

5 October 2021

Mr Mark Harrold  
Heliport Developers Pty Limited  
25 Wentworth Street  
GRANVILLE NSW 2142

Norton Rose Fulbright Australia  
ABN 32 720 868 049  
Level 5, 60 Martin Place  
SYDNEY NSW 2000  
AUSTRALIA  
  
Tel +61 2 9330 8000  
Fax +61 2 9330 8111  
GPO Box 3872, Sydney NSW 2001  
DX 368 Sydney  
nortonrosefulbright.com

**Direct line**  
+61 2 9330 8519

**Email**  
ashleigh.egan@nortonrosefulbright.com

**Your reference:**  
**Our reference:**  
4039551

Dear Mark

**Advice regarding development application for a helipad at 89-151 Old Castlereagh Road, Castlereagh NSW 2749 (the Property)**

**Introduction**

- 1 You have sought our advice in relation to the preparation of a development application for the purpose of constructing and using the Property for a helipad (the **Proposed Development**).
- 2 Specifically, you have sought advice on the meaning of the term “helipad” and how your Proposed Development should be characterised given what is proposed to be conducted on the Property as part of your business.

**The planning controls**

- 3 The principal environmental planning instrument that applies to the Property is *State Environmental Planning Policy (Penrith Lakes Scheme) 1989 (SEPP)*. Under the SEPP, the Property is zoned Tourism. The land use table for that zone provides as follows:

**Tourism**

**1 Objectives of zone**

- To provide for a variety of tourist-oriented development and related uses.
- To provide for diverse tourist and visitor accommodation and activities that are compatible with the promotion of tourism in Penrith that utilises the public assets of the Penrith Lakes Scheme.
- To create an appropriate scale that maintains important views to and from the Nepean River as well as to the Blue Mountains escarpment, while also improving important connections to the Penrith City Centre and the Nepean River.

**2 Permitted without consent**

Nil

**3 Permitted with consent**

APAC-#118085374-v1

Amusement centres; Boat launching ramps; Boat sheds; Car parks; Charter and tourism boating facilities; Community facilities; Educational establishments; Entertainment facilities; Environmental facilities; Environmental protection works; Flood mitigation works; Food and drink premises; Function centres; Health services facilities; Helipads; Information and education facilities; Jetties; Kiosks; Markets; Neighbourhood shops; Passenger transport facilities; Places of public worship; Recreation areas; Recreation facilities (indoor); Recreation facilities (major); Recreation facilities (outdoor); Registered clubs; Roads; Service stations; Signage; Tourist and visitor accommodation; Water recreation structures

#### 4 Prohibited

Any development not specified in item 2 or 3

4 Clause 14(2) of the SEPP provides:

(2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.

5 We note that while a 'helipad' is permissible with consent in the Tourism zone, development that comprises a 'heliport' is prohibited (as it is not specified as a permissible use with or without consent in that zone).

6 The terms 'helipad' and 'heliport' are not defined in the SEPP. Rather they are defined in the *Standard Instrument—Principal Local Environmental Plan* as follows:

**helipad** means a place not open to the public used for the taking off and landing of helicopters.

**heliport** means a place open to the public that is used for the taking off and landing of helicopters, whether or not it includes—

(a) a terminal building, or

(b) facilities for the parking, storage or repair of helicopters.

7 A heliport is a type of air transport facility. That term is defined in the Standard Instrument as follows:

**air transport facility** means an airport or a heliport that is not part of an airport, and includes associated communication and air traffic control facilities or structures.

8 An airport is defined in the Standard Instrument as follows:

**airport** means a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes, and includes associated buildings, installations, facilities and movement areas and any heliport that is part of the airport.

#### The case law

9 In determining whether to approve the Proposed Development, the consent authority must:

- (1) consider whether the Proposed Development is properly characterised as a helipad;
- (2) have express regard to the zone objectives in the assessment of the Proposed Development and
- (3) carry out the appropriate merit assessment in accordance with the usual requirements of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

