



30 June 2022

Reference File: F14533

Ms Casey Joshua
Principal Case Manager
Office of the Independent Planning Commission NSW
Suite 15.02, Level 15
135 King Street
SYDNEY NSW 2001

By email: casey.joshua@ipcn.nsw.gov.au

Dear Ms Joshua,

**SUBJECT : Penrith Lakes Helipad – Submission by Blue Mountains City Council
Address to the IPC Meeting on 30 June 2022**

This letter follows up the public meeting convened yesterday by the Independent Planning Commission (**IPC**) in relation to the proposed Penrith Lakes Helipad development (**Proposed Development**).

Following my address on behalf of Blue Mountains City Council (**BMCC**) the Chair requested that I provide to the IPC a copy of the legal advice secured by BMCC in relation to the Proposed Development. That advice was provided by McPhee Kelshaw, solicitors. A copy of the advice is **attached**.

Also **attached** is a copy of the notes of my address to the public meeting. Those notes substantially reflect the legal advice that BMCC has received.

As part of my address, I noted the submission made by Penrith City Council (**PCC**) to the IPC, including the concerns expressed by PCC in relation to the appropriate characterisation of the Proposed Development. BMCC endorses the PCC submission.

The Applicant has made available in support of its application the legal advice provided by Norton Rose Fulbright. The IPC now has the benefit of the legal advice received by BMCC. Given the public interest in the Proposed Development, BMCC requests that the IPC make available as part of the assessment process, the legal advice that the IPC has received in relation to the characterisation of the Proposed Development as a "helipad" and concerning the permissibility of that Development within the Tourism zone regulated under Chapter 5 of the State Environmental Planning Policy (Precincts – Western Sydney Parkland) 2021.

BMCC stands ready and willing to provide any further information or assistance that the IPC seeks.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'W. Langevad', written in a cursive style.

WILL LANGEVAD
Director, Environment & Planning Services



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30 June 2022

Mr Will Langevad
Director - Environment and Planning Services
Blue Mountains City Council
2 Civic Place
KATOOMBA NSW 2780

By email: WLangevad@bmcc.nsw.gov.au

Dear Mr Langevad,

Independent Planning Commission Public Meeting: Proposed Helicopter Facility at Penrith Lakes

Background and Summary of Advice

1. We are instructed to advise the Council concerning the characterisation and permissibility of a development proposed to take place at the property known as 89-151 Old Castlereagh Road, Castlereagh (**Property**). The Property is located on land within the boundaries of the Penrith Lakes Scheme (**PLS**) a matter addressed in greater detail below.
2. The development application is supported by an Environmental Impact Statement prepared by Urbis and dated 25 October 2021 (**EIS**). At page 10 the EIS states:

“Specifically, this DA is seeking consent for the construction and operation of a helipad facility at the subject site, ... comprising the following ...”,

with a number of elements then listed (**Proposed Development**).

3. The development application is supported by a letter of advice prepared by Norton Rose Fulbright, lawyers (**NRF advice**). That advice opens with the following paragraphs:

“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 ...

2 Specifically, you have sought advice on the meaning of the term “helipad” and how your proposed development should be characterised given what is

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**McPHEE
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proposed to be conducted on the Property as part of your business.”

4. In summary, and for the reasons set out in detail in this letter, we conclude:
- (1) The proposed development is not appropriately characterised as a helipad.
 - (2) The proposed development is most appropriately characterised as development for the purpose of a “*heliport*”, subject to determining the meaning of the words “*open to the public*” in the context of the definition of a “*heliport*” and in the context of the Proposed Development, as described by the Applicant, and is therefore prohibited, by operation of *State Environmental Planning Policy (Precincts – Western Parkland City) 2021 (SEPP PWP)*.
 - (3) Alternatively to (2), and if the Proposed Development is not “*open to the public*” (contrary to our opinion on that issue), then the Development would be most appropriately characterised as an innominate use under the applicable planning instrument, being Chapter 5 of SEPP PWP, as successor to the former *State Environmental Planning Policy (Penrith Lakes Scheme) 1989*, which has been incorporated into SEPP PWP, and would also be prohibited.

Applicable EPI: SEPP PWP

5. The environmental planning instruments administered by Penrith City Council (**PCC**), including Penrith Local Environmental Plan 2010 (**LEP 2010**), do not apply to the Property or to the land covered by Penrith Lakes Scheme as a whole (**PLS**), having been specifically displaced by SEPP PWP.
6. SEPP PWP incorporates a limited number of definitions. However, clause 5.6(2) of SEPP PWP provides that any word or expression used in Chapter 5 has the same meaning as the meaning given in the Standard Local Environmental Planning Instrument prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006 (Standard Instrument)* unless it is otherwise defined in the Chapter.
7. By operation of clause 5.7 of SEPP PWP, the Minister for Planning is the consent authority for the purposes of the Proposed Development.
8. Clause 5.15 of SEPP PWP designates six land use zones within the PLS area. The Property is located within the “*Tourism*” zone under SEPP PWP. The Land Use Table (**LUT**) for that zone is found at the end of clause 5.22 of SEPP PWP and is 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

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

9. The development that is permitted with consent within the Tourism zone is listed in Item 3 of the LUT, and includes a number of purposes which are not tourism related. Development for the purpose of “*Education establishments*” and “*Places of public worship*” fall within this category. Other permitted developments include “*Roads*”, “*Service stations*” and “*Helipads*” which are not, in themselves, tourism related by which may facilitate tourism focussed developments or other activities, including emergency services.
10. The LUT identifies in Item 3 the development that is permitted with consent within the Tourism zone. If development is not listed in Item 3 then the development concerned is prohibited. That result arises by a combination of Item 2 and Item 4 in the LUT for the Tourism zone. Under Item 2 no development is permitted without consent. Under Item 4 any development not specified in Item 2 or Item 3 is prohibited. Development for the purpose of “*Heliports*” is, as a result, prohibited.

