The Meaning of the Word “Dwelling” in Planning Law

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Introduction

Since its inception in the 1940s, planning law in NSW has sought to control the size, location and number of dwellings on a parcel of land. This has required the word “dwelling” to be defined in legislation so that regulators can distinguish a building constituting a dwelling from other types of buildings.

The definition of dwelling has remained relatively the same since the early days of town planning regulation in NSW. From time to time the definition of dwelling and dwelling house has been considered by the courts. This has occurred mainly in the context of serviced apartments, dual occupancy development, group homes and, more recently, secondary dwellings or granny flats. Disputes have occurred because of the town planning controls that turn on the permissibility of development.

Whether a building contains a dwelling or not can make the difference between the use of a building being prohibited or permissible with development consent. From a certification perspective, the difference between a dwelling and another type of building can make the difference between a lawful and an unlawful complying development certificate.

The purpose of this paper is to explore how the courts, namely the NSW Land and Environment Court and Court of Appeal, have, over the last 30 years, dealt with the legal meaning of dwelling and dwelling house in planning law cases.

The Legal Definition of Dwelling and Dwelling House

The Standard Instrument created under the Standard Instrument (Local Environmental Plans) Order 2006 currently defines the expressions “dwelling” and “dwelling house” as follows:

- **dwelling** means a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

- **dwelling house** means a building containing only one dwelling.
All local environmental plans and most state environmental planning policies in NSW now adopt the Standard Instrument definition. Prior to the standard instrument, which commenced on 31 March 2006, most environmental planning instruments adopted the definition of dwelling and dwelling house in the *Environmental Planning and Assessment Model Provisions 1980*. Under that instrument dwelling had exactly the same meaning as the Standard Instrument. Dwelling house was defined differently, but not materially so.

Prior to the Model Provisions 1980, words and phrases were defined for planning law purposes in the *Environmental Planning and Assessment Model Provisions 1970*. This instrument commenced on 17 July 1970, which was before the commencement of the *Environmental Planning and Assessment Act* in 1980. The definitions in the Model Provisions 1970 applied to planning scheme ordinances and interim development control orders created under Part XIIA of the *Local Government Act 1919*.

The *Model Provisions 1970* defined the expressions “dwelling house” and “flat”, but not dwelling. Dwelling house was defined as:

“... a building intended for use as a dwelling for a single family, together with such outbuildings as are ordinarily used therewith, and includes a dwelling in a row of two or more dwellings attached to each other such as are commonly known as semi-detached or terrace buildings.”

Flat was defined in the 1970 Model Provisions in similar terms to the current definition of dwelling, as ".. a room or suite of rooms occupied or used or so constructed, designed or adapted as to be capable of being occupied or used as a separate domicile.”

A comparison of the 1970 and 1980 versions of the definitions reveals a significant change occurred with the commencement of the 1980 Model Provisions. The 1980 definitions expanded the concept of dwelling to a domicile (which imported the concept of permanency) and to a building capable of being used as a dwelling, regardless of whether the owner intended it to be used as such. These additional aspects of the definition have been the subject of most of the case law over the last 30 years.

As a matter of interest, the *County of Cumberland Planning Scheme Ordinance 1951* defined the expressions “country dwelling” and “dwelling house”, but not “dwelling”.

Part XI of the *Local Government Act 1919* regulated the construction of buildings from 1919 to 1998. It contained a definition of “flat”, which was in much the same terms as the current Standard Instrument definition of dwelling.

**The Two Limbs to the Definition of Dwelling**

The Courts have recognised that the current Standard Instrument definition of “dwelling” has two limbs. The first limb – “a room or suite of rooms occupied or used ... as a separate domicile” is concerned with actual occupation or use of a room or rooms as a separate domicile. The second limb – “a room or suite of rooms ... so constructed or adapted as to be capable of being occupied or used as a separate domicile” is concerned with a hypothetical test of whether a room or rooms are capable of being occupied or used as a separate domicile.\(^1\) A room or suite of rooms might constitute a dwelling if its falls within *either limb*.

The cases reviewed for this paper fall within 3 themes. The first are cases that falls within first limb (“occupied or used as a separate domicile”). The second are cases that fall within the second limb

\(^1\) Leichhardt Municipal Council v Mansfield (1985) 57 LGRA 214 at 221; Wollongong City Council v Vic Vellar Nominees Pty Limited [2010] NSWLEC 266

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("constructed or adapted as to be capable"). The third set of cases are those dealing with the concept of “domicile”, and the implication that the courts have drawn from that concept.

At the conclusion of this paper, there is a summary of principles derived from the case law that could be a basis for assessing whether a room or a suite of rooms constitutes a dwelling.

The First Limb Cases – The concept of “occupied or used as a separate domicile”

**R v Storn** (1865) 5 SCR (NSW) 26

The earliest reported decision in NSW dealing with the meaning of dwelling house is the Supreme Court’s decision in **R v Storn** (1865) 5 SCR (NSW) 26. The entirety of the decision reads:

“A tent, which is the ordinary sleeping place of the prosecutor and his family, and in which he and they lived for many months to within a few days of the arson, is a “dwelling-house” for the purposes of arson.”

Obviously, this decision was well before planning or building law commenced in NSW, and when tents were probably a common place of abode. However, the decision does demonstrate the notion that a place can be a house, regardless of its nature and design, if it is occupied as a permanent place of abode. The following case is a contemporary example of the same theme.

