



**City Administrative Centre**

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The General Manager, PO Box 42, Nowra NSW Australia 2541

COUNCIL REFERENCE:

RA13/1003-02 (D14/138801)

CONTACT PERSON:

Russ Pigg

6/06/2014

Joint Regional Planning Panel - Southern Region  
GPO Box 39  
SYDNEY 2001

Dear Sir/Madam

**RA13/1003 - Sikorsky Aircraft Australia Limited**

Please find attached a further request to the Joint Regional Planning Panel (JRPP) to amend draft condition of consent number 45. This request has been prepared by RMB Lawyers on behalf of Council to ensure that a more appropriate legal mechanism to assign car parking spaces to be constructed on Lot 20, for the use of personnel associated with the development to be constructed Lot 1, is embedded into the development consent, if the JRPP determines the application by consent.

Also attached is a letter from Sikorsky Helitech confirming they agree with the requested change.

If further clarification is necessary, I will be in attendance at the JRPP meeting on 12 June.

Yours faithfully

A handwritten signature in black ink, appearing to read "Russ Pigg", is written over the printed name.

**Russ Pigg**  
**General Manager**



L A W Y E R S

Our Ref: GG:TT:131826 – AMR  
JRPP Ref: 2014STH003

6 June 2014

Pam Allen, Chairperson,  
Southern Joint Regional Planning Panel  
Regional Panels Secretariat  
GPO Box 39,  
Sydney, NSW 2001.

By Fax: 9288 2066

Dear Ms Allen,

**Re: DA Number RA13/1003 Sikorsky Aircraft Australia Limited  
Property: 29 Wugun Street, Yerriyong**

I act for the Shoalhaven City Council. I am instructed that the Panel is meeting on 12 June 2014 to consider this application.

I have been asked to give specialist advice on the documentation associated with the implementation of any Consent that may issue in relation to the proposed development.

I have reviewed:-

1. The Planning Officers recommendation to the joint Regional Planning Panel dated Tuesday 20 May 2014, in particular page 26 item (h);
2. The draft development consent RA13/1003 attachment A to the recommendation, in particular clause 45.

My instructions are to ensure that any documentation relating to car parking protects the public interest and requires Sikorsky to carry out its obligations under the consent.

#### 1 Comment on Report and Draft Consent

- 1.1 In order to properly protect the public interest and enable Council to enforce the consent condition by requiring Sikorsky (or its successors) to carry out their obligations in the future it is important that correct legal terminology is used.
- 1.2 Achieving certainty in this instance is important because the Applicant for

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development proposes to carry out the development on two lots of land separated by a public road. These parcels are not to be consolidated.

- 1.3 In the public interest Sikorsky offers to provide a set number of car parking spaces on Lot 20 for the exclusive use of Lot 1.
- 1.4 Absent the proposed parking being provided on Lot 20, there is insufficient parking available on Lot 1 for the Development. Council staff raise no concern with this in light of the offer to make parking available on Lot 20 but seek the imposition of a s88B restriction 'to enable the users of Lot 1 to legally park on Lot 20.'
- 1.5 Clause 45 of the draft consent requires Sikorsky as owner of both Lot 1 and Lot 20 to enter into a s88B restriction 'for the purposes of burdening land known as lot 20 ... and benefiting Lot 1 ... and must detail ... The number of car spaces provided in Lot 20 ... to benefit Lot 1...'.
- 1.6 The law of easements does not look kindly on exclusivity. An easement is the right of one owner to use the land of another owner for a particular limited purpose. If it incorporates exclusivity then that can amount to the exclusion of the owner of the burdened land from using the burdened land. The courts have said that this is tantamount to a transfer of ownership. If that is how the proposed restriction is interpreted then the restriction may fail of its purpose.
- 1.7 The Conveyancing Act provides a mechanism in s88E to enable exclusivity to be granted but it does so in the context of a Public Positive Covenant.
- 1.8 A public positive covenant is defined in section 87A as follows:-

### **"87A Definitions**

*In this Division:*

*positive covenant means a covenant for maintenance or repair imposed under section 88BA, a public positive covenant or a forestry covenant.*

*public positive covenant, in relation to land, includes a covenant which imposes obligations requiring:*

- (a) *the carrying out of development on or with respect to the land, within the meaning of the Environmental Planning and Assessment Act 1979,*
  - (b) *the provision of services on or to the land or other land in its vicinity, or*
  - (c) *the maintenance, repair or insurance of any structure or work on the land,*
- or imposes any term or condition with respect to the performance of or failure to perform any such obligation."*

- 1.9 The intent of draft condition 45 is to impose obligations on both Lot 1 and Lot 20 requiring the provision of services to users of Lot 1, namely car parking, on Lot 20 for the use in connection with the approved development on Lot 1. The approval will be issued pursuant to the *Environmental Planning & Assessment Act 1979*.
- 1.10 It is essential that the provisions of the development consent uses the correct terminology and refers to a public positive covenant rather than a restriction and refer to section 88(E) of the *Conveyancing Act 1919* and not to section 88(B).

**2 Amendments to draft conditions of development consent**

2.1 I recommend amendments to the draft conditions of consent.

2.2 I recommend that the heading on page 43 Easements/Restrictions as to User – 88(b) be deleted and replaced with a new heading:

*Easements/Restrictions as to User/Public Positive Covenant – 88(B) and 88(E).*

2.3 I also recommend condition 45 be deleted and replaced by a new condition 45 as follows:-

*45 A section 88(E) public positive covenant must be imposed and registered with the NSW Land and Property Information (LPI) to ensure that 61 car parking spaces are available on Lot 20 DP1194689 for use by the occupants of Lot 1 DP106977. The Section 88(E) public positive covenant must detail:-*

- that the party with the right to release or vary the public positive covenant is Shoalhaven City Council and in the case of variation with the written consent of each person against whom, at the time the memorandum of variation is recorded the public positive covenant is enforceable; and*
- the number of car spaces provided in Lot 20 DP1194689 for the use of the occupants of Lot 1.*

*The applicant/developer must consult with Shoalhaven City Council (Planning and Development Group) to confirm the requirements of the section 88(E) public positive covenant prior to it being registered.*

**3 Real Property Act Form of Positive Covenant Section 88(E)(3) Conveyancing Act 1919**

3.1 To comply with the requirements of the Act the public positive covenant must burden not only Lot 20 but also Lot 1.

3.2 That is achieved by the registration of a form 13PC creating the Positive Covenant showing both Lot 20 and Lot 1 as being burdened by the covenant.

Yours faithfully



**Grant Gleeson**

Accredited Specialist Local Government & Planning Law

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# Sikorsky Helitech

A Sikorsky Aerospace Services Company

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The General Manager,  
Shoalhaven City Council,  
PO Box 42,  
Nowra NSW 2541.

6<sup>th</sup> June 2014,

Re: Public Positive Covenant  
Lot 20 DP 1194689 Wugan Street, Yerriyong

Dear Russ,

I am writing to confirm that Sikorsky Helitech will agree with the changes being proposed to the DA conditions in regard to car-parking.

We understand that Shoalhaven City Council will be requesting the Joint Regional Planning Panel to amend Clause 45 of the consent conditions by replacing the reference to an 88B instrument with an 88E Public Positive Covenant.

The essence of what is being achieved ie 61 car parking spaces on Lot 20 being available for Lot 1 remains, and on this basis, Sikorsky Helitech has no issue with this change.

Yours faithfully,

Peter Dun  
Support Services Manager