Helipad or Heliport?

11. The definitions of helipad or heliport are 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.

Note—

*Heliports are a type of **air transport facility**—see the definition of that term in this Dictionary.”*

12. The definition of *helipad* is quite simple. A helipad is “... a place ... used for the taking off and landing of helicopters”. In addition to being a place used for the taking off and land of helicopters, a helipad is “*not open to the public*”.
13. The definition of *heliport* is more complex than the definition of *helipad*. A heliport is also a place used for the taking off and landing of helicopters. However, in contrast to a *helipad*, a *heliport* is “*open to the public*”. Further, a heliport (in contrast to a helipad) may include the following:

“(a) a terminal building, or

(b) facilities for the parking, storage or repair of helicopters.”
14. The definition of “*helipad*” does not leave open the possibility that a “*helipad*” may include the facilities that may form part of a heliport.
15. A *heliport* but not a *helipad* is an “*air transport facility*”. That term is defined 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.”*

The Proposed Development

16. The proposed development is described at a number of points in the EIS, with some variation between the descriptions given on different pages.
17. For example, at page 16 of the EIS the following description of the Proposed Development (excluding identified demolition and tree removal works) is given:

“The DA seeks consent for the construction and operation of a Helipad with a maximum of 25 vehicle movements per day. The Helipad facility is to be comprised of the following:

 - ...
 - *Reinstatement of grass turf in locations of removed hardstands and pavement.*
 - *New concrete hardstand in the location of existing concrete hardstands.*
 - *New lighting as required for the Final Approach and Take off (FATO).*
 - *Minor earthworks and tree removal are also proposed as part of the development to facilitate the delivery of the Helipad.”*

18. The description quoted in paragraph 17 above then links with the drawings found in Appendix B of the EIS.
19. Within section 3.1 of Project Overview of the EIS (page 32), the following description of the Proposed Development is given”

| | |
|------------------------------|---|
| <i>“Construction Summary</i> | <p><i>Construction at the site is limited to the instillation [sic] of the following:</i></p> <ul style="list-style-type: none"> ▪ <i>Construction of hardstand area.</i> ▪ <i>Fit-out of existing shed on site for use as a hanger [sic], including instillation of new hanger doors.</i> ▪ <i>Fit-out of existing single storey building on site for use as ancillary office.</i> ▪ <i>Instillation of small Jet A1 (Avtur) fuel storage tank.</i> ▪ <i>Instillation of new lighting as required for the Final Approach & Take-off (FATO).</i> <p><i>A two-month construction period is anticipated for the establishment of the Helipad facility.</i></p> |
| <i>Operational Summary</i> | <p><i>The proposed Helipad is seeking operational activities consistent with the existing EPA License [sic.] held by Sydney Helicopters for their Granville facility which permits up to 25 flights per day. This may be exceeded in the event Sydney Helicopters are engaged for emergency services activities (e.g. Bushfire fighting activities, SES activities etc).”</i></p> |

20. The hours of operation of the Proposed Development are given on page 33 as:

“First light to 10:00pm, with the majority of flights between 8:00am and 5:30pm.”

21. However, also on page 33, those specified hours are qualified by the following statement:

“Aircraft owned and operated by Sydney Helicopters that are engaged by emergency services such as the NSW Rural Fire Services, Fire & Rescue NSW and the NSW State Emergency Service and other Emergency service aircraft such as Polair, Toll, Careflight and NPWS would be required to be exempt from these hours of operation to undertake emergency work when required.”

22. The capital investment value of the project is given as \$1.1m.
23. Section 3.3 of the EIS is titled *“PROPOSED DEVELOPMENT: OPERATION”*. Within this section of the EIS, the following description of the Proposed Development is given:

- “▪ *The proposed helipad has been designed and assessed to be suitable for use by small to medium turbine engine helicopters and limited to the following helicopter types:*
 - *AS350 squirrel helicopter (most common type used).*
 - *Bell 206.*
 - *Bell 407.*
 - *Robinson R44.*
 - *Robinson R66.*
 - *AW139 (emergency services helicopter).*
 - *Bell 412 (emergency services helicopter).*
 - *Bell 429 (emergency services helicopter).*

- *To ensure compliance with the definition of helipad under the Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a), the proposed helipad will operate with the following characteristics: – The proposed development is only for the business operations of Sydney Helicopters.*
 - *Security measures on site, including locked access which can only be opened by the operators, prevent unauthorised access to the site.*
 - *Operations from the site do not include regular helicopter flights to or from a set destination which any member of the public can seek to enter the premises, purchase a ticket, or board a flight.*
 - *Only helicopters operated by Sydney Helicopters will be taking off and landing on the site.*
 - *The public is not allowed or entitled to enter the site without being invited to do so by Sydney Helicopters.*
 - *No other helicopter operator is permitted to access the site unless in an emergency.*
 - *The proposed operation of the site does not involve: (i) the provision of facilities for the hire of helicopters by others, (ii) the provision of facilities for the landing, refuelling and take off of helicopters by others, and (iii) general access by the public to the facility for the use and enjoyment by the public.”*

