference to development *for the purposes of* that type of building or other use. For example, the listing of 'dwelling houses' under the heading "Permitted with consent" in Zone RU1 Primary Production means that development for the purposes of a dwelling house is permitted with consent in that zone.

The following terms are discussed in this practice note:

- development for a purpose
- ancillary uses
- principal purpose

Development for a purpose

Development is considered to be *for a particular purpose* if that purpose is the dominant purpose of the development. This purpose is the reason for which the development is to be undertaken or the end to which the development serves.

To determine whether a development is (or will be) for a particular purpose, an enquiry into how that purpose will be achieved by the development is necessary. The assessment will vary depending on the facts of each case.

Example 1: Supermarket

Shop means premises that sell merchandise such as groceries, personal care products, clothing, music, homewares, stationery, electrical goods or the like or that hire any such merchandise, and includes a neighbourhood shop and neighbourhood supermarket, but does not include food and drink premises or restricted premises.

Note. Shops are a type of retail premises—see the definition of that term in the Dictionary, Standard Instrument LEP.

In the case of development for the purpose of a shop, such as a supermarket, the development could involve the construction of:

- the building in which the supermarket and its associated stock room and loading dock are located,
- a basement or adjoining car park for customers who wish to shop at the supermarket,
- driveways providing vehicular access from the public road to the car park and passageways, travelators or pedestrian ramps providing pedestrian access between the public road, the car park and the supermarket, and
- a landscaped, supermarket forecourt area that provides passive recreation and access for customers.

All of the above developments can be regarded as being for the one dominant purpose of a shop. The integral relationship between the various components means it is not appropriate to characterise each as being for the purpose of a ‘car park’, or ‘roads’, or ‘recreational area’.

The fact that there are different components or parts of varying nature comprising the development is not necessarily of importance. Obviously, the only part of the proposed development specifically intended for use as a supermarket is that part of the building which incorporates the supermarket. The other parts of the development, such as the car park, driveways, access ways, and landscaped forecourt, serve the purpose of enabling the supermarket to function on the land.

Ancillary use

An ancillary use is a use that is subordinate or subservient to the dominant purpose. The concept is important when a development involves multiple components on the same land.

To put it simply:

- if a component serves the dominant purpose, it is ancillary to that dominant purpose,
- if a component serves its own purpose, it is not a component of the dominant purpose but an independent use on the same land. It is a dominant use in its own right and not an ancillary use. In such circumstances, the development could be described as a mixed-use development. Each principal use in a mixed-use development must be permitted with consent on the land.

In the Standard Instrument LEP Dictionary *mixed use development* means a building or place comprising 2 or more different land uses.

Example 2: Industrial premises

As located in the Standard Instrument LEP Dictionary:

General industry means a building or place (other than a heavy industry or light industry) that is used to carry out an industrial activity.

In the case of development for the purpose of general industry, such as a factory, the development could involve the construction of:

- the building in which the factory and its associated storehouse and loading dock are located
- an adjoining car park for employees
- driveways providing vehicular access from the public road to the car park and passageways
- fencing around the premises for security and safety, and
- a caretaker's residence for a full-time caretaker to manage and maintain the premises.

The integral relationship between the various components means it is appropriate to characterise the entire development as being for the dominant purpose of general industry, including the caretaker's residence, the built form of which could be considered a different residential use of land. However, since the residence exists to serve the dominant purpose, it is properly characterised as an ancillary use and is therefore development for purposes of general industry.

However, if the proposed residence is not for a full-time caretaker at all but is instead a house that could be rented out to anyone, fenced off away from the industrial premises with separate access and driveway from a road, it should be characterised as development for the purposes of a dwelling house or residential accommodation. The proper characterisation of the residence will depend on the facts.

The characterisation of the residence has the following implications:

- If the entire development is for the purpose of general industry, 'general industry' must be permitted with consent on the land for consent to be granted.
- If the development is mixed use, for the purpose of general industry as well as a dwelling house, both 'general industry' and 'dwelling house' must be permitted with consent on the land for consent to be granted.

