

5 October 2023

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Our Reference
232554

Dear Tony

Same Day Granny Flats – Whether units installed at 125 Gipps St, Bega are ‘moveable dwellings’ or ‘caravans’

Thank you for your email of 15 September 2023.

1. Instructions

1.1 Council has sought our advice on the installation of three habitable ‘units’ at 125 Gipps Street, Bega. Specifically, our advice is sought on whether the units meet the definition of a ‘movable dwelling’ or ‘caravan’ under the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 (the LG Regulation)*.

2. Advice in summary

2.1 For the reasons set out in detail below, we are of the view that:

- (a) the units are not caravans for the purpose of the LG Regulations; and
- (b) the units do not satisfy the definition of moveable dwellings given their similarity to the units considered in *Ogilvie v Rovest Holdings Pty Ltd* [2023] NSWLEC 17.

2.2 Our advice is set out in detail below.

3. Background

3.1 A charitable organisation known as the Social Justice Advocates of the Sapphire Coast Inc (SJASC) has installed three units at 125 Gipps St, Bega, a site which is owned by the Uniting Church and where the Bega Uniting Church is located. It is understood that the units have been installed for the purpose of providing crisis accommodation to vulnerable people. Development consent was not sought or obtained prior to the installation of the units.

3.2 In or around December 2022, a development application was submitted by SJASC seeking development consent for the future use of the units as crisis accommodation in the form of multi-dwelling housing (**the DA**). In support of that application the following documents were submitted:

- (a) Statement of Environmental Effects prepared by Fitzpatrick Planning Services dated 16 November 2022 (**SEE**);
- (b) Elevations and Floor Plans prepared by Richie McNeil Design dated 10 July 2022; and

- (c) Site Plan prepared by Fitzpatrick Planning Services dated 21 November 2022 (Rev 1).
- 3.3 These documents reveal that the units have an identical layout, contain a dining/loungeroom, bathroom, kitchen and two bedrooms (with no laundry), and include a front deck/veranda area. The application proposes that the units, described as 'moveable dwellings', will be in place for five years, pending further, more permanent, social housing outcomes for the site.¹
- 3.4 The SEE provides that:
- (a) The units have an approximate internal floor area of 37m², have a dimension of 5.84m x 6.3m (excluding the deck), and that a timber deck 1.3m wide has been added to each unit.
- (b) The units are single storey prefabricated structures constructed from a 3mm galvanised steel frame with a 3mm steel plate over the main pod roof, fibreglass cover on side roofs, aluminium windows and sliding door frames, and fibre cement flooring.²
- (c) *'The units comply with the relevant Australian Standards applicable to caravans. The units alone are not able to be registered, but when their purchase is combined with a purpose-built registrable trailer, they meet the definition of a caravan. The trailers do not form part of the units that have been installed on the site, and therefore it is understood that the units on the subject site cannot be considered as caravans...'*³
- 3.5 The units were supplied by a business known as Same Day Granny Flats (**SDGF**). The following can be observed on the SDGF website:⁴
- (a) The website displays promotional photographs and videos showing various units that are transported on purpose-built trailers and which then are "folded open" upon arrival at a site. There are also photographs showing units being lifted by cranes onto footings.
- (b) The company advertises that it manufactures trailers specifically designed for their range of 'tiny homes' and states that: 'this means our tiny homes are no longer dwellings and are classified as a caravan'.⁵
- (c) With the exception of the deck which has been added, the floor plans for the units installed at the site are consistent with the plans for the 2 bedroom "Expander Standard" unit advertised.
- (d) In respect of an Expander Standard unit, the website provides that "set up can typically be completed within 2 days with 2 -3 people" and that a plumber and electrician will need to be engaged to connect to services.⁶
- (e) The company can arrange delivery of the units, and the majority of the drivers used for delivery operate tilt tray trucks.⁷
- 3.6 We have been provided with a letter from Pickup Legal to the SJASC dated 31 July 2023 (**Pickup Legal Advice**). The Pickup Legal Advice concludes that, in the authors' opinion, the units are 'moveable dwellings' for the purposes of the LG Regulation either as a 'caravan' or as an 'other portable device'.

¹ Description of the development on Pre-lodgement Application Form PAN 286215 and page 3 of the SEE.