**Wollondilly Shire Council v 820 Cawdor Road Pty Ltd** [2012] NSWLEC 71

In this case, the Council commenced civil enforcement action under section 123 of the Environmental Planning and Assessment Act 1979 seeking an order requiring an owner of land at Cawdor, near Camden south west of Sydney, to cease using a building on the land as a dwelling house, in contravention of the Wollondilly Local Environmental Plan 2011. This case is as much an example of the compassion of the Court as it is of the meaning of dwelling.

The building was described in the judgement as a dilapidated old building erected in about the 1890s. The building had no facilities that would normally be found in a house - it had no kitchen, no bathroom, no toilet, no laundry, no water laid thereon, no electricity, no stove, no refrigerator, no heating and no cooling. The building was described by an expert for the council as “manifestly unsound and unsafe and, in particular, at a clear and obvious risk of collapse due to wind action.”

The building was occupied by a 67 year-old man described in the judgement as a recluse with a history of manic depressive disorder. Apart from one period of about nine months, the man had lived in the building for the last 20 years. He cooked on a grate on an open fire or on a camping stove, and kept his perishable food cool by storing it in a container topped with a wet cloth. He used a toilet in an empty building on the property which appeared to be connected to a septic tank, but which had to be flushed with a bucket. His means of transport was a bicycle. He gave evidence in court, which is recorded in the judgement as follows:

“Although the building I occupy may seem very limited and quite basic, it is comfortable and I am used to living that way. I still have a means to collect water for everyday use. I live alone in the building and I believe that it is well suited to me, and I am well suited to it and the lifestyle it brings. If given the chance to upgrade the building, I would most likely decline this offer as it is comfortable and the change would ruin my familiarity with it.”

The Court noted that previous decisions of the Court in relation to the second limb of the definition of dwelling established that a building without a kitchen providing a stove was not a separate
dwelling and that the absence of kitchen, bathroom and laundry facilities necessarily takes a building outside the ambit of a definition of “dwelling”. The building in the 820 Cawdor Road case was not a dwelling within the second limb of the definition.

In considering the first limb of the definition the Court said that the focus must be on the word "domicile". The Court applied previous cases where the Court held that "domicile" in the context of the definition of dwelling embodied the idea of a permanent home or a significant degree of permanency or occupation. The Court held that building in question quite obviously was used as a separate domicile. The occupant had lived in the building for the last 20 years. He did not live anywhere else, and had not done so for many years. The Court said, in relation to the types of buildings that might fall within the first limb, that:

“[a] person might have as his or her domicile a caravan, or even a tent, as long as it has a sufficient degree of permanency of habitation or occupancy.”

The Court held that the occupant was using the building as a separate domicile. The building was thus a "dwelling" for the purposes of the relevant definition. However, the Court exercised its discretion under section 124 of the Environmental Planning and Assessment Act 1979 to not make any order requiring the unauthorised use to cease. The factors relevant to discretion were the impact on the occupant compared to his impact on the environment. The Court said:

“Whether Mr Garton’s occupation of the building is lawful or unlawful, his environmental footprint is minimal. His presence is harming or disturbing nobody. There is no evidence of any other environmental harm. On the other hand, to order Mr Garton out when he has nowhere else to go, where he is clearly unsuited to commercial or community living, and when to do so would remove him from a largely stress-free existence to a situation which would be both stressful and possibly catastrophic to his mental state would be a wrongful exercise of discretion.”

The Second Limb Cases - The concept of “capable of being used”

Leichhardt Municipal Council v Mansfield (1985) 57 LGRA 214

Leichhardt Municipal Council v Mansfield is one of the earliest decisions of the NSW Court of Appeal dealing the meaning of dwelling. It concerned a proposal for a professional consulting room, which was defined as:

“a room or a number of rooms forming either the whole of or part of, attached to or within the curtilage of a dwelling house”.

The Court was required to determine whether a suite of rooms was a dwelling for the purposes of the definition of professional consulting room. The relevant planning instrument adopted the 1980 Model Provisions definitions for “dwelling house” and “dwelling”, which were respectively, “a building containing one but not more than one dwelling”, and “a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile”.

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2 Hornsby Shire Council v Monk [2001] NSWLEC 248;
3 Townsend v Lake Macquarie City Council [2004] NSWLEC 38; Wollongong City Council v Vic Vellar Nominees Pty Ltd [2010] NSWLEC 266
4 Wollongong City Council v Vic Vellar Nominees Pty Limited [2010] NSWLEC 266
The respondent was a legally qualified medical practitioner who carried on a pathology practice with the assistance of two other doctors. The respondent acquired a two-storey terrace house at Glebe which comprised a residential flat building containing one dwelling upstairs and two dwellings downstairs. He sought development consent to use the ground floor of the building for professional consulting rooms and the first floor as a self-contained dwelling.

The Council refused consent and the respondent appealed to the Land and Environment Court. The Court at first instance held that because the respondent intended to use the whole of the ground floor for professional consulting rooms the building would qualify as a dwelling house containing professional consulting rooms and that development consent should be granted. The Council appealed the Court’s decision.

The plan of the proposed development showed no structural alterations. The kitchen in the front consulting room was described as a “tea room”. The kitchen of the rear lower dwelling was modified to the extent that it appeared that a stove or refrigerator had been removed. The separate toilets in each of the lower units remained shown on the plan. On the appearance of the plan, save for the possible removal of a stove or a refrigerator from the lower rear unit, the “capacity” of each of the lower units to be used as a separate domicile was not affected by the proposed development.