24. The various descriptions of the proposed development do not:
- (a) refer to the Applicant’s current website and the promotion of tours and helicopter bookings on that website;
 - (b) explain the way in which members of the public may book a tour or a journey by helicopter utilising the Applicant’s services as presently extended; or
 - (c) explain how tours and helicopter bookings will be arranged if the new facility on the Property is established.

These omissions are significant and material, given the Applicant's assertion that the new facility will not be open to the public.

25. The EIS confirms that the applicant is Heliport Developers Pty Ltd, which is referred to in the EIS as "Sydney Helicopters" and also as "The Applicant".
26. The Applicant is introduced on page 10 of the EIS in the following paragraphs:

"Sydney Helicopters are a commercial helicopter operator who have been providing chartered flights, tours and emergency services around the Sydney Metropolitan Area and greater NSW since 1985 operating out of their current site located at 25 Wentworth Street, Clyde.

The proposal accommodates the relocation of the long-standing Sydney Helicopters operation that has been disrupted by the resumption of its current site at Granville for the Sydney Metro Project. Approval of the helipad is essential to facilitate the relocation and survival of the Sydney Helicopters operation and the essential services they provide.

After an extensive 10-month review of potential sites and ongoing discussion with Sydney Metro and consultation with both Transport for NSW (TfNSW) and the Greater Sydney Commission (GSC), who oversee government land assets in the Western Sydney area, the landholding at 89-151 Old Castlereagh Road, Castlereagh was identified as the most suitable location for Sydney Helicopters to continue its operation. Sydney Helicopters and its related entity Aerotech Sydney is now seeking to relocate their operation to the site within the Penrith Lakes Scheme Locality."

27. In the context of the development application and the Proposed Development, these statements are also material. The application does not relate to the establishment and use of a simple helipad. The application relates to the complete relocation of the existing operations conducted by Sydney Helicopters Pty Ltd and "Aerotech Sydney" and/or Heliport Developers Pty Ltd from the existing facility at Granville/Clyde to Castlereagh.
28. The new facility will provide hangar accommodation for the Applicant's helicopter fleet and facilities for the maintenance and operation of that fleet. These facilities will include facilities for the parking, storage and repair of helicopters. Under the definitions of "helipad" and "heliport", those elements may be part of a "heliport" but they cannot be part of a "helipad".
29. The scale of the operation proposed by the Applicant is disclosed by proposed reconstruction of the very large shed located on the Property and its conversion into a helicopter hangar. Five new hangar doors will be fitted to that shed to allow helicopters to be stored and maintained within the shed and also to allow helicopters to be moved out of the shed onto the very large hardstand area which is to be constructed and established. That new hardstand area is to be located immediately in front of the new hangar doors.

Environment Protection Licence

30. At page 11 of the EIS, the Applicant confirms that it holds an existing Environment Protection Licence (**EPL**) issued under the *Protection of the Environment Operations Act 1997 (POEO Act)* authorising the conduct of “*helicopter-related activities*”. We have to date been unable to identify the Applicant’s EPL through the EPA licence search facility.
31. Schedule 1 to the POEO Act lists the activities that are scheduled activities for the purposes of the Act. That list is prescribed in accordance with sections 48 and 49 of the POEO Act which identify scheduled activities (premises-based) and scheduled activities (non premises-based) respectively.
32. Part 1 of Schedule 1 to the POEO Act lists premises-based activities. Within Part 1, Item 20 lists helicopter-related activities and reads as follows:

“20 Helicopter-related activities

- (1) *This clause applies to a **helicopter-related activity**, meaning the landing, taking-off or parking of helicopters (including the use of terminals and the use of buildings for the parking, servicing or maintenance of helicopters), being an activity—*
- (a) *that has an intended use of more than 30 flight movements per week (where take-off and landing are separate flight movements), and*
- (b) *that is conducted within 1 kilometre of a dwelling not associated with the landing, taking-off or parking of helicopters,*
- but not including an activity that is carried out exclusively for the purposes of emergency aeromedical evacuation, retrieval or rescue.*
- (2) *The activity to which this clause applies is declared to be a scheduled activity.”*

33. The EIS confirms that the Applicant, as the holder of an existing EPL for helicopter-related activities for its facility at Granville/Clyde, has commenced engagement with the NSW Environment Protection Authority (**EPA**) about transferring that EPL from the Granville/Clyde facility to the Property. This acknowledgment confirms that the activities proposed by the Applicant on the Property, once its new facility is established, will fall within clause 20 of Schedule 1 of the POEO Act and will, amongst other matters, involve the use of buildings for the parking, servicing or maintenance of helicopters and will require the grant of the EPL described in the EIS.
34. At pages 16-17 of the EIS, the Applicant describes the difficulties that it faces as a result of the imminent loss of its existing facility at Granville/Clyde. An explanation of the submission of the current application, seeking development consent for the establishment and use of a *helipad* is found in the following paragraphs on page 17 of the EIS:

“The significant delays with the advancement of the proposal to amend the Penrith Lakes SEPP to include Heliports as permissible development on the site along with requirement to vacate their existing site by 31 October 2021, have necessitated Sydney Helicopters submitting this application for a Helipad which is permissible development and can be approved under the provisions of the existing SEPP.

