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Our Ref: JBH:SC:24265

14 August 2024

PMAP Putney Pty Ltd as trustee for the PMAP Property Trust
C/- PO Box Q1611
Queen Victoria Building
NSW 1230

By Email

Dear Ms Azzopardi,

Advice as to the proper characterisation of LDA2023/0335 Ppty: 20 Waterview Street, Putney

We refer to your request for advice concerning the proper characterisation of the proposed development at 20 Waterview Street, Putney (**Site**) pursuant to the *Ryde Local Environmental Plan 2014 (RLEP)* and the *State Environmental Planning Policy (Biodiversity and Conservation 2021) (B&C SEPP)*.

Executive Summary

1. Properly characterised, the proposed development comprises a 'marina' for the purposes of the RLEP and B&C SEPP.
2. The proposed development for a 'marina' is permissible within the W4 Working Waterfront Zone pursuant to the RLEP.

Background

3. The land-based component of the Site is zoned W4 Working Waterfront pursuant to the RLEP. The water-based component of the Site is zoned Zone 1 – Maritime Waters pursuant to the B&C SEPP.
4. The proposed development on the Site, the subject of Application No. LDA2023/0335, comprises the following (as set out in the letter from Ethos Urban dated 29 July 2024):
 - (a) A single new 220m marina pontoon extending north west up the Parramatta River, generally parallel to the Putney foreshore, with access provided via gangway extending off the existing hardstand;
 - (b) A marina office on the proposed floating pontoon between the gangway and marina arm;

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- (c) The provision of 36 fixed berths accommodating vessels ranging between 12 and 18m in length on the eastern side of the pontoon;
- (d) Relocation of the existing swing moorings located in the footprint of the proposed new berths;
- (e) Extension of the existing hardstand adjacent the boatshed and demolition of existing jetty structures;
- (f) Provision of a small craft pontoon extending from the proposed hardstand extension which will be available for public use;
- (g) Provision of and use by public water taxis;
- (h) Construction of a dry dock storage area for kayaks and other passive watercraft which will be available for use by the public;
- (i) Associated signage and safety buoys; and
- (j) Construction and rebuilding of seawalls around the boatshed.

Question to be answered

5. We are instructed that City of Ryde Council (**Council**) has queried whether the proper characterisation of the proposed development is as a 'private marina' or as a 'marina', and consequentially, whether it is permissible with consent.

Advice

6. In order to determine the proposed characterisation of the proposed development, we set out below the relevant, current definitions for 'private marina' and 'marina'.
7. Chapter 6 of the B&C SEPP applies to the proposed development. The Dictionary at Schedule 6 of the B&C SEPP defines words used in that Chapter. Unless otherwise defined, any other word used in the Chapter has the same meaning as is provided in the *Standard Instrument (Local Environmental Plans) Order 2006* (**Standard Instrument**).
8. A '*private marina*' is defined in the B&C SEPP as follows:
- private marina** means an apparatus or structure located on or in a waterway that-
- (a) is used for restraining 2 or more vessels, and
 - (b) is privately owned and not generally available for public use.
9. To understand what constitutes a *private marina*, the definition needs to be broken down to its essential elements, those being:
- (a) an apparatus or structure;
 - (b) located on or in a waterway; and which
 - (c) is used for restraining 2 or more vessels; and
 - (d) is privately owned and not generally available for public use.
10. As a matter of statutory construction, if one or more the essential characteristics we have set out above are not met or there are additional elements to it, then the structure in question cannot be a *private marina*.
11. A '*marina*' is not defined in the B&C SEPP, however clause 6.2 of the B&C SEPP provides that definitions in the Standard Instrument are incorporated.

12. The Standard Instrument defines a '*marina*' as:

marina means a permanent boat storage facility (whether located wholly on land, wholly on a waterway or partly on land and partly on a waterway), and includes any of the following associated facilities –

- (a) any facility for the construction, repair, maintenance, storage, sale or hire of boats,
- (b) any facility for providing fuelling, sewage pump-out or other services for boats,
- (c) any facility for launching or landing boats, such as slipways or hoists,
- (d) any car parking or commercial, tourist or recreational or club facility that is ancillary to the boat storage facility,
- (e) any berthing or mooring facilities.

13. We understand that there has been some suggestion that a *private marina* can mean a *marina*. If that is so, then, respectfully it is wrong. We elaborate why below¹.

14. Environmental planning instruments are a species of delegated legislation, a statutory instrument² and should be interpreted in accordance with the general principles of statutory interpretation.³

15. A construction should be preferred that is consistent with the language and purpose of all the provisions of such instruments.⁴

16. In *Gibb v Federal Commissioner of Taxation* [1966] HCA 74; (1966) 118 CLR 628 at 635, Barwick CJ, McTiernan and Taylor JJ stated: (our emphasis)

"The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense - or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way ... the effect of the Act and its operation in relation to dividends as defined by the Act must ... be found in the substantive provisions of the Act which deal with 'dividends'."