The Court held that the Land and Environment Court did not properly determine whether the second limb of the definition of dwelling, that is the rooms were “constructed or adapted as to be capable of being occupied or used as a separate domicile” applied to the rooms to be occupied by the doctors. If neither of the lower units were not capable of being occupied or used as a separate domicile then the doctors’ rooms were not “attached to or within the curtilage of a dwelling house”, and in turn were not professional consulting rooms.

*Wyong Shire Council v Ardi Pty Ltd* [2000] NSWLEC 253

In *Wyong Shire Council v Ardi Pty Ltd* the Court held that a building, approved as a dual occupancy, was in fact being used as four separate dwellings, which constituted an unlawful use of the building for the purpose of a residential flat building.

The design and layout of the building was central to the Court’s decision. The judgement records that the building contained two attached residential units the entry to which was by a common entrance foyer. Internally, each unit had a stairway leading from the ground floor to the upstairs section, and each upstairs section had a rumpus room, a bathroom and a balcony. Modifications were made to each unit which involved the installation of a lockable door midway up the stairs leading to the upper level of both units.

At some point after the modifications the upstairs section of one of the units was separately occupied to the downstairs section. A separate electricity meter was installed in respect of the upstairs portion. The two occupations ultimately ceased, and the whole of unit 7A was leased pursuant to a residential tenancy agreement.

The downstairs section of the other unit was leased and the upstairs section was used by the owner and his family for the purpose of an occasional visit (said to be up to 5 times per year, for between two and three days per visit) and for storage. The owner resided permanently elsewhere. The upstairs section of this unit was furnished with a small bar fridge, a toaster, a kettle, a table and chairs, a couch and a double bed, but no cooking is carried out there. It had no separate water or electrical connections or meters, nor did it have hard wired cooking facilities.
The Court held that the installation of the lockable doors which closed off the upstairs sections of each unit from the downstairs sections was significant in determining whether the separate parts of each unit were dwellings. Additionally, the upstairs sections of each unit had separate bathrooms and there was provision for separate electricity meters for each of the upstairs and downstairs sections of each unit. The Court held that the physical layout of the upstairs section of each unit meant that those sections were “so constructed or adapted as to be capable of being occupied or used as a separate domicile”, and accordingly constituted separate dwellings.

The Court also noted that although one of the upstairs sections was not at the time of the hearing occupied or used as a separate domicile, it was nonetheless used as a separate domicile and therefore “capable” of being so occupied or used.


In **Hornsby v Monk** involved a residential building originally constructed in the 1950s and added to in 1974. It comprised two floors containing rooms and accommodation on each floor, and had the appearance of a conventional dwelling-house. It was accepted that the use of the building as a dwelling-house was a lawful continuing use (EP&A Act s 109(1)).

The 1974 additions involved a new living room (incorporating what was described in the approved plans as a "temporary kitchen") a new bedroom and ensuite bathroom and a covered porch on the ground floor. An existing laundry and water closet room, located in the garage of the existing dwelling-house adjacent to the approved addition, was modified to remove the laundry component and a set of internal stairs was installed from the garage of the existing dwelling-house giving access to the first floor level of the dwelling. A set of external stairs from the rear porch to the first floor level was also provided.

The development consent approving the 1974 additions required the owners to enter into a legal agreement with the Council wearing the owners agreed that should the owners parents cease to use “the flat”, the kitchen fittings be permanently removed and it be converted to form part of the dwelling house and not used for separate accommodation.

The flat was duly erected and occupied by the owners' mother until 1975 when she died, after which time the owners removed all kitchen facilities and the place was used thereafter as a "bar and rumpus room". The house was sold in 1984 and in 1985 and 1986 the new owners rented the flat in 1987 and 1988 commenced to rent the whole of the subject premises on a share accommodation basis. At the time of the proceedings, there were four persons occupying the house on a share accommodation basis, in addition to the owner and his partner.

The Council contended that the use of the subject premises was as "multi-unit housing". The Council led evidence from its planning officer, who had inspected the premises. The officer deposed that:

*Based on my observations that the ground floor of the premises contained a combined kitchen/living room and a bedroom with an ensuite bathroom, that the ground floor dwelling had separate front and rear access; and that there was no internal access from the interior of the ground floor premises to the first floor premises, I am of the opinion that the ground floor premises are capable of being occupied or used as a self contained dwelling, or separate domicile.*

*Based on my observations that the first floor premises contain a kitchen, a combined lounge/dining room, 3 bedrooms, a sunroom (being used as a 4th bedroom), and a bathroom, I am of the opinion that the first floor premises are capable of being occupied or used as a self contained dwelling or separate domicile.*
The Respondent led evidence that established the building was not actually used or occupied as two self-contained and separate dwellings. Rather, the whole of the building was indivisibly used and occupied on a shared residential accommodation basis. The Court accepted the Respondent’s evidence of actual use, which meant that the building did not contain two dwellings within the first limb of the definition of dwelling.

In terms of the second limb, the Court noted that the ground floor did not contain a kitchen or any other cooking facilities (ie a stove). The presence of a microwave oven did not diminish that consideration. This was “a crucial consideration”.

The Court held that the existence of cupboards and sink in the ground floor flat did not, either by itself (or taken in combination with the presence of a portable microwave oven) render those facilities or the space they occupy a kitchen within the ordinary understanding of what facilities are conventionally provided by a kitchen. Nor did the Court find any significance in the fact that the internal stairs between the floors run between the living area upstairs and the garage area (rather than the living area) downstairs.

