

**RE: PARITER PTY LIMITED:
REDEVELOPMENT OF CUMBERLAND COUNTRY GOLF CLUB**

ADVICE

Mills Oakley
Lawyers
Level 7
151 Clarence Street
Sydney NSW 2000

Attention: Matt Sonter

**PARITER PTY LIMITED:
REDEVELOPMENT OF CUMBERLAND COUNTRY GOLF CLUB**

ADVICE

1. Cumberland Country Golf Club Limited (**the Golf Club**) is the owner of a large parcel of land located at 246-248 Old Prospect Road, Greystanes. That land is presently developed to provide what is described as a championship 18-hole golf course (**the golf course**). In the north-eastern corner of that land, the Golf Club provides a club building and ancillary facilities including carparking. I am told that the clubhouse operated by the Golf Club is a registered club under the *Liquor Act 2007*.
2. Pariter Pty Limited (**Pariter**) has agreed with the Golf Club to carry out redevelopment work on the Club's land. In accordance with that agreement, Pariter has lodged with the Department of Planning, Housing and Infrastructure (**the DPHI**) State Significant Development Application 64795219 (**the SSDA**) for the intended redevelopment of the land, seeking the Minister's consent for the development there described pursuant to s 4.5 of the *Environmental Planning and Assessment Act 1979* (**the EPA Act**).
3. As a consequence of an issue raised by officers of the DPHI as to the permissibility of the SSDA, I have been asked to address the following question:

"Whether the subdivision proposed by the SSDA (as amended) in Stage 1, may lawfully be approved or if cl 90 prohibits subdivision of the land taking place until such time as the Seniors Living Development has been 'carried out'."

4. For the reasons that follow, my succinct response to that question is that the subdivision component proposed in the SSDA may lawfully be undertaken once development consent is granted as the first step in implementing the proposed development. As is obvious, the understanding of that response requires an understanding of the land to be developed, the development proposed and the provisions of both the EPA Act and the relevant planning instruments that determine the permissibility of the development proposed.

The Site

5. The land at 246-248 Old Prospect Road, Greystanes (**the Site**) is legally described by reference to some 29 lots in 6 different deposited plans. In aggregate, those lots have an area of about 38 hectares. The northern frontage to the Site to Old Prospect Road has a length of about 440 metres. The Site may loosely be described as being rectangular in shape, with its northern and southern boundaries being the two shorter sides of that “rectangle”. The northern boundary is formed by Old Prospect Road while the Site is bounded on the south by Whalans Road.
6. The fairways of the golf course run generally north-south. There are a number of waterbodies or dams on the Site that form part of the Golf Course development. The only other significant improvement on the Site is the clubhouse and associated parking located close to its north-eastern corner with access gained from Old Prospect Road.

Development proposed by the SSDA

7. There are several components to the development sought in the single development application for the Site. Those components involve the following:

- (i) subdivision of the Site that will, in effect, involve consolidation of the existing lots by which it is constituted into a single lot, with the subdivision of that single lot into four separate lots;
- (ii) undertaking upgrade works to the golf course;
- (iii) construction of a new clubhouse with road access and internal roads upgraded along with parking for the new clubhouse;
- (iv) provision of “seniors housing” (within the meaning of that expression as defined in the “standard instrument”) to comprise 234 independent living units in a total of 6 buildings together with a residential care facility accommodating 38 beds and ancillary café together with health and wellness consulting rooms; and
- (v) landscaping and associated public domain works.

8. While the Environmental Impact Statement (**the EIS**) lodged with the SSDA describes the development as being carried out in stages, all elements are included in the single SSDA for which a single development consent is sought. The SSDA is not a concept development application within the meaning of s 4.22 of the EPA Act. To the extent to which the EIS identifies the development as being carried out in “stages”, that intent may more felicitously be expressed as the sequence within which the components of the development proposed will be undertaken. As I am instructed, that sequence will differ from that indicated in the EIS, necessitating an update to the sequencing proposed in the SSDA. The sequence is to be:

- (i) subdivision (including consolidation of the existing lots) into four lots, with the golf course, as such, to be included in a single lot (identified as being Lot 4 in the EIS); the clubhouse together with associated road and parking facilities to be within a second lot (identified as Lot 2 in the EIS) and two lots, namely those numbered 1 and 3 in the EIS (separated by Lot 2), for

seniors housing, with that subdivision proceeding to the issue of a subdivision certificate so that the approved plan of subdivision may be registered on title, with the Golf Club recorded as the registered proprietor of each lot;

- (ii) during this process, golf course upgrade works will be undertaken;
- (iii) once the subdivision has been registered, the seniors housing component located west of the clubhouse land, namely on Lot 1 as identified in the EIS, will be commenced as will construction of the new clubhouse on lot 2;
- (iv) upon completion of the seniors living component intended for Lot 1, the seniors housing component intended for Lot 3, being the land to the east of the clubhouse land, will be undertaken.