17. *Gibb* underlines the proposition that the meaning of a definition turns on the context in which it appears, considered as a whole.⁵ As McHugh J explained in *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at [103]: (our emphasis)

"[T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment ... [O]nce ... the definition applies, ... **the only proper ... course is to read the words of the definition into the substantive enactment** and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of

¹ These paragraphs have been extracted from the Court of Appeals decision in *Cranbrook School v Woollahra Council* [2006] NSWCA 155; 146 LGERA 313; 66 NSWLR 379

² s 3, *Interpretation Act* 1987

³ *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389 at 398; see also *Healesville Holdings Pty Ltd v Pittwater Council* (1997) 97 LGERA 95 at 101 per Priestley JA (with whom Powell and Stein JJA agreed).

⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381, 384 [69], [78] per McHugh, Gummow, Kirby and Hayne JJ.

⁵ *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104 at 108 per Mahoney JA; *Allianz Australia Insurance Limited v GSF Australia Pty Limited* [2005] HCA 26; (2005) 79 ALJR 1079 at [26] per McHugh J.

the substantive enactment invites error as to the meaning of the substantive enactment ... [T]he true purpose of an interpretation or definition clause [is that it] shortens, but is part of, the text of the substantive enactment to which it applies.” (emphasis added)

18. It should also be recognised that even though the words “unless the contrary intention appears” do not appear in a definition section, they are implied.⁶ This also ensures that a definition is not interpreted in a manner which would defeat a meaning required by the context.⁷
19. Finally, clause 6.2 dispels the myth of the suggestion that a *private marina* and a *marina* are interchangeable terms or one in the same thing.
20. It should be readily apparent that a *private marina* is limited form of mooring facility. That is, it is limited to only apparatuses or structures that restrain 2 or more vessels and which are located within or on a waterway. As soon as there are other elements such as:
 - (a) facilities for the construction, repair, maintenance, storage, sale or hire of boats;
 - (b) facilities for providing fuelling, sewage pump-out or other services for boats; and or
 - (c) facilities for launching or landing boats, such as slipways or hoists,then the relevant apparatus and or structure will no longer be capable of falling within the definition of a *private marina*. It will, however, fall within the definition of *marina*.
21. Additionally, as soon as the apparatuses or structures in question are not located within or on a waterway they will not be capable of constituting a *private marina*.
22. For the reasons set out below, it is clear that the proposed development extends well beyond the scope of what is anticipated to be, or what would comprise, a ‘*private marina*’, and therefore cannot be characterised as such.
23. As the proposal includes the facilities referred to in [20](a) – (c) and includes apparatuses or structures that are not located within or on a waterway it cannot, and does not, meet the limited, and more restrictive definition of *private marina*, it falls squarely within the definition of *marina*.
24. We also consider that the following factors support the proposition that the proposed development is characterised as a ‘*marina*’:
 - (a) Whilst the berths may be privately owned, the pontoon is accessible to the public, as is the small craft pontoon, storage area, and public taxi;
 - (b) The use of the marina is not limited to simply the ‘restraining of vessels’, rather there are a myriad of other structures, apparatuses and purposes including a marina office, small craft pontoon (which is accessible to the public), slipway and public storage areas; and
 - (c) The proposed development provides for the storage of boats, facilities for the launching or landing of boats, a marina office ancillary to the boat storage facility, and berthing facilities.
25. The proposed development is simply not a ‘*private marina*’. It does however have all of the elements set out within the definition of a “marina”. Therefore, the proposed development is properly characterised as development for the purposes of a ‘*marina*’.

⁶ *Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449; *Hall v Jones* (1942) 42 SR (NSW) 203 at 207-8.

⁷ *Betella v O’Leary* [2001] WASCA 266 at [13] per Burchett AUJ (with whom Wallwork and Wheeler JJ agreed).

26. In the event you continue to encounter resistance from Council as to whether or not the proposal is a *private marina* or the more expansive *marina*, then I recommend you file the attached summons seeking declaratory relief and costs in the Land & Environment Court.

Permissibility of the proposed development

27. Permissible uses within the nominated land zoning are ordinarily located in the Land Use Table of the applicable planning instrument. In this case that instrument is the RLEP.
28. The land-based component of the Site is a nominated prohibited use in the Land Use Table in the W4 zone. It is, *prima facie*, impermissible.
29. Notwithstanding that prohibition, Schedule 1 of the RLEP (as set out in cl 2.5 of the RLEP) provides an exception to otherwise impermissible development.
30. In this case, development for the purposes of a 'marina' on the Site (i.e. the land based component) is an additional permitted use by reason of Schedule 1, clause 17.
31. In terms of the water-based component of the Site, the Land Use Table for Zone 1 Maritime Waters in the B&C SEPP specifies that development for 'marinas' is permissible with consent.
32. The water-based component being a 'marina' in Zone 1 of the B&C SEPP it is clear that that component is also is permissible with development consent.
33. We trust that this correspondence assists in resolving any outstanding concerns of the City of Ryde Council.

Yours faithfully

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