- 10 It is uncontroversial that if the preconditions set out above are not satisfied, the power to grant consent to that development is not enlivened and any purported exercise of the power to grant consent will be invalid: *Clifford v Wyong Shire Council* (1996) 89 LGERA 240 at 249, 251-252; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 at 372, 374-375; *Franklins Ltd v Penrith City Council* [1999] NSWCA 134 at [18], [27], [28]; *Manly Council v Hortis* [2001] NSWCA 81; (2001) 113 LGERA 321 at [22], [31], [32], [53], [54]; and *Schroders Australia Property Management Ltd v Shoalhaven City Council* [2001] NSWCA 74 at [7].
- 11 In characterising proposed development, it is again uncontroversial that the concept of a use or uses of land is for a ‘purpose’ and the ‘purpose’ is the end to which the land is seen to serve: Kitto J in *Shire of Perth v O’Keefe* (1964) 10 LGRA 147; 110 CLR 529. The characterisation of the purpose of a development must also be done in a common sense and practical way: *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400; [2007] NSWLEC 114 at [45].
- 12 When construing the terms ‘helipad’, it is always important to consider and understand the proper function of a definition – which is not to create operative law – and the importance of considering the text of the substantive provision. In *Kelly v The Queen*, [33] McHugh J observed that:

The 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. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – I think 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 the substantive enactment invites error as to the meaning of the substantive enactment.

- 13 What this means is that one cannot consider the definition of ‘helipad’ in a narrow and confined way without regard to the evident policy or purpose of the zoning table. The policy and purpose of the zoning table is set out in the zone objectives. In simple terms, the primary policy and purpose of the zone is promote the use of land for the purpose of tourism.
- 14 Turning now to the definitions of a helipad and heliport, it can be readily observed that the key difference is whether or not the proposed helicopter facility is open to the public. This was confirmed by Preston CJ in the case of *Nessdee Pty Limited v Orange City Council* [2017] NSWLEC 158, where His Honour held [at 13-16]:

13 The development of an “air transport facility” is defined in the Dictionary to Orange LEP to mean “an airport or a heliport that is not part of an airport, and includes associated communication and air traffic control facilities or structures”. An airport is defined to mean:

“a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes, and includes associated buildings, installations, facilities and movement areas and any heliport that is part of the airport.”

14 A “heliport” is defined to mean:

“a place open to the public that is used for the taking off and landing of helicopters, whether or not it includes:

(a) a terminal building, or

(b) facilities for the parking, storage or repair of helicopters.”

15 A “helipad” is a distinct development to a “heliport”. A “helipad” is defined to mean “a place not open to the public used for the taking off and landing of helicopters.”

- 16 The existing helicopter landing facility would be classified as a helipad under the current definition, as it is not open to the public. The proposed development is for a heliport, which will be open to the public.
- 15 We note the following facts concerning your proposed use of the Property:
- (1) The Proposed Development is only being used by you for your own business.
  - (2) There is significant security measures proposed to be installed to prevent unauthorised entry into your premises.
  - (3) You will not be operating regular helicopter flights to or from a set destination which any member of the public can seek to enter your premises, buy a ticket, and board the flight.
  - (4) Only your helicopters will be taking off and landing at the Property.
  - (5) The public will not be allowed or entitled to enter the premises without being invited to do so by your business.
  - (6) No other operator of helicopters will be allowed to access the Property (unless in an emergency).
  - (7) Your helicopter business involves a number of income earning activities including:
    - (a) Provision of emergency services including flood and emergency relief;
    - (b) Provision of fire support services; and
    - (c) Provision of other services to customers such as transport, aerial photography and survey, joy flights, tourism flights and other services.
- 16 We note that your business does not involve:
- (1) The provision of facilities for the hire of helicopters by others;
  - (2) The provision of facilities for the landing, refuelling and take off of helicopters by others; and
  - (3) General access by the public to the facility for the use and enjoyment by the public.
- 17 In contrast, air transport facilities (being heliports and airports) are open to the public for which the public may access and use for air transport purposes. This would include facilities where more than one aeroplane or helicopter operator may land and take off at the facility as well as the general public being able to enter and use the facility.
- 18 In our view, the proper characterisation of the intended purpose for which the land is proposed to be used is clearly a helipad as it is not 'open to the public'.
- 19 This view is supported by a decision from the Court of Appeal in *Ryan v Nominal Defendant* [2005] NSWCA 59, (2005) 62 NSWLR 192, where the Court considered the meaning of the phrase "open to the public". His Honour, Santow JA, held at [82],
- 82 It is possible to put forward a tentative taxonomy of the relationship between openness and use, based upon different degrees of relationship between the landowner and the potential user. It is the relationship between the landowner and those who may use the land which is the primary criterion of openness:
- (1) *Public places* – First, in the case of a place which the public have an entitlement to use, the place will be said to be "open to the public" regardless of whether in actual fact it is a place which the public can enter without impediment. This is because the public have a collective right vis-à-vis the (usually governmental) owner to use the place, and

any member of the public who in fact uses it can reasonably expect others to be using it also. In such a case it is unnecessary to consider the question of whether the place is “used by the public”. It is established by *Schubert v Lee* that the ambit of the legislation is not confined to such public places.