9. The Club will remain the registered proprietor of all four lots following completion and occupation of the seniors housing component on Lots 1 and 3.
10. As will be seen from the location of Lots 1, 2 and 3, all are located within the northern area of the Site proximate to Old Prospect Road. The work intended for Lots 1, 2 and 3 is generally confined to an area of about 3.8 hectares. Outside that area the only works to be undertaken are works to upgrade the golf course, including fairway adjustment so as to accommodate those areas to be occupied by the seniors housing components of the development. To the extent to which the development of the clubhouse and associated facilities is to be undertaken, that work is generally in the location of the existing clubhouse.

Statutory land use controls

11. The primary instrument imposing land use controls upon the Site is Cumberland Local Environmental Plan 2021 (**the LEP**). Under that instrument, the Site is zoned RE 2 Private Recreation. The Land Use

Table for land so zoned identifies uses permissible with consent to include both “recreational facilities (outdoor)” and “registered clubs”. By reference to the Dictionary to the LEP, “recreational facilities (outdoors)” includes a golf course while the “registered club” use is satisfied by reason of the Club’s licence issued to it under the *Liquor Act*.

12. The other provision of the LEP of present relevance is cl 2.6(1), providing that “land to which this Plan applies may be subdivided but only with development consent”. That clause, together with cl 4.1 are the only clauses of the LEP that potentially have relevance to the subdivision of the Site. The latter provision specifies the minimum lot size for the subdivision of land in various parts of the Cumberland local government area by reference to the “Lot Size Map”. That Map does not identify a minimum lot size for subdivision of the Site. Moreover, there is no provision of the LEP that prohibits subdivision of land zoned RE 2.
13. The seniors housing component of the SSDA engages the provisions of State Environmental Planning Policy (Housing) 2021 (**the Housing SEPP**) to support its permissibility. The term “seniors housing” is defined in the ‘standard instrument’ to include “a combination of any of the buildings or places” that are used as a “residential care facility” and also as “a group of independent living units” that are intended for the permanent use of “seniors or people who have a disability”. The buildings and areas referred to in the SSDA as intended for seniors housing, propose a use that conforms with that definition. By s 4(2) of the Housing SEPP, that definition in turn applies to the term “seniors housing” as used in the SEPP.
14. Part 5 of the Housing SEPP applies to “seniors housing”. The provisions to which I will next refer are all found in that Part. Relevantly, s 79(p), the first section in that Part, provides that the Part applies to land (among others) in “Zone RE 2 Private Recreation”. Section 81 provides that development for the purposes of seniors housing may be carried out, with

development consent, “on land to which the Part applies”. As a consequence, its provisions apply to the seniors housing component of the development proposed for the Site.

15. Section 86(1)(a) is specific to development for seniors housing on land in Zone RE 2 and is therefore applicable to development of that kind on the Site. The subsection requires that a consent authority not grant development consent for seniors housing development on RE 2 zoned land unless it is satisfied that:

- “(i) the development is carried out on land used for the purposes of an existing registered club, and
- (ii) the land adjoins land in a prescribed zone...”.

16. Clearly, all elements of the development proposed in the SSDA, including the seniors housing component, are to be carried out on land used for the purpose of the Golf Club which, for reasons earlier stated, is a “registered club” within the meaning of the SEPP. Further, the Land Zoning Map identified in cl 2.2 of the LEP shows land adjoining the Site to be zoned R2 Low Density Residential, “a prescribed zone” within the meaning of that term as defined in 82(1) of the Housing SEPP.

17. Sections 90 and 92 of the Housing SEPP are also relevant to the question that I am asked to address. Those sections relevantly provide:

“90 Subdivision

- (1) Development consent may be granted for the subdivision of land on which development has been carried out under this Part.
...