The Court held that the ground floor of the building was not capable, without a kitchen providing a stove, of being occupied or used as a separate dwelling.

Townsend v Lake Macquarie City Council [2004] NSWLEC 38

The issue in Townsend v Lake Macquarie City Council [2004] NSWLEC 38 was whether two buildings were properly characterised as development for the purpose of “dual occupancy—detached” and prohibited within the rural 1(a) zone under Lake Macquarie Local Environmental Plan 1984.

The land has an area of approximately 3.5 hectares and contained a brick veneer dwelling-house. The owner lodged a development application seeking development consent for a new dwelling house on the land and conversion of existing dwelling to outbuilding by removal of cooking facilities.

The Council argued that the proposed development was a detached dual occupancy, being two detached dwellings on a single allotment of land.

The applicant argued that imposition of a condition requiring the decommissioning of the existing dwelling-house so that it no longer had the functioning capability of a dwelling would result in only one dwelling-house on the land. The proposed decommissioning action involved the physical removal of the kitchen, bathroom and laundry facilities and any additional action thought necessary eg disconnection of water and electricity services.

The Council held that the crucial question was whether, as a matter of law, the old building could be decommissioned so that what remained after the work was not properly characterised as a dwelling or dwelling-house. The Court accepted that the decommissioning action would necessarily have the effect of taking what remains of the existing building outside the ambit of the definition of “dwelling” adopted by the LEP and relevant to the provisions of the LEP relevant to this case. This was because the decommissioned existing dwelling-house will not be “so constructed or adapted as to capable of being occupied as a separate domicile” by virtue of the absence of kitchen, bathroom and laundry facilities.

Warlam Pty Ltd v Marrickville Council [2009] NSWLEC 23 (19 March 2009)

Warlam is a decision in a merit appeal involving a development application for the partial demolition of a residential building and the construction of a replacement residential building.
The Council contended that the existing development was a boarding house and the proposed development was a residential flat building, both of which were prohibited under the provisions of the LEP. The argument between the parties was whether the proposed development was an “evolution of and/or an enlargement, expansion or intensification” of an existing use. If it was the proposed development was permitted with consent. If it was not, it was prohibited and consent could not be granted.

The existing development comprised a two storey building containing 11 residential rooms, a communal shower and toilet on the ground floor, and a communal kitchen, shower and toilet on the first floor. A small single storey building to the rear contained a twelfth residential room and a communal toilet and laundry. Half of the rooms had full kitchens. Another had a kitchen bench with a sink, bar fridge and microwave with cooktop. Two others had a fridge and microwave. Another two had a bar fridge. One room had none of those facilities.

The Court concluded that the purpose of the existing use should be characterised as a boarding house. The fact that some bedrooms in a boarding house have ensuite bathrooms and toilets did not detract from their characterisation as a boarding room. That is an example of the evolution of the bedroom.

The proposed development was for a residential flat building, not for a boarding house. The rooms varied in size between 15.9 square metres and 35.6 square metres. Each residential room (and the manager’s flat) had an ensuite shower and toilet and a kitchenette. The majority of the rooms were large enough for a double bed, a lounge and a dining table. The proposed development provided each residential room with an ensuite bathroom and toilet, a kitchenette and a laundry facility. Each room would be capable of being occupied as a separate domicile.

The Court relied on the definition of “residential flat building” incorporating the word “dwelling” in the relevant LEP. The Court noted that the notion of a separate domicile was critical to the definition of dwelling. The Court applied the principle in North Sydney Municipal Council v Sydney Serviced Apartments (1990) 21 NSWLR 532 that the word “domicile” carried with it the notion of a significant degree of permanence of habitation or occupancy in a separate and more or less self-contained domestic establishment. The fact that some residential flat buildings have a communal laundry does not detract from that proposition.

The Court held in Warlam at [36] that:

“Rooms with ensuite bathrooms and toilets but without kitchens do not constitute a separate domicile. Nor, at least in the circumstances of this case, do rooms with kitchens but without ensuite bathrooms and toilets. Rooms with both ensuite bathrooms and toilets and kitchens constitute separate domiciles. The development proposed by the applicant goes too far, in my opinion, because its rooms have both ensuite bathrooms and toilets and kitchens.”

The Court held that each of the proposed boarding rooms were dwellings, which constituted the development as a residential flat building which was prohibited in the zone.

To overcome the legal difficulty of characterisation, the council proposed a condition be imposed on the development consent that “no stove, oven, cooktop or dishwasher to be installed within any of the rooms of the boarding house excluding the common kitchen”. The Court accepted that if such a condition were to be imposed that the proposed development was a boarding house and accordingly permitted in the zone. The Court upheld the appeal and granted development consent.
Wollongong City Council v Vic Vellar Nominees Pty Limited [2010] NSWLEC 266 (31 December 2010)

The issue before the Court in Vic Vellar Nominees was whether each of two partially constructed dwellings was an “existing dwelling-house” for the purposes of a clause in Wollongong Local Environmental Plan 1990 that permitted subdivision of land only if “each allotment of land to be created by the subdivision has an existing dwelling-house on it and no rights for additional dwellings are created”.