² SEE, page 6

³ SEE, page 3 and 4

⁴ www.samedaygrannyflats.com.au

⁵ <https://samedaygrannyflats.com.au/council/>

⁶ <https://samedaygrannyflats.com.au/products/standard/>

⁷ <https://samedaygrannyflats.com.au/faq/>

- 3.7 We have also been provided with an undated letter from Same Day Granny Flats to Mr Ian Ritchie. The letter refers to the sale of a caravan, seemingly purchased for use at a different property (at 479 Sapphire Coast Drive, Bournda). The letter attaches a copy of a “road worthy inspection” certificate for the caravan and provides, with reference to s 77 of LG Regulation, that as the caravan is capable of registration as a trailer, the prior approval of the Council is not required for its installation. The letter also refers to the case of *Russell v Camden Council* (2018) NSWLEC 1159 in apparent support for this proposition.
- 3.8 On 19 September 2023, the Council received an email from Mick Brosnan attaching two “Registration Notices” issued by Transport for NSW. These Notices were provided to the Council as evidence that the units are caravans.
- 3.9 We have also reviewed a number of photographs of the units, some of which are including in the SEE. Those photos show, amongst other things, that the units are placed on concrete block footings, are connected to underground plumbing infrastructure, that the roof extends over the front deck such that the deck appears fully integrated with the units, and that the deck is secured to the ground by piers and concrete footings.

4. Relevant definitions in legislation and regulations

- 4.1 The expression “moveable dwelling” is not defined in the LG Regulation. It is defined in the *Local Government Act 1993 (LG Act)* to mean:
- (a) *any tent, or any caravan or other van or other portable device (whether on wheels or not), used for human habitation, or*
 - (b) *a manufactured home, or*
 - (c) *any conveyance, structure or thing of a class or description prescribed by the regulations for the purposes of this definition.*
- 4.2 No conveyance, structure or things have been prescribed for the purposes of this definition. We also note that the units do not have a laundry and it appears accepted that they are not therefore a ‘manufactured home’. The relevant criterion is therefore part (a) of the definition.
- 4.3 The expression ‘other portable device (whether on wheels or not), used for human habitation’ is not defined in the LG Act or the LG Regulations. However, the meaning of that expression was considered in *Ogilvie v Rovest Holdings Pty Ltd* [2023] NSWLEC 17 (**Ogilvie**), a case which is addressed further below.
- 4.4 ‘Caravan’ is not defined in the LG Act. It is defined in the LG Regulation to mean: *a moveable dwelling designed to be capable of being registered as a trailer but does not include a camper trailer*. The elements of this definition are also addressed below.
- 4.5 ‘Trailer’ is defined in s 4 of the *Road Transport Act 2013 (the RT Act)* to mean ‘a vehicle that -
- (a) *is built to be towed, or is towed, by a motor vehicle, and*
 - (b) *is not capable of being propelled in the course of normal use on roads or road related areas without being towed by a motor vehicle,*
- whether or not its movement is aided by some other power source, but does not include— [matters not relevant here].*
- 4.6 The word ‘vehicle’ is also defined in s 4 of the RT Act to mean (with our emphasis): ‘(a) *any description of vehicle on wheels (including a light rail vehicle) but not including any other vehicle used on a railway or tramway, or ... [not relevant].*’

5. Advice

Are the units a “caravan”?