92 Development on land used for the purpose of existing registered club

- (1) Development consent must not be granted for development under this Part on land used for the purpose of an existing registered club unless the consent authority is satisfied that –
 - (a) the development includes appropriate measures to separate the club from residential areas to avoid land use conflicts, and

- (b) an appropriate protocol will manage the relationship between the seniors housing and the gambling facilities on the site of the club to minimise harm associated with the misuse and abuse of gambling activities by residents of the seniors housing.
 - (2) For the purposes of subsection (1)(a), appropriate measures include the following –
 - (a) separate pedestrian access points for the club and the residential areas of the seniors housing,
 - (b) design principles underlying the building aimed at ensuring acceptable noise levels in bedrooms and living areas in the residential areas of the seniors housing.”
18. Section 90 does not, either in terms or by implication, circumscribe the capacity to subdivide land intended for development of seniors housing on any land that is within a “prescribed zone” as specified in s 79. Having regard to the definition of “subdivision” in s 6.1 of the EPA Act, it seems to me that s 90 makes clear that subdivision may be effected, with consent, in respect of seniors living development at any time, including once the use of land for that purpose has commenced so as to allow, for example, the strata subdivision of a building or buildings so used.
19. I make reference to s 92 because it manifests the clear intention of Pt 5 of the instrument to distinguish the registered club user of land as the prerequisite for development of land for seniors housing and the separate lawful dual use of that land upon the approved seniors housing being developed and occupied. The section is directed to important amenity aspects to be addressed before consenting to development for the purpose of seniors housing on land that is necessarily, at the time of consent for that purpose, lawfully supporting the use of the land for the purpose of a registered club.

Permissibility

20. The question I have been asked to address has earlier been quoted. I understand that question has, in turn, been informed by a request from

the DPHI, seeking information to “demonstrate that the proposal will be carried out on land used for the purpose of an existing registered club in accordance with Section 86 of the Housing SEPP.” The request from DPHI continues:

“Further consideration, including legal advice as appropriate, on whether the site can be subdivided as proposed, which would have the effect of the seniors housing development being located on a separate lot to the registered club.”

21. For the purpose of addressing permissibility, I have already identified the relevant provisions of both the LEP and the Housing SEPP. As for the provisions of the LEP relevant to permissibility, I have identified –

- (i) the zoning of the Site as RE 2;
- (ii) the permissibility, with consent, of the golf club components of the SSDA under the Land Use Table for RE 2 zoned land;
- (iii) the provisions of cl 2.6 of the LEP sanctioning subdivision, with consent, of all the land to which the LEP applies; and
- (iv) the absence of any other provision of the LEP proscribing subdivision of the Site by reference to lot size or otherwise.

In combination, those provisions identify the permissibility, with consent, of each component of the SSDA, apart from the seniors housing component.

22. The seniors housing component of the SSDA is sanctioned by reference to the provisions of the Housing SEPP, summarised in the following way:

- (i) s 79 states that the provisions of Pt 5, headed “Housing for Seniors and People with a Disability”, applies to land zoned RE 2;

- (ii) s 81 sanctions, with consent, the carrying out of development for seniors housing on land to which the Part applies;
- (iii) the provisions of s 86(1)(a)(i), limiting seniors housing development on land zoned RE 2 to land used for the purpose of an existing registered club is satisfied by the Golf Club's continuing operation and use of the clubhouse on the Site; and
- (iv) the second limitation imposed by s 86(1)(a)(ii), requiring that the adjoining land be "in a prescribed zone", is satisfied by reason of the R2 zone of land adjoining the Site.

Read together, those provisions, as applied to the seniors housing component of the SSDA, establish that such development is permissible with the consent of the consent authority.

23. That leaves the only outstanding issue raised by the question posed, informed by the issue raised by DPHI, as being the timing of the proposed subdivision of the Site, particularly when considered in the context of s 90 of the Housing SEPP. In my opinion, s 90 does not, in terms, limit the timing of the consent to subdivision in the context of the SSDA. The section is not, in terms, a provision that is either expressly or impliedly, restrictive of consent to subdivide land that is the subject of a development application for seniors housing.
24. The provisions of s 90(1) are provisions of general application in that they are directed to subdivision of land in any zone to which Pt 5 of the Housing SEPP applies. If it was intended to confine the exercise of power to grant consent to subdivision of land in a "prescribed zone" to the point of time at which the buildings and works are completed and occupied by qualified seniors housing occupants, one would expect the provisions of the subsection to be differently framed. Adopting the formula of words used

in Pt 5 of the Housing SEPP to express a constraint or limitation, one would expect the provision to state “Development consent must not be granted for subdivision under this Part unless...” (see, for example, ss 88(2), 89(2), 92(1), 93(1) and 94(1)). The fact that s 90(1) is expressed in permissive terms speaks against its interpretation as being restrictive, particularly having regard to the terms in which the exception in s 90(2) is expressed, excluding the operation of subsection (1) to a building constructed as a result of consent under Pt 5 on land zoned E2 Commercial Centre or B3 Commercial Core..