Vic Vellar Nominees owned land on the edge of the Illawarra Escarpment. Part of the land was dedicated to the Council, who transferred it to the National Parks and Wildlife Service. On the other part of the land the owner obtained development consent for the construction of two dwellings. Construction of the dwellings commenced in 1996 and ceased in 1999 before the dwellings were completed.

The dwellings remained partially constructed when in 2009 the owner lodged a development application for subdivision of the land so as to create two lots, each of which would contain one of the partially constructed dwellings. The application was refused by the Council. The principal reason for refusal was that the subdivision was not permitted with consent because neither of the proposed allotments were to contain “an existing dwelling-house”. The issue before the Court was whether one or both of the partially constructed dwellings was an existing dwelling house.

The status of construction of one of the dwellings was itemised in a schedule to the Court judgement. The schedule described the part finished elements of the dwelling as follows:

- The cement floors and slabs had been completed but lack floor coverings.
- The plumbing for the bathrooms, kitchen and laundry had been installed in the ground floor concrete slab.
- The concrete stairs had been poured and await tiling.
- The internal brick walls for rooms had been completed on the ground floor.
- On the first floor the timber frames for the walls of each room were in deteriorated condition and without electric wiring.
- The timber framing for the ceiling to the first floor had been completed but was been gyprocked.
- There was no kitchen sink, facilities for the preparation and cooking of food, bath, shower, taps, toilet, clothes washing facilities, closet pan or washbasin. However, plumbing was fitted for these purposes.
- There was no cabling in the house.
- The floors and ceilings of most rooms were concrete with no floor coverings.
- There were no internal doors, architraves or skirtings.

The planning instrument adopted the conventional meaning of dwelling, being “a room or number of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.”
The Court adopted a previous decision of the Court of Appeal where the Court held that the essential requirements of a separate “domicile” were not only accommodation for sleeping and living but also kitchen, bathroom and laundry facilities. The absence of a kitchen, bathroom and laundry facilities had been held to not satisfy a definition of “dwelling” in essentially the same terms.

The Court held that the second limb of the definition of dwelling captures the notion that the rooms are physically capable of being used for human habitation as a domicile. The focus is on the present state of the rooms.

The Council submitted that the building was not habitable in its current form as it did not have a kitchen, bathroom and lavatory facilities, was partly constructed and could not be presently occupied. Vic Vellar submitted that the buildings were substantially completed and were dwellings within the second limb of the definition of dwelling, as they contained rooms that were constructed so as to be capable of being occupied or used as a separate domicile. Minor works were required to install a kitchen sink, facilities for the preparation and cooking of food, a bath, shower, taps, toilet, washbasin or clothes washing facilities.

The Court agreed with the Council. At least one of the buildings did not meet either the first or second limb of the definition of dwelling. To meet the definition of an “existing dwelling-house” the building must have an existing kitchen, bathroom and lavatory facilities, if not also laundry facilities. Minor things that may still need to be done are not an impediment to a conclusion that a building is an “existing dwelling-house”. In the case of at least one of the dwellings, much more than minor work was required to make the building habitable. The Court dismissed the merit appeal.

Recent Class 1 Cases

Following three cases, *Luke and Warnock v Lane Cove Council, Baenziger Coles Pty Ltd v Bega Valley Shire Council* and *Elbaf and Anor v Campbelltown City Council*, are examples of how the legal principles established by the decisions summarised above have been applied by Commissioners of the Land and Environment Court. All these decisions do not establish precedent, they do indicate how individual Commissioners approach the application of these legal principles to particular building designs.

*Luke and Warnock v Lane Cove Council [2011] NSWLEC 1094*

This case was an appeal against refusal of a development application for major alterations and additions to an existing dwelling house on the land at Northwood Road, Northwood. The proposed alterations and additions included an internal lift, internal alteration including extension to the ground floor, demolition and reconstruction of the top level (third storey), demolition of the existing garage, a new double garage with loft towards the east of the site including excavation for the garage, and a pool.

The Council contended that the application should be refused as the application was in respect of a dual occupancy. The Council argued that the dwelling had the potential to be used as two separate dwellings by reason of the proposed installation of two kitchens and the arrangement of doors to the lower ground floor and ground floor which could be accessed independently, together with the new double garage and onsite parking providing a total of four car spaces.

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The applicant’s expert gave evidence that the lower kitchen operated to service the yard and lower ground floor entertaining area, that the layout particularly the internal lift does not suit a dual occupancy and the proposed car parking makes use of an existing garage and circulation space to provide convenient parking for occupants and visitors. The applicant was also prepared to accept a condition that the proposed dwelling not be used as a dual occupancy.

The Commissioner commented that it was not unusual in a property of this size, for both a main kitchen and secondary kitchen to service the outdoor living area and ground floor and the double garage and additional parking spaces is consistent with the size of the dwelling and allows for convenient access. The Court was satisfied that the provision of a second kitchen and the parking did not constitute two dwellings and approved the application.

Elbaf and Anor v Campbelltown City Council [2014] NSWLEC 1074

These proceedings involved in an appeal against the deemed refusal of an application for a building certificate for a partly constructed dwelling and outbuilding and an appeal against the Council’s refusal of a development application for the completion of the partly built structure and use of the as built structures.

The judgement describes the dwelling as proposed to be completed contained the following elements:

- A lower level containing a large subfloor area and a storage room, two bathrooms, two bedrooms, bar room and a rumpus room.

- An upper floor containing a double garage, a further three bedrooms, study, family room, formal living and dining rooms, lounge, family dining, kitchen and a covered outdoor living area, ensuite, two toilet rooms, laundry and a bathroom.