A Helipad accommodates most aspects of the Sydney Helicopters operation and approval enables the re-establishment of the business operation which has been disrupted by the acquisition process. Sydney Helicopters intend to continue to pursue the Penrith Lakes SEPP amendment to ultimately include Heliports as permissible at the Site, as it is their intention to eventually restore the full operation of the facility as ‘like-for-like’ with their previous Granville facility and deliver services to the public consistent with the Tourism zoning of the site.”

35. The second paragraph quoted immediately above is not correct. The grant of development consent for the establishment and use of a *helipad* does not accommodate most aspects of the Applicant’s operations previously conducted at Granville/Clyde. A *helipad* does not allow the establishment, as part of the approved development, of facilities for the parking, storage or repair of helicopters, nor the establishment of associated offices and facilities.

36. At page 114 the EIS usefully provides a list of existing helipads in the Blue Mountains. The relevant paragraph reads:

“Furthermore, threat to the Blue Mountains Escarpment as a result of operation is not to be considered a concern. It should be noted the below helipads are currently operational in the Blue Mountains region which are substantially closer to the heritage listed Blue Mountains National Park than the proposed Penrith Lakes site:

- *Glenbrook Office & Depot – NSW National Parks & Wildlife Service.*
- *Valley Heights RFS Site – Great Western Highway.*
- *Katoomba – Scenic World Helipad – top deck of multi-story carpark.*
- *Blackheath NSW National Parks & Wildlife Service site.*
- *Blue Mountains Hospital Helipad.*

The assessment concludes that the proposed helipad is of small scale and low overall visibility in the context of the existing Penrith Lakes site ...”

37. The list provided by the Applicant throws into stark relief the clear distinction between a “*helipad*” as defined and a “*heliport*” as defined. Each of the helipads identified by the Applicant either serves the relevant facility (NPWS Glenbrook and Blackheath, Valley Heights RFS or Blue Mountains Hospital) or allows helicopter travel to an entirely separate and well-established tourist development (Katoomba Scenic World). None of the helipads identified by the Applicant are self-sufficient and self-sustaining developments. The helipad in each case is a facility that serves either a NSW State Government facility or a much larger development, conducted for entirely different purposes than the purpose of a helipad.

38. **Attached** to this letter is a photograph of the helipad that has been established on the breakwater at Kiama Harbour NSW. The helipad is identified by a white circle around the large white letter “H”. The helipad is separated from the adjoining carpark by a locked gate. The Kiama helipad appears to be located to facilitate the arrival and departure of helicopters to and from the Kiama Harbour, with the opportunity for emergency services, including rescue services, to utilise the helipad.
39. In the context of the PLS, the permissibility with consent of a helipad is understandable and aligns with the established helipads to which we have referred above. A helipad allows the evacuation of injured people and also allows the arrival of emergency services teams, should accidents occur. A helipad of the nature established at Kiama Harbour, and the helipads listed on page 114 of the EIS, demonstrate the fallacy in the Applicant’s contention that development for the purpose of a helipad allows the Applicant to relocate the major parts of its existing operations (including the parking, storage and maintenance of helicopters) to the Property.
40. As a comparison point, we have reviewed a number of judgements delivered by the Land and Environment Court, dealing with a “*helipad*” or a “*heliport*”. The relevant decisions include the following:
- (1) *Larry Karlos v Tweed Shire Council; Matthew Karlos v Tweed Shire Council* [2019] NSWLEC 1418. The judgement related to an appeal against a refusal of a development application for a helipad. The facility concerned was for private use, ancillary to a dwelling house for up to 10 flight movements per week. The appeal was upheld.
 - (2) *Walker v Warringah Council* [1998] NSWLEC 276. The judgement related to an appeal against refusal of a development application for the establishment of a helicopter landing site or helipad. The applicant intended to use a small 2-seater helicopter for personal/private transportation between his dwelling house and various places at which he carried on business. The Court accepted that the use was for a helipad not a heliport.
 - (3) *Warringah Shire Council v Raffles* [1979] 2 NSWLR 299; (1978) 38 LGRA 306. Dr Raffles used a helicopter to travel between his home and his medical practices at Bankstown, Liverpool and Richmond. He also used it for social purposes and in particular to visit friends in the country, and used it for trout fishing expeditions. Dr Raffles used his helicopter to travel to a medical conference at Camden. The Court upheld the appeal and determined that the helipad was ancillary to the use of Dr Raffles dwelling house.
 - (4) *Lilley v Lithgow City Council* [2007] NSWLEC 608. The appeal related to the refusal of the Council to grant development consent for a helipad. Relevantly, the judgement refers consistently to a “*helipad*”, to be constructed on the applicant’s property to accommodate a single-engine Robinson R44 II helicopter or similar. The development proposal included a lockable compound, fuel containers, security and lighting systems, a bund for chemical spills, parking, toilets and a hangar. The appeal was upheld but for development for the purpose of a “*heliport*”, not for a “*helipad*”. The orders made by the Court are consistent

with our conclusion that the Proposed Development proposal described in EIS is for a heliport not a helipad.