Considerations for characterisation

A component of a development may have features that are both ancillary and independent. If this is the case, consider the following:

- Is the component going to serve the dominant purpose of the development, or is it independent?
- What is the amount of land to be used for a certain component, relative to the amount of land proposed to be used for other purposes? If the amount of land is relatively small, it is more likely to be ancillary.
- Evidence of a purpose that is inconsistent with the dominant purpose is likely to undermine a claim that a component is ancillary.
- If the component is temporary, it is more likely to be ancillary; if it is regular (that is, will constitute an ongoing use for a long period of time), it is likely to be an independent use.
- If the component goes beyond what is reasonably required in the circumstances for the development to implement the dominant purpose, it is likely to be an independent use (regardless of whether it has ancillary qualities).

- Related components of a development are likely to have an ancillary relationship, although this is not necessarily determinative of such a relationship.
- Physical proximity of the component to the rest of the development is likely to be evidence of an ancillary relationship, although again not necessarily determinative.

The above considerations are not determinative, as it depends on the facts of each case.

Example 3: Warehouse and distribution centre

A development application is made to develop land for a warehouse and distribution centre. A retail component is proposed as part of the development. Development for the purposes of 'warehouse and distribution centre' is permitted with consent under the Land Use Table for the relevant zone, but 'retail premises' is prohibited.

In the Standard Instrument Dictionary:

***Warehouse or distribution centre** means a building or place used mainly or exclusively for storing or handling items (whether goods or materials) pending their sale, but from which no retail sales are made but does not include local distribution premises.*

Development consent can only be granted to the development if the land is rezoned to permit 'retail premises'. The retail premises component cannot be characterised as being ancillary to the other purpose of the development (warehouse or distribution centre), however minor it may be in comparison, because the definition of 'warehouse or distribution centre' excludes any retail sales being made from the premises. Therefore, the retail premises cannot be considered ancillary rather, both uses should be characterised as independent, dominant purposes. This is the case even if the operations are related.

Changes to an ancillary use

If an ancillary use expands to the extent that it is no longer subordinate or subservient to the dominant purpose, development consent may be required for the change of use.

Definitions that use the term “principal purpose”

There are 13 land use terms in the Standard Instrument Dictionary that use the term “principal purpose” as part of their definition.

For example:

***Hardware and building supplies** means a building or place the principal purpose of which is the sale or hire of goods or materials, such as household fixtures, timber, tools, paint, wallpaper, plumbing supplies and the like, that are used in the construction and maintenance of buildings and adjacent outdoor areas.*

The use of the term “principal purpose” in such a context adds flexibility to what may be considered the purpose of 'hardware and building supplies'.

A building or place that sells goods or materials relating to the construction and maintenance of buildings and related outdoor areas, and also sells other goods or materials or provides related or unrelated services, may still fall within the definition of 'hardware and building supplies', but only if those other goods, materials or services do not constitute a major component of the development.

The definition makes it clear that even if these other goods or materials are sold or services provided, the principal purpose of the building or place must remain “the sale or hire of goods or materials such as household fixtures, timber, tools, paint, wallpaper, plumbing supplies and the like, that are used in the construction and maintenance of buildings and adjacent outdoor areas”.

Example 4: Hardware and building supplies

A development application is made to develop land for hardware and building supplies. The sale of goods or materials used in the construction and maintenance of buildings and related outdoor areas is the main purpose of the development, but the sale of goods not necessarily for this purpose is also proposed on-site. Some of the goods that will be available for sale (whether or not of a kind used in the construction and maintenance of buildings and related outdoor areas) could be considered more associated with a 'specialised retail premises.'

Development for the purposes of 'hardware and building supplies' is permitted with consent under the Land Use Table for the relevant zone, but 'specialised retail premises' is prohibited.

In such circumstances, development consent may be granted to the development so long as the principal purpose of the development is still the sale of goods or materials used in the construction and maintenance of buildings and adjacent outdoor areas. The land does not need to be rezoned to permit 'specialised retail premises' for development consent to be granted because the development, when considered as a whole, is not for the purpose of a 'specialised retail premises'.

Consultation with council

If you have any concerns or questions as to whether a proposed development is permitted, or whether a rezoning is required, please contact your local council for assistance. Pre-DA meetings (a meeting held prior to the lodgement of any development application) with council planning staff are available in all local government areas.

Further information

For further information please contact Service NSW on 13 77 88.

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Important note: This practice note does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this practice note.

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