- An outbuilding/granny flat (connected to the main dwelling by a hallway) containing a storage room, three bedrooms, two bathrooms, lounge room, dining and kitchen and a separate entry foyer with stairs from a formal courtyard.

The Court considered that the structure when completed would comprise two dwellings, each within the second limb of the definition of dwelling. The Court considered that the outbuilding section of the structure contained all the facilities and services required for individual occupation as a home and, would be occupied by one family separate to the main building.

The provision of linkages between the two buildings does not alter the conclusion. Both dwellings had separate entries, entry foyers, kitchens, laundries, bathrooms, living spaces, dining areas and bedrooms. Each dwelling was on a different level to each other. Court concluded that the two dwellings would be occupied by two families separately and independently, despite the fact that those families were related. The Court considered that the relationship between the families was irrelevant to the determination of the issue.

Baenziger Coles Pty Ltd v Bega Valley Shire Council [2015] NSWLEC 1427

Similar to the dwelling in Luke and Warnock, the dwelling in Baenziger Coles was a large single detached dwelling comprising a basement, ground floor, first floor and second floor, with lift access to all floors. The Council contended that the application was in respect of an attached dual occupancy, not a single detached dwelling. The ground floor contained a kitchen dining and living area with external terrace, and the first floor also contained a kitchen, dining and living area opening
onto a balcony, lobby area with access to the lift and stairs. The first floor could be accessed externally via rake path along the side of the dwelling through a door at the rear of the living area.

The applicant submits that the proposal was for a dwelling, albeit for a beach house which will, at certain times of the year, house a number of generations of one family and for this reason, the proposal includes a separate and more modestly scaled kitchen on the ground floor associated with the guest accommodation on the ground floor.

The applicant further submits that the pedestrian circulation was centred between the bedrooms on one side and the living areas on the other on both the ground and first floors. For this reason the proposal could not be characterised as an attached dual occupancy because one must travel through the central lobby that divides the bedrooms from the living area on the ground floor in order to reach the first floor.

The Court applied the principles established by the court in relation to the second limb of the definition of dwelling, notably the decision in Wollongong City Council v Vic Vellar Nominees Pty Ltd [2010] NSWLEC 266.

Court held that the building did not comprise two dwellings. Court relied principally on the spatial planning of the proposal, being the expression of an architectural brief for a luxurious beach house with ample and independent accommodation for visitors. The proposal did not in the Court’s view lend itself to neatly dividing into two separate domiciles, because of:

- the single entry to the dwelling
- the centrally located vertical circulation spine and
- the unappealing pedestrian entry to the first floor from the rear courtyard if it were to be used as a separate domicile.
- the separate and more modest kitchen bar on the ground floor which allowed guests to prepare food without disturbing those in the main living areas on the first floor.

The Court upheld the appeal and granted development consent.

The Group Home Cases

The following three cases each concern a proposal for a transitional group home. The first case Blacktown City Council v Haddad concerned a complying development certificate issued for a transitional group home under the State Environmental Planning Policy (Affordable Rental Housing) 2009 (“SEPP (ARH)”). The second case, McAuley v Northern Region Joint Regional Planning Panel concerned a development application for a transitional group home made under the Coffs Harbour City Local Environment Plan 2000. The third case, Association for Better Living and Education Inc v Wyong Shire Council (2) was a decision of a Commissioner of the Court on a preliminary question of fact as to the proper characterisation of a proposal for the use of an existing building for the provision of a drug and alcohol rehabilitation services

Blacktown City Council v Haddad [2012] NSWLEC 224 (28 September 2012)

In this case Blacktown City Council challenged the validity of a complying development certificate issued by an accredited certifier Mr Camile Haddad for the "construction of a two storey permanent group home comprising of 29 bedrooms and associated facilities". The CDC was issued pursuant to
the SEPP(ARH). The principal ground of challenge was that the proposed development was not properly characterised as a “permanent group home”. This required the Court to determine whether the proposed building was a dwelling within the meaning of the expression “transitional group home” in the Standard Instrument. The Court determined that the building was not a dwelling and upheld the appeal.

The proposed building was configured to comprise 29 bedrooms. Each bedroom had an ensuite bathroom, a wardrobe, a bench and sink area, and its own washing/drying laundry facilities. Neither a cooktop nor a stove was provided in each bedroom, however, there was provision for tea making. Each bedroom had its own television and access to Foxtel. Twenty two of the 29 bedrooms had either access to balconies with associated privacy screens, or access to a private ground floor outdoor area. A communal laundry and kitchen with the capacity to seat 12 persons was proposed. There was a managing agent.

Permanent group home was defined in the SEPP(ARH) as a dwelling, that:

- is occupied by persons as a single household with or without paid supervision or care and whether or not those persons are related or payment for board and lodging is required, and

- is used to provide permanent household accommodation for people with a disability or people who are socially disadvantaged.

The Court agreed that the definition of a “dwelling” in the Standard Instrument did not require the occupants to be related to each other. A dwelling could be occupied by friends living together in a share house arrangement or persons living together who, while initially strangers, ultimately live together as a household unit under the rubric of flat-mates or house-mates.

The Court also agreed that bedrooms in modern dwellings often had ensuite bathrooms or toilets, their own televisions, telephones and other forms of entertainment and communication. The Court was indifferent to the number of proposed bedrooms in the development and accepted that the SEPP(ARH) was silent on the number of permissible bedrooms.