Open to the Public?

41. We understand the EIS to submit on behalf of the Applicant that the proposed new facility will not be “*open to the public*”. On the basis of that submission, the EIS suggests that the proposed new facility (regardless of the infrastructure that it will incorporate) is a “*helipad*” and not a “*heliport*”. For the reasons given above, we disagree with that conclusion but it is appropriate to consider whether the new facility will be “*open to the public*”.
42. The NRF advice refers to the decision of Preston CJ of the Land and Environment Court in *Nessdee Pty Ltd v Orange City Council* [2017] NSWLEC 158, at paragraphs [13]-[16].
43. The *Nessdee* decision provides only limited details of the helicopter landing site which was in existence at the time of the hearing, including (apparently) buildings and works undertaken without development consent. The Court ultimately allowed the appeal on the basis that the consent for a heliport would allow the future use of those unlawfully constructed structures.
44. The *Nessdee* decision does not clearly indicate the way in which the proposed heliport would operate in contrast to the previous helipad, particularly in the context of booking of flights, including joy flights and point-to-point flights. The Court did accept that the proposed heliport was designated development. However, the judgement does not address the criteria that would be appropriately taken into consideration when determining whether a particular helicopter facility was “*open to the public*”.
45. In the context of the present application, the Applicant attempts to underpin its submission that the proposed new facility will not be “*open to the public*” by relying upon the elements set out on page 35 of the EIS, quoted in paragraph 23 above.
46. Those elements are then outlined (in substantially the same terms) in paragraph 15(1)-(7) of the NRF advice. However, we note that the NRF analysis does not address a number of very important matters.
47. The Sydney Helicopters website includes the following passages:

“PROVIDING SYDNEY WITH QUALITY HELICOPTER TOURS & CHARTERS

Operating for over 30 years we are Sydney’s premier helicopter service provider, we operate a wide range of aircraft types all housed on site at Parramatta Heliport (<https://www.sydneyhelicopters.com.au/facilities/>).

We also provide corporate and private chartered helicopter flights. Our program of tours ranges from scenic flights around Sydney Harbour to the magnificent Blue Mountains, Hunter Valley Wineries, Central Coast retreats and the Southern Highlands. We also cater for the more adventurous, with Helicopter Pub Tours

(<https://www.sydneyhelicopters.com.au/pub-tours-with-altitude/>) and really exciting Heli-adventures.

EVENTS SERVICED BY US

As a multi disciplined helicopter service provider we undertake a range of flight operations, some recent operations include the following:

Attendance at the Super Cheap Auto 1000 Mt Panorama Bathurst, Rolex Sydney to Hobart, and the NSW Rural Fire Service.

READ MORE ([HTTPS://WWW.SYDNEYHELICOPTERS.COM.AU/EVENTS/](https://www.sydneyhelicopters.com.au/events/))”

48. Under the title “Sydney Scenic Flights”, the Sydney Helicopters website provides the following information:

“SYDNEY SCENIC FLIGHTS

New tour options coming soon.

Whether you’re visiting our city for the first time or a Sydney-sider looking for an exciting new experience, Sydney Helicopters will give you a tour like you’ve never seen before. Our scenic helicopter flights in Sydney are renowned for their picturesque views of some of Australia’s most iconic attractions, including the Sydney Harbour Bridge, the Sydney Opera House and much more! If you’re looking for a tour that soars above the rest, you’ve come to the right place. Our Sydney Scenic flights range from 20 to 30 minutes in duration and are available 7 days a week. We look forward to giving you a tour of our city that you won’t forget!”

49. The passages quoted in the previous paragraphs invite readers of the website to get further information accessing each of the following:

“ABOUT / TOURS / CHARTERS / AIR WORK / EVENTS/ GIFT VOUCHERS / CONTACT (02) 9637 4555”

50. Set out below is a screen shot taken from the Sydney Helicopters website, promoting the facility to be established on the Property as “**NEPEAN AEROSPACE PARK (PENRITH)**”:

NEPEAN AEROSPACE PARK (PENRITH)

We recently purchased a 32 acre site in Penrith zoned Tourism and permitting helipads in order to replace the compulsorily acquired heliport we operated from for 27 years at Rosehill. This facility will be Sydney’s only standalone helicopter facility providing year round air transport services and emergency aerial firefighting capability at the most western fringe of metropolitan Sydney. Our facility is modern, including passenger lounge, viewing areas, training facilities and secure overnight car parking. In addition to Nepean Aerospace Park, we operate to / from Sydney Airport, Bankstown airport and the Central Coast.

Please click on the [Contact](#) page for driving directions or see [this map](#).