(2) *Private property to which the public are invited* – Second, in the case of a place which is held open by a private owner for the public to enter, the place will be considered to be “open to the public” only if the owner is in fact making it available to the public. The openness is co-ordinate, both in scope and in time, with the owner’s invitation. Those who use the place are invitees and unless the invitation is issued indiscriminately to the public at large the place will not be open to the public: *Mercantile Mutual* (supra). Because the land has a potential for use which exceeds that potential inherent in its openness, the land may nevertheless be used by the public, if the requirements of use are satisfied.

(3) *Other private property* – Third, in the case of a place which the public has no entitlement or invitation to use, it can only be said to be “open to the public” if it is in fact used by members of the public, the owner having failed consistently to maintain a prohibition on that use, though the users be technically trespassers.

- 20 As noted above, the Proposed Development does not involve the construction and operation of a facility that is generally open to the public. The Proposed Development does not contemplate at all an invitation that is issued indiscriminately to the public at large allowing them **as of right** to enter and use the Property.
- 21 Indeed, only those who are owners, employees, contractors or specific invitees of the business will be allowed to enter the Property. This is much the same as any private business.
- 22 Furthermore, we note that it is clearly contemplated that a helipad involves the use of the helipad as for the purpose of, among others, tourism.
- 23 That much is obvious by the zoning table which lists a helipad as a use permissible with consent in the Tourism zone. To contend that merely because some tourists may be invited to enter and use the Proposed Development that automatically makes it a heliport is wrong. It would be the very error in approach identified by McHugh J in *Kelly v Queen*, quoted above.
- 24 The zoning of the land contemplates tourism uses. The zone makes a helipad a permissible use. Thus the drafting of the SEPP clearly contemplates that a helipad may be used for the purpose of tourism. To examine the definition of helipad and argue that because tourists may use the facility, it is open to the public and therefore not a helipad and a prohibited use is to ‘negate the evident policy or purpose of the substantive enactment’. As McHugh J notes, that is fundamentally incorrect.
- 25 This is not to deny the effect of the definitions. It remains the case that to be properly characterised in planning law terms as a helipad, members of the public must be **invited to enter** the premises, rather than enter in response to an open invitation to the public at large.
- 26 Suppose for example, your Proposed Development contemplated daily flights at 10am and midday for a maximum of say 10 people each time to and from a particular destination – say Penrith to Kingsford Smith Airport. And suppose that the business invited the public at large to come and buy tickets to join those flights on a ‘first come, first served’ basis. In our view, that would make the facility a heliport rather than a helipad.
- 27 Similarly, suppose your Proposed Development contemplated daily tourist flights at 10am and midday for a maximum of say 10 people each time over the Blue Mountains. And suppose that the business invited the public at large to come and buy tickets to join those joy flights on a ‘first come, first served’ basis. In our view, that would also be a heliport, rather than a helipad.
- 28 But your Proposed Development contemplates neither of these activities. It doesn’t contemplate a facility open to users at large, be they passengers or other helicopter operators.

29 By analogy, an office does not become an office if the building itself hosts other uses, such as inviting tourists to enter and view the building for a fee. The Opera House does not cease to be used for the purpose of an Opera House merely because the Trust conducts tours.

**Conclusion**

- 30 In our view, the facts concerning your Proposed Development and the nature of the uses of the Property clearly demonstrate that the proper characterisation of the Proposed Development is a helipad.
- 31 We further note that, in accordance with ordinarily planning law principles, facilities that are ancillary to the use of a helipad are permissible with consent being part of the purpose for which the land is proposed to be used.
- 32 This would permit the development application to include ancillary structures such as storage and maintenance facilities and appropriate office and customer facilities.
- 33 We recommend the development application state that the purpose of the proposed use is for a private helipad facility to which the general public may not enter as of right. It should clearly explain the types of activities and the purpose for which they will be undertaken.
- 34 We further suggest a copy of this letter accompany the development application.

We trust the above is of assistance. Please contact us if you have any queries.

Yours faithfully



Dr Nick Brunton  
Partner  
Norton Rose Fulbright Australia  
Contact: Ashleigh Egan