However, the large number of proposed bedrooms in this case (29), particularly when viewed in the context of other features of the development, was:

“suggestive of a living arrangement that is inconsistent with any modern ‘family’ life in the ordinary way, that is to say, a dwelling.”

The Court also considered the degree of permanence that is implied by the word "domicile", relying on the Courts decision in North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd reviewed above. Given the anticipated nature of the occupation, a potential turnover of tenants of three months was antithetical, in the Court view, with the type of permanence reasonably characteristic of ordinary family life, even in the 21st century.

Nor was the building proposed to be occupied as a single household. "Household" meant “more than a random collection of individuals conveniently located under one roof, living wholly separate lives with limited or no social interaction.”

**McAuley v Northern Region Joint Regional Planning Panel [2013] NSWLEC 125 (2 August 2013)**

This case involved a challenge to the validity of a development consent issued by the Northern Region Joint Regional Planning Panel for a transitional group home at Bucca on the north coast of NSW. The principal basis for the challenge was that the development for which the consent was
granted was not a “dwelling”, which is must be for the purposes of the definition of "transitional group home" within the meaning of that expression in SEPP(ARH).

The proposal involved the use of existing and proposed buildings on a rural parcel of land for the purpose of providing facilities and services, including accommodation, for persons undertaking a drug and alcohol rehabilitation program. The buildings were to be clustered in to 3 precincts, described as the group home precinct, the staff accommodation precinct and the chapel precinct. The group home precinct comprised three linked pavilions intended to be used for sleeping, common rooms and recreation respectively.

The applicant's principal argument was that the degree of permanence implicit in the term "domicile" in the definition of dwelling was not present because persons residing at the premises would do so for periods between three and six months.

The applicant also submitted that the buildings comprising the transitional group home were not “capable of being occupied or used as a separate domicile" because the number and size of buildings concerned and the separation among those buildings and facilities would ordinarily identify a room or suite of rooms necessary for separate living.

The Court accepted that ordinarily the concept of domicile in the definition of dwelling embodied the idea of a permanent home or a significant degree of permanency of habitation or occupancy. However, the meaning of that term dwelling in the context of the definition of transitional group home is by the terms of that definition which determine both the manner of its occupation as a building and the purpose of its use. That manner of the use is described in the definition as comprising "temporary accommodation ... for drug or rehabilitation purposes", which could never satisfy the "technical legal meaning" of "domicile" as applied by the Court in previous cases. This required an implied modification of the technical legal meaning so as to operate harmoniously with the defined expression, of which "dwelling" is but an element.

In response to the applicant’s submission in relation to the number and separation of buildings, the Court held that a dwelling house could comprise more than one building. The Court noted that nothing in the definition of "dwelling" identified the necessity for the activity to be contained within a single building. The Court also noted that:

- the use of land for the purpose of a "dwelling" or "dwelling-house" frequently involves more than one building, for example a stand-alone motor garage to accommodate vehicles used by a family occupying a "dwelling-house"; and
- modern single family homes are sometimes designed with two or more pavilions between or among which the facilities essential for separate family living are dispersed - for example a teenage retreat, pavilion containing swimming pool, spa and exercise room or pavilions separately containing sleeping accommodation and family living accommodation.

The Court considered that the existence of an administration office, interview rooms and a conference room did not deny the proposed use, seen as a whole, from being characterised as a "transitional group home". The definition, read as a whole, contemplated an “institutional aspect” to this form of development. Paragraph (a) of the definition applied by SEPP(ARH) contemplates that occupants may be supervised. Provision for supervisors needs to be made within the facility.

The definition of transitional group home implies that there should be a facility or facilities onsite, such as meeting rooms, in which a program actively facilitating rehabilitation can be undertaken.
The Court dismissed the appeal.

**Association for Better Living and Education Inc v Wyong Shire Council (No.2) [2014] NSWLEC 1239**

This is a decision in a merit appeal against the Council’s refusal of a development application for use of existing buildings for the provision of drug and alcohol rehabilitation services on land within an environmental protection zone. The Council contended that the proposed development was prohibited. The applicant contended that the proposed development was permitted with consent either as a "transitional group home" under SEPP(ARH) or a "community facility" under Wyong Shire Local Environmental Plan 1991.

The Commissioner was satisfied that the use was a transitional group home as described by the Court in McAuley, and was accordingly permitted with development consent. The Court applied the principle established in McAuley, namely that the meaning of the term “dwelling” in the definition of transitional group home in SEPP (ARH) is qualified by the provisions of paragraph (a) and (b) of that definition, which determine both the manner of its occupation as a building and the purpose of its use. The Court reiterated that when the definition is read as a whole, it is apparent that a “transitional group home” as anticipated by the SEPP is something different to a conventional dwelling or place of residence, in the sense that the use involves an institutional aspect to its form in order to accommodate people on a temporary basis to undertake drug and alcohol rehabilitation.

The Court held that despite its differences to a conventional dwelling, the proposed development will contain a suite of rooms that together are capable of being used as a separate domicile, albeit across a number of buildings. In their totality, the suites of rooms proposed in the proposed development did contain facilities expected to be found within a dwelling. The court is satisfied that the residents and carers would live together as inhabitants of a single household and as a single unit.

There were no individual kitchens proposed in bedrooms where a meal could be cooked and the occupants were encouraged to share in chores and be involved in domestic activities as part of their rehabilitation.