51. The passages quote above, taken from the Applicant's website, confirm that the Applicant is inviting members of the public to deal with it. In particular, the Applicant is inviting the public to utilise the Applicant's services by booking tours and charter flights. The Applicant extends an invitation to treat, in the classic business sense, to any member of the public who wishes to deal with it and who is prepared to pay the fees that are charged by the Applicant.
52. In that context, it is immaterial whether the Applicant owns all the helicopters that it operates or stores those helicopters at a secure facility. The Applicant offers to transport members of the public and utilise its helicopters in doing so. The Applicant's helicopter transport services are proposed to be established on the Property which will be entered by members of the public, probably by motor vehicle and probably utilising the facilities available at the property, to check in and perhaps to wait for the flight, pending the agreed departure time for the tour, charter or point-to-point flight.
53. Adopting the wording of paragraph 17 of the NRF advice, the Applicant's proposed facility on the Property is intended to be one "*which the public may access and use for air transport purposes*". As proposed, "*the general public [will be] able to enter and use the facility*".
54. An airport (such as the Kingsford Smith domestic airport (**Sydney airport**)) or a heliport (such as the Applicant's current operations at Granville/Clyde) will include areas that are open to the public and areas from which the public is at all times excluded. The major part of Sydney airport is closed to the public, being the site of extensive maintenance facilities, aircraft manoeuvring areas and take-off and landing facilities.
55. However, there are also areas of the Sydney airport which are open to the public. For example, the general concourse area within the domestic terminal falls within that category as are some areas beyond the security check points. The general public is then excluded from all areas beyond the gates which lead to aircraft about to depart. Only passengers who have purchased a ticket on a flight can then pass through those gates to board their designated aircraft.
56. There is no substantive difference, in our opinion, between an airport (acknowledging the much larger scale of an airport operation over a heliport) and the helicopter facilities proposed by the Applicant. Subject to the booking and ticketing arrangements for flights using the Applicant's helicopter fleet, members of the public will enter the site (having purchased a ticket or booked a tour) and will be permitted into those areas which are open to passengers. Realistically, the Applicant's customers will be required to stay away from areas where helicopters might be manoeuvring or within which helicopters were being transported (by tugs or whatever mechanical means are used to move helicopters) around the hardstand and into the large maintenance hangar which will be established as part of the Proposed Development.
57. On the issue of "open to the public", the NRF advice refers in paragraph 19 to a decision of the NSW Court of Appeal in *Ryan v Nominal Defendant* [2005] NSWCA 59 (2005, 62 NSWLR 192) and to the judgement of Santow JA, at paragraph [82].

58. At paragraph 82(2) of the *Ryan* decision, Santow JA stated:

“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) ...

(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.”

59. In the case of the Applicant, its website clearly indicates that there is an invitation issued indiscriminately to the public at large to utilise the Applicant’s services. That invitation is part and parcel of the Applicant’s business.

60. The issue of public access was usefully and further considered by the Full Court of the South Australian Supreme Court in the decision of *Zerella Holdings Pty Ltd & Anor v Williams & Anor* [2012] SASFC 100 (24 August 2012) at paragraph [40], in the judgement of Kourakis CJ and Blue J, where their Honours stated:

“40 The authorities discussed above establish the following general propositions as to whether a road or area “is open to or used by the public.

- 1. It is not necessary that the land be publicly owned or that there be a public right of access or use.[24] Different considerations apply to private land compared to public land in this sense.[25]*
- 2. In the case of private land, the composite phrase “open to or used by the public” encompasses legal entitlement to entry by the public (de jure) as well as actual use by the public (de facto).[26] The words “open to” are more apposite to the former and the words “used by” are more apposite to the latter.[27]*
- 3. In the case of private land, the phrase “open to... the public” refers to an invitation or licence expressly or impliedly extended to members of the public by the private occupier.[28] The question is not whether the land is physically open to the public, although the existence or non-existence of a physical barrier to entry may be one factor in assessing whether an invitation is extended to the public.[29]*

4. *For this purpose, there is a distinction between a general invitation extended without discrimination to the public and a series of invitations restricted to specific invitees for the purpose of transacting business with the occupier or otherwise. Much will depend on the circumstances including the restrictions upon those eligible for entrance and the scope of the permitted uses on gaining access. [30]*
 5. *The mere fact that a fee is charged[31] or that the area is used only by members of the public with a particular interest (for example, swimming or natural history in the case of public pools and museums respectively) does not of itself establish that it is not “open to the public”. [32]*
 6. *In the case of private land, the phrase “used by the public” refers to actual use (even without the permission of the occupier) by the public but not to mere use by specific invitees or to an isolated use by a member or members of the public. [33]”*
61. The analysis recorded in the *Zerella* judgement is in our submission directly applicable to the development application submitted by the Applicant. The existence or non-existence of a physical barrier to entry (such as a security gate), on which the NRF advice places reliance, is simply one factor to be weighed in assessing whether an invitation is extended to the public. Similarly, the absolute exclusion from some area of the Proposed Development of all persons other than the Applicant’s employees or authorised contractors does not go to the issue of whether the Proposed Development which will be established to facilitate the use of the Applicant’s helicopter fleet, is or is not “open to the public”. The analogy of Sydney airport, noted above, is relevant in this regard.
 62. Adopting the reasoning of the Full Court in paragraph [82. 3.] of *Zerealla* the Applicant’s proposed facility will be “open to the public” because the Applicant has extended and will continue to extend an express invitation to members of the public to utilise the Applicant’s facility. The Applicant’s helicopters stored, parked and maintained at the facility, will be available for booking and use by members of the public for the purpose of tours, charters and point-to-point flights.
 63. The EIS makes no suggestion, and no inference can be drawn from the Applicant’s existing websites, that the Applicant’s invitations to use its service are restricted to only some limited class or group of people. In effect, if a member of the public has the money to pay for the Applicant’s services, then those services will be available to the person or persons concerned.

Ancillary and Dominant

64. Paragraph 30 of the NRF advice records the conclusion that the proper characterisation of the Proposed Development is a “helipad”, a conclusion with which we disagree, for the reasons already noted.

65. Paragraphs 31 and 32 of the NRF advice then read:
- “31 We further note that, in accordance with ordinary planning 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.”*
66. As a matter of fact, it is, in our submission, relevant to note that the designated “*helipad*” is quite small in relation to the size and layout of the Proposed Development. The major part of that Development comprises the large maintenance hangar, the extensive hardstand area and the associated office and lounge areas.
67. In the context of the Proposed Development it is necessary to identify “*the reason for which the Development is to be undertaken or the end to which the Development serves*” (Planning & Infrastructure Circular PS13-001, 21 February 2013). Based on the descriptions of the Proposed Development found in the EIS, and given the identified need for the Applicant to relocate its existing heliport and associated facilities from Granville/Clyde to Penrith Lakes, it is difficult to conclude that the proposed maintenance hangar, the hardstand area and the associated offices and lounge area are subordinate or subservient to the submitted dominant purpose of the Proposed Development, being the purpose of establishing and conducting a “*helipad*”.
68. In our opinion, based on all the available information, it is unrealistic to attempt to segment the “*helipad*” component of the Development from the total Proposed Development. The application relates to one integral development, including all of the elements described. Each of those elements is essential to the conduct of the Proposed Development.
69. The Applicant will store its helicopter fleet (identified as comprising 8 helicopters) on the Property. Those helicopters will be securely stored in the large hangar, which will also be the area within which the helicopters are serviced and maintained. The Applicant requires offices to administer the operation of its helicopter fleet including the acceptance of bookings for tours, charters and point-to-point flying. The helipad is the point from which chartered or booked helicopters will take off and land.
70. None of these elements of the Proposed Development is subordinate or subservient to the use of the Property for the purpose of a “*helipad*”. Each of the elements is integral to the total development, being the establishment of a heliport or (if it is concluded that the proposed facility is not “*open to the public*”) the establishment of a helicopter transport facility which could perhaps be described (adopting part of the wording used in Schedule 1 to the POEO Act) as a helicopter-related facility, and being a prohibited innominate use in the Tourism zone.
71. When considering the dominant/ancillary issue it is also appropriate to note that the Applicant does not propose that its helicopters would use the designated helipad within the Property without direction or reason. The Applicant’s helicopters are an essential part of the Applicant’s overall business. It is realistic to anticipate that the

Applicant's helicopters will be directed to travel to particular locations (tours, charters or point-to-point flights) or to undertake particular work (lifting heavy objects into remote locations, fighting bush fires) all as directed by the Applicant, utilising the booking and contract administration facilities that will be located in the offices on the Property.

72. In summary, the Proposed Development is not in any way analogous to the use of a helipad located within or adjacent to a public facility (such as an RFS station, a public hospital etc.) or a private development (such as Blue Mountains Scenic World). Helicopters using such helipads simply pick up or drop-down passengers who have used or will use the public facility or the development concerned. Such helipads clearly subserve a public facility or private development, hence the dominant use of the land would remain the use for the purpose of the public facility or private development.
73. As illustrations of the point made in paragraph 72 we **attach** a Six Maps photograph which depicts the helipad established at Katoomba Hospital.

Conclusion

74. The primary conclusion in this advice, that the Applicant's Proposed Development is not a "helipad", is consistent with the submissions made by PCC to the Department in its submission dated 2 December 2021 in relation to the development application.
75. On page 3 of that submission, under the heading "1. Planning Matters (a) Permissibility", PCC states:

"The Department will need to be satisfied that the primary activities and operations proposed in this application can be appropriately categorised as a helipad to ensure the proposal is a permitted land use and does not pre-suppose that the site is suitable for heliport operations, which are currently not permitted or detailed in this application. It may be useful for the Department to understand the differences between the current application and the existing operations at Granville, particularly as the proponent is seeking the same Environmental Protection Licence requirements under this application.

The use of the facility for flights not associated with emergency services, such as ticketed joy flights, other commercial flights and training, remains a critical aspect in establishing permissibility particularly as it relates to the number of flights, scale of activity, use of associated facilities and whether these services are 'open to the public'."

76. Our conclusion that the proposed development is prohibited is also consistent with the submission made by Urbis to the Department on 11 May 2020. In section 2 of that submission under the heading "PERMISSABILITY AND PLANNING PATHWAY" Urbis then stated:

"The principle [sic] purpose of Sydney Helicopters operation is a commercial facility open to the public for hire and recreational flights, the provision of

emergency services and the repair and maintenance of aircraft. Given this, the proposal is more consistent with the definition of a Heliport than a Helipad.”

