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Land and Environment Court of NSW rejects notion of 'Retail Pharmacy' alleged to be in breach of CDC

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The Land and Environment Court in [Bronger v Greenway Health Centre Pty Ltd t/as Greenway Plaza Pharmacy \[2022\] NSWLEC 91](#) rejected a claim that the operation of a pharmacy in the Greenway Medical Hub was an impermissible retail pharmacy.

Key Takeaways

- The terms 'retail pharmacy' and 'medical pharmacy' are foreign to planning law, and a lack of clarity exists as to the meaning of those terms.
- The dispensing of medication in a pharmacy which results in the sale of medicine fails to meet the description of a 'shop'
- The applicant bears the onus of proving that the current use is prohibited and not ancillary to the use approved by a CDC.

Background

The applicants commenced proceedings alleging that the use of a pharmacy located in the Greenway Plaza shopping complex at Wetherill Park (**Greenwood Plaza**) was in breach of both the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) and complying development certificate (CDC).

The pharmacy forms part of a medical hub within Greenwood Plaza, providing products and advice to both patients of the medical hub and medical professionals operating out of such hub.

On 30 September 2019, the Respondent received a CDC approving the operation of a "medical centre". The applicable FLEP defined "medical centre" as a facility providing health services, such as advice or treatment.

Relying on the terminology of an occupational certificate (OC) granted to the Respondent on 25 June 2020, the Applicants submitted that the Respondent was conducting a 'retail pharmacy' as opposed to a 'medical pharmacy', contrary to the use approved by the CDC and permitted under the FLEP.

Section 4.3 of the EPA Act

The Applicants sought to argue that the current use of the pharmacy for the retail sale of goods, as a shop, is contrary to section 4.3 of the EPA Act. The subject land is zoned B5- Business Development, which prohibits commercial premises. As commercial premises is defined to include "retail premises" such as shops, the Applicants contended that the present use of the premises was an explicit breach of the Act.

At a high level, the Applicants submitted that the operation of a retail pharmacy was prohibited and not ancillary to the use approved by the CDC, as the pharmacy sells goods not only to patients of the medical hub but to customers with no relationship to the medical hub.

Conclusion

The Court concluded that the Applicants failed to establish that the pharmacy constituted an impermissible retail pharmacy. In reaching its decision, the Court considered the activities of the pharmacy as a whole in the medical centre, deciding that the goods sold and services provided by the pharmacy are consistent with its use as a medical centre.

The Applicants raised an alternative argument that use of the pharmacy as a shop constitutes an independent use as defined in *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404, an argument which was ultimately rejected by the Court.

Whilst the Applicants argued that all categories of medicine amount to personal care products falling under the definition of shop, Justice Pain found that the dispensing of drugs by sale does not equate to a retail sale transaction for the purposes of selling personal care products in a shop. The Court considered the sale of goods in a pharmacy as subordinate to medical centre use, and unable in and of itself to convert the lawful use into a shop use.

In response to the Applicant's submission that pharmacy customers should be limited to parties of the medical centre, the Court found that the relevant planning instruments do not impose any such limitation, as the term 'retail pharmacy' does not exist at law. Nevertheless, the Court affirmed that a pharmacy by nature is necessarily retail, and that the provision of health services is the overarching purpose of a pharmacy.

The Court also disregarded evidence submitted by the Applicants as to the signage and trading name of the pharmacy that may have indicated its operation as a retail pharmacy, as the Court resolved that such evidence did not assist the court in the process of ascertaining the planning purpose.