25. For these reasons, I have concluded that the subdivision component of the SSDA may lawfully be the subject of a single consent to the SSDA even if the sequence of implementing that consent involves the subdivision proceeding to the issue of a certificate of subdivision and registration of a plan of subdivision prior to the seniors housing component being commenced. The consent authority is not prevented from granting consent to the subdivision component until the seniors housing component has been completed on the Site.
26. There is an aspect of the request from DPHI, questioning whether the subdivision component of the SSDA could be sanctioned if it will result in the seniors housing development being located on a separate lot to that on which the registered club is to be located. The concern implicit in that request is, in my respectful opinion, misplaced, being without any legal foundation.
27. The circumstance that the seniors housing component would, as a consequence of subdivision, be located on a separate lot from that of the registered club is irrelevant to the issue of permissibility of either component of the SSDA. The determination of a development application requires consideration and application of the facts and law, relevant to the development proposed, as they each exist at the date of determination of

that application (*Goldcoral Pty Limited (Receiver and Manager Appointed) v Richmond Valley Council* [2024] NSWLEC 77 at [75] and the authorities there cited). At the date upon which the SSDA is determined for each component of the development presently sought, the whole of the Site is assumed to have its RE 2 zoning; it is land on which there is an existing registered club, used as such, and the land adjoining the Site is within a “prescribed zone”. The prerequisite for the lawful grant of consent, imposed by s 86 of the Housing SEPP, will therefore be satisfied. (In so concluding, I assume that the present planning regime established by the two planning instruments to which I have referred, will remain unchanged at the date upon which the SSDA is determined).

28. Importantly, the grant of consent to the subdivision proposed for the Site does not require the carrying out of any subdivision work. The subdivision of land and registration of the relevant plan of subdivision does not involve **the carrying out of development on the land** (*Hillpalm Pty Limited v Heaven’s Door Pty Limited* (2004) 220 CLR 472; [2004] HCA 59 at [42]; *Goldcoral (Receiver and Manager Appointed) Pty Limited* at [58]). In short, the registration of a plan of subdivision has no legal consequence for or upon either the RE 2 zoning of the Site or the lawful purpose for which development may be carried out on the Site in accordance with the two relevant planning instruments.
29. That proposition is well illustrated by the present circumstances pertaining to the Site. The legal title to the Site presently comprises some 29 lots in various deposited plans, each of which lots may, as a matter of property law, be separately alienated. That circumstance has had no impact upon either the zoning of the Site or the lawful capacity to carry out development on the Site imposed by and under the EPA Act. While “subdivision of land” is “development” for the purpose of the EPA Act (s 1.5), it does not involve the carrying out of development on land.

30. Clearly, the requirement that RE 2 zoned land on which a registered club use is currently being undertaken, as being legally essential to engage the power of a consent authority to consent to development for seniors housing under the Housing SEPP, has the consequence that upon the grant of development consent for such housing the land is lawfully able to be used for two purposes within the meaning of the EPA Act. The use of a building on land as the permanent residence of a person entitled to occupy independent living accommodation, sanctioned by a consent granted by reference to the provisions of the Housing SEPP, does not involve the use of land for the purpose of a registered club. The operation of s 86(1)(a) of the Housing SEPP could not be construed otherwise. Moreover, the coexistence of the two purposes of land use is implicit in s 92 of the Housing SEPP by identifying the manner in which the potentially conflicting environmental consequences of the two uses are addressed.
31. To conflate the land title consequences of consenting to the subdivision of land with the provisions of a planning instrument directed to the control of the purpose for which development may be carried out on land fails to recognise that the EPA Act and instruments made under the Act are directed to land as a topographical entity rather than the imposition of constraints upon the rights attaching to the proprietorship of that land (*Hillpalm Pty Limited v Heaven's Door Pty Limited* at [81]). Neither the zoning of the Site nor the limitation upon the manner of its lawful use under the EPA Act can be affected by registration of a plan of subdivision.
32. Stated succinctly, s 90 of the Housing SEPP imposes no constraint upon the subdivision of the Site being approved prior to the construction and use on part of the Site of the seniors housing component of the overall development for which a single consent is sought in response to the SSDA.

33. At a practical level, I am informed that the proposed creation of separate lots for golf course, Golf Club and seniors housing is intended to serve an administrative function, allowing for a clear separation of operational responsibility between the seniors housing function of land use and the use for which the Golf Club will bear operational responsibility. As I have earlier recorded, the Golf Club will be and will remain the registered proprietor of each lot.
34. In aggregate, these are the reasons for which I have answered the question posed for my consideration in the manner indicated in paragraph [4] of this advice.

Chambers

16 October 2024



MALCOLM CRAIG KC