77. Urbis was correct. The Proposed Development “*is more consistent with the definition of a Heliport than a Helipad*”. The EIS prepared by Urbis, in support of the development application, simply reverses the original Urbis submission.
78. There are two other important points to note in support of the conclusions that we have reached.
79. First, the EIS appears to advance the proposition that as the Proposed Development, when operated, will not be open to the public (a proposition with which we disagree) then it must follow that the Proposed Development is a “*helipad*” not a “*heliport*”. That conclusion is fallacious. The conclusion does not address the nature of the development, including the very large hangar, the office (and apparently lounge) facilities and the reality that helicopters will be stored, parked and maintained at the Property by a significant number of employees of the Applicant. Although we consider that there are very sound reasons for concluding that the Proposed Development will be open to the public, the appropriate characterisation of the development will not be determined solely by reference to that factor.
80. An associated point relates to the suggestion in the NRF advice (paragraph 31) that the various facilities making up the proposed development (the large hangar and maintenance facilities) the offices, lounge, etc, are “*ancillary*” to the conduct of a helipad. In our opinion, the contrary conclusion should be reached. Those facilities are an integral part of the overall Proposed Development. They are essential to its conduct. The capacity of the Property to accommodate those facilities is the substantive reason why the Applicant proposes to relocate its entire operation from Granville/Clyde to the Property.
81. In our opinion, the Proposed Development is appropriately characterised as a “*heliport*”, for the reasons given in this advice. As a result, the Proposed Development is prohibited in the Tourist zone regulated by SEPP PWP. Given that circumstance, the development application must be refused.

Yours faithfully



McPhee Kelshaw



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Kiama Harbour

4.9 (7)

Harbor



Verbal Submission to the Independent Planning Commission (IPC) – 30 June 2022

Blue Mountains City Council

Good morning Commissioners.

I am William Langevad, the Director of Environment and Planning Services at Blue Mountains City Council.

The Council's submission is informed by legal advice prepared by McPhee Kelshaw Solicitors, at the Council's instruction.

Those instructions concern the characterisation and permissibility of the proposed development. That is the sole focus of today's representations.

That Council's full legal opinion will be made available to the Commission in the Council's further written submission.

As the Commissioners are aware the DA is supported by an EIS prepared by Urbis which states:

“Specifically, this DA is seeking consent for the construction and operation of a helipad facility at the subject site, ... comprising the following ...”,

with a number of elements then listed.

1. By way of summary, Council's submission is:
 - (1) Firstly, the proposed development is not appropriately characterised as a helipad.
 - (2) Secondly, the proposed development is most appropriately characterised as a “*heliport*”, subject to determining the meaning of the words “*open to the public*” as used in the definition of a “*heliport*” and in the context of the proposed development as described by the Applicant. The proposed development would be prohibited under the State Policy.
 - (3) Alternatively if the proposed development is not “*open to the public*” (which is contrary to Council's view), then the proposed development and its essential elements would most appropriately be characterised as an innominate use and would be prohibited under the SEPP.

Introduction

As you are aware the SEPP provides that any word or expression used in the SEPP has the same meaning as prescribed by the *Standard Instrument*.

In common with every Standard Instrument LEP in NSW, the SEPP distinguishes between a helipad and a heliport.

This legal distinction within the NSW planning system between helipads and heliports is critical to orderly development and strategic planning, not only in the Blue Mountains region but across NSW.

The development application is supported by a letter of advice prepared by Norton Rose Fulbright Lawyers which also considers this necessary distinction (which I will refer to as the ‘**applicant’s legal advice**’).

The question of Helipad or Heliport?

2. The definition of *helipad* is quite simple. A helipad is “... a place ... used for the taking off and landing of helicopters”. In addition to being a place used for the taking off and land of helicopters, a helipad is “not open to the public”.
3. The definition of *heliport* is more complex than the definition of *helipad*. A heliport is also a place used for the taking off and landing of helicopters. However, in contrast to a *helipad*, a *heliport* is “open to the public”. Further, a heliport (in contrast to a helipad) may include the following:
 - “(a) a terminal building, or
 - (b) facilities for the parking, storage or repair of helicopters.”
4. The definition of “*helipad*” does not leave open the possibility that a “*helipad*” may include the nominated facilities that may form part of a heliport.

The Proposed Development

5. The proposed development is described at a number of points in the EIS, with some variation between the descriptions given on different pages.
6. The various descriptions of the proposed development in the EIS do not, however,
 - (a) explain the way in which members of the public may book a journey by helicopter utilising the Applicant’s services as presently extended; or
 - (b) explain how tours and helicopter bookings will be arranged if the new facility on the Property is established.

These omissions are significant and material, given the Applicant’s assertion that the new facility will not be open to the public.

7. The Applicant is introduced in the EIS as:

“Sydney Helicopters are a commercial helicopter operator who have been providing chartered flights, tours and emergency services around the Sydney Metropolitan Area and greater NSW since 1985...”

8. The application does not relate to the establishment and use of a simple helipad. The application relates to the relocation of the existing heliport operations conducted by Heliport Developers Pty Ltd.
9. The new facility will provide hangar accommodation for the Applicant's helicopter fleet and facilities for the maintenance and operation of that fleet. As touched on, under the definitions of "*helipad*" and "*heliport*", those elements may be part of a "*heliport*" but critically they cannot form part of a "*helipad*" as sought in this application.

Environment Protection Licence (EPL)

10. The EIS confirms that the Applicant has commenced engagement with the **NSW EPA** about transferring its EPL. This acknowledgment confirms that the activities proposed by the Applicant, once its new facility is established, will fall within the POEO Act and will, amongst other