- 5.1 SJASC and the Pickup Legal Advice rely on the road worthy certificate and evidence of an apparently equivalent unit’s registration as conclusive evidence that the units are designed to be capable of being registered as a trailer and are therefore a caravan. While this documentation may be relevant to the Council’s assessment process, in our view, both as a consent authority under the *Environmental Planning and Assessment Act 1979* and an approvals body under the LG Act, the Council is able to form its own view on the nature and characterisation of the development. In our view, there are several factors that mean there is a sound basis to doubt the conclusion which has been put to Council by SJASC and Pickup Legal.
- 5.2 Firstly, we note that there is no evidence that the certificates of registration provided to the Council were issued with respect to the units that are actually installed on the site. Even if the certificates were issued with respect to the SJASC units, it is possible that roadworthy certificates have been issued on an erroneous understanding of the relevant statutory registration requirements and the registration of the units with Transport NSW has occurred in reliance on that error. We do not have sufficient instructions to say whether this has occurred and this is an issue that can likely only be clarified by an independent expert assessment. For now, we will proceed on the assumption that there was no error in the road worthy inspection assessment.
- 5.3 Secondly, and perhaps most significantly, the SEE and the material on the SDGF website make it plain that the units are separate to, and do not form part of, the purpose-built trailer on which they may be transported. Whilst the units are evidently designed such that transportation on a trailer is possible, it is clear that the units, independent of the trailer, are not ‘on wheels’ so they do not satisfy the definition of ‘vehicle’ (and therein a ‘trailer’) under the RT Act. In our view, the fact that the units are separate to the trailers supports the view that they are not designed to be capable, on their own, of moving or being registered as a trailer.
- 5.4 Thirdly, even if the units were designed to be capable of registration at the point of purchase, it seems reasonably arguable that the design of the units have been transformed such that they are no longer of a design capable of registration now. The following factors support this conclusion:
- (a) The units are no longer connected to or form part of a trailer, are installed on footings and are not on wheels;
 - (b) The units have been modified by the installation of the deck to which they are connected;
 - (c) The units appear to have been connected to a single large roofing sheet which covers entire unit footprint (including the deck area);
 - (d) The units are connected to services at the site, such as water, electricity and wastewater.
- 5.5 Even if the units were ‘vehicles’, to be registered as a trailer we understand they would need to comply with the *Road Transport (Vehicle Registration) Regulation 2017*, and in particular, the Light Vehicle Standards Rules contained in Schedule 2 (**‘the Rules’**).⁸ Based on our understanding, the units do not comply with those requirements in their present form. For instance, cl.66 of the Rules provides a vehicle must not be over 2.5m wide, whereas the units have a width of 6.3m. The units also appear to contravene cl.47, which provides that vehicles must be fitted with tyres.

⁸ *Road Transport (Vehicle Registration) Regulation 2017*, cl 59(a)– 60(1). We also note that cl.64(1) provides that it is an offence to carry out modifications on a registered light vehicle (whether by addition or removal of components) that result in the vehicle failing to comply with the applicable vehicle standards.

- 5.6 There is also an argument, based on a principle of statutory construction, that the units are not caravans because they do not fit within the ordinary and natural meaning of that word as it appears in the context of the LG Act. In summary:
- (a) To satisfy the definition of a caravan under the LG Regulations, a unit must be:
 - (i) a *moveable dwelling* (as defined by the Act), and
 - (ii) designed so that it is capable of being registered as a trailer.
 - (b) The definition of *moveable dwelling* in the LG Act includes a ‘caravan’, but caravan is not independently defined in the Act itself;
 - (c) Subject to a few exceptions, there is a recognised principle of statutory construction that primary legislation (here the LG Act) ought not be construed with reference to delegated legislation (here the LG Regulation) as to do so would result in the ‘tail wagging the dog’.⁹ If this principle was applied, the meaning of caravan in the LG Act could be construed by its ordinary and natural meaning in its context without reference to the design element of the definition contained in the LG Regulations;
 - (d) In our view, the ordinary and natural meaning of ‘caravan’ (as it appears in the moveable dwelling definition) requires a caravan to be a vehicle which is a trailer in and of itself, and one which is portable in a sense that it is readily able to be moved from place to place like the other items referred to in the definition (a tent or van). In our view, a caravan which does not have wheels and typically takes 2- 3 days to install does not fit within such a classification.
- 5.7 The applicant relies on the decision of *Russell v Camden Council* [2018] NSWLEC 1159 for the proposition that the units are caravans. This case concerned an order issued by Camden Council to remove a ‘mobile structure’ from the rear of a residential dwelling. It is clear from the judgment that the Court observed the ‘mobile structure’ at a site view, and noted that “it had the obvious appearance of a caravan”.¹⁰ The judgment also reveals that it was registered and had wheels.¹¹ In our view, these features distinguish it from the units being considered here, which resemble a dwelling house.
- 5.8 We prefer the view that the units are not caravans for the purpose of the LG Regulations for the reasons explained above. At best, they are a moveable dwelling. However, as explained below, we also have serious reservations that a Court would reach that conclusion.
- Are the units a ‘moveable dwelling’?*
- 5.9 If it is accepted that the units are not caravans, they can only be a moveable dwelling for the purpose of the LG Regulations if they fall within the meaning of the term ‘other portable device (whether on wheels or not), used for human habitation’.¹²
- 5.10 The meaning of ‘other portable device (whether on wheels or not), used for human habitation’ was considered in *Ogilvie*. That case concerned the installation of prefabricated (14.4m x 3.25m) units which were to be used for accommodation as part of a motel. Each unit was installed on footings by a crane, attached to a veranda, and connected to services (electricity, stormwater, potable water and sewage). The proponent’s evidence was that the units could be connected to the services on site within two days and were capable of being dismantled in a day.

⁹ *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [56] per French CJ.

¹⁰ At [7].

¹¹ At [8].

¹² Noting there is no laundry so they do not constitute a ‘manufactured home’. See also paragraph 4.2 above.

- 5.11 In *Ogilvie*, the Court held that there were a number of indicators pointing towards the permanence (and hence lack of portability) of the units such that they did not fall within the meaning of 'other portable device'. Key features of the Court's reasons included:
- (a) Confirmation that the expression 'portable device' should be interpreted as falling within the same genus as the other items referred to in the defined meaning of moveable dwellings (tents, caravans or vans), being items that "are of inherently (generally) modest dimensions".¹³
 - (b) The fact that the units were connected to a veranda and a range of services which required disassembly and disconnection before the units were capable of being moved.
 - (c) It noted that "portability", in the context of where that expression is used in the definition of "movable dwelling", embodies an ability for an item so characterised as being one "specifically designed to be readily and frequently moved from place-to-place". Although the units could be disconnected from the services and veranda, there was no suggestion that the units were so designed in circumstances where they were to be used for accommodation as part of a motel.
- 5.12 In this case, similar factors support the view that the units are not a 'portable device used for human habitation':
- (a) A deck has been connected to each unit. The deck appears to be covered by the same roof sheet as the balance of the unit, and is constructed on concrete footings/piers which are fixed into the ground. It is apparent that the deck and roof, would need to be disconnected before the units were moved;
 - (b) The units are connected to a range of services, such as electricity, water, and wastewater infrastructure;
 - (c) The SDGF website states that the units typically take 2 days to install (by 2- 3 people);
 - (d) The SEE and DA state that the units are intended to be in place for at least 5 years;
 - (e) The units, although presumably capable of being dismantled and reassembled, do not appear to be designed to be readily and frequently moved in the same sense as a caravan, van or tent, nor are they of same generally modest dimensions typical of those items.
- 5.13 We understand the main factors that are different to the units considered in *Ogilvie* are that:
- (a) the SJASC units have dimensions of 5.84m x 6.3m (excluding the deck). This is less than the units in *Ogilvie* which were 14.4m x 3.25m. Based on these dimensions, the *Ogilvie* units had approximately 10 m² larger footprint; and
 - (b) the development application submitted for the use of SJASC units indicates the units are to be used for a period of 5 years, whereas there was no such suggestion in *Ogilvie*.
- 5.14 There is a degree of subjectivity with these factors. For example, does the smaller unit size mean the SJASC units are of sufficiently modest dimensions? Does a 5 year limitation to the intended use period indicate permanence? In light of this subjectivity, there is some risk that a Court would find the SJASC units are sufficiently different to those in *Ogilvie* and do fall within the meaning of 'portable devices'.

¹³ At [72- 73] citing *Warnes v Muswellbrook* [2009] NSWLEC 1284 at [41].

5.15 However, on balance, we prefer the view that the units at the site are not moveable dwellings given the similar characteristics the units have to those considered in *Ogilvie*. Although the SJASC units have a smaller footprint, it seems to us that when compared to tents, caravans and vans, they are still sufficiently large enough not to be considered to be of 'modest dimensions'. They are also connected to a range of services which require disconnection before they are moved, as well as disconnection from the deck. Furthermore, installation takes a number of days by 2-3 people. Even if they are only used for 5 years, it is apparent that they are not intended to be "readily and frequently moved from place to place". Taken together, it is our view that, like the decision in *Ogilvie*, these factors mean the SJASC units exhibit features that point to a sufficient degree of permanence such that they do not fall within the meaning of the expression 'other portable device'.

6. Conclusion

6.1 In conclusion, based upon our instructions and understanding of the units, we are of the view that the SJASC units do not meet the definition of caravan or moveable dwelling.

6.2 We understand this advice is likely to have broader implications in respect to similar units situated throughout the Council's LGA. We are also conscious that we have formed a different view to the Pickup Legal Advice. We are able to discuss Council's options with you, including the possibility of obtaining a peer review of our advice from a barrister practicing in this area of the law.

6.3 In light of the conclusion we have reached, there are a range of compliance and enforcement options available to the Council, which we are happy to discuss with you. Please let us know if you would like our advice on the options, including those that may be appropriate for the SJASC units.

Yours sincerely

BAL LAWYERS



Andrew Brickhill
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