**The “Domicile” Cases**

**North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd and Ors [1990] 21 NSWLR 532.**

This decision is the leading authority on the meaning of the word domicile in the definition of dwelling in the Standard Instrument. The facts of the case were that the defendant managed the use as serviced apartments of 37 of the 144 residential units in a large residential building named Blues Point Tower in the North Sydney Municipality. The development consent authorising construction of the building described the proposed use as a residential flat building. At that time use of the land was governed by the County of Cumberland Planning Scheme Ordinance and the land was with a living area under that instrument.

The Council commenced proceedings in the Land and Environment Court for an order requiring the use to cease. The basis of the claim was that the use of units for the purpose of serviced apartments was unlawful. The Land and Environment Court dismissed the appeal, and the Council appealed to the Court of Appeal.

The defendant managed the 37 units as serviced apartments, exercising its management control via management agencies or leases obtained from the individual owners of the units. The Court noted that Pt XI (Building Regulation) of the Local Government Act 1919 defined “flat” and “residential flat
“building” as respectively “a room or suite of rooms occupied or used or so constructed, designed, or adapted as to be capable of being occupied or used as a separate domicile” and “a building containing two or more flats but does not include a row of two or more dwellings attached to each other such as are commonly known as semi-detached or terrace buildings.”

The Court observed that the serviced apartment units did not differ physically from those otherwise occupied in the building. However the focus of the proper characterisation of the development was on the use of units, not the physical form of the building. The physical structure of the building was relevant, but did not determine whether the use was permissible.

The Court upheld the appeal and made orders restraining the use of the serviced apartments. The Court held that the meaning of the development consent should be read consistently with the use of language in the definitions of flat and residential flat building in the County of Cumberland Planning Scheme Ordinance. The Court agreed with the Council’s submission that the use of word domicile in the definition of flat in the Local Government Act 1919 carried with it the notion of a degree of permanency. The use of the serviced apartments, which was as little as one or two days, did not have that degree of permanency.

**KJD York Management Services Pty Limited v City of Sydney Council [2006] NSWLEC 218 (5 May 2006)**

In KJD York Management the applicant commenced proceedings in the Land and Environment Court seeking a declaration that a building known as “The York” in York Street Sydney could lawfully be used for both short term and long term residential occupation and serviced apartments pursuant to a development consent issued in 1979 for the construction of a residential flat building. The Council neither opposed nor consented to the declaration.

The development consent permitted the construction of a residential flat building as defined in the standard or model provisions incorporated pursuant to s 342U(3) of the Local Government Act 1919 by way of a schedule to the Act gazetted on 2 November 1962, which was:

“.... a building containing two or more flats, but does not include a row or two or more dwellings attached to each other, such as are commonly known as semi-detached or terrace buildings and “Flat” means a room or suite of rooms occupied or used or so constructed, designed or adapted as to be capable of being occupied or used as a separate domicile.”

The term “serviced apartment” was defined in the City of Sydney Local Environmental Plan 1996 (the CSLEP 1996”) as:

“.... a building containing two or more self-contained dwellings:

(a) which are used to provide short term accommodation, but not subject to residential tenancy agreements within the meaning of the Residential Tenancies Act 1987, and

(b) which are serviced or cleaned by the owner of manager of the apartments or the owner’s or manager’s agents.”

The Court applied the decision in North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd (summarised above). The Court held that the requirement for “The York” to be used for the purpose of “flats” or “domicile” implied a degree of permanency and therefore suggested something more than serviced apartments.
The Court described a residential unit as one which the owner may occupy and live in; or one which, if so desired by the owner, may be leased out to a tenant for terms which may vary and are subject to the Residential Tenancies Act 1987. On the other hand, a serviced apartment is a unit which is ordinarily hired out in a similar fashion to a hotel for short terms and which is serviced regularly by a manager. The Court dismissed the application and declined to make the declaration.
General Principles to Distinguish between a Dwelling and a Building other than a Dwelling

Having regard to the authorities summarised in this paper, the following general principles could apply to the assessment of whether a room or suite of rooms is a dwelling within the meaning of that expression in the Standard Instrument:

- a building or place used as a permanent accommodation is a dwelling, regardless of its nature or design, or the facilities provided;
- a building containing a room or suite of rooms comprising accommodation for sleeping, a kitchen, bathroom and a laundry is a dwelling;
- a room or suite of rooms without a kitchen is not a dwelling;
- a building containing a room or suite of rooms comprising two or more kitchens associated with rooms for sleeping and bathroom is probably more than one dwelling if the kitchens and associated facilities are physically separated from each other;
- a building containing a room or suite of rooms comprising two or more kitchens associated with rooms for sleeping and bathroom is probably more than one dwelling if the kitchens and associated facilities have their own separate and independent outside access;
- a separate second kitchen and associated rooms for sleeping and a bathroom does not comprise a separate dwelling if it is physically integrated with the remainder of the building containing the primary kitchen and dissocialed rooms.
- A boarding house room is probably **not a dwelling** if it includes:
  - an ensuite bathroom and toilet but without a kitchen is probably not a dwelling
  - a kitchen but not an ensuite bathroom and toilet.
- A boarding house room is **probably a dwelling** if it contains both an ensuite bathroom and toilet, as well as a kitchen.

These are only principles of general application, and every proposed building must be considered on a case by case basis.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.

Michael Mantei
Planning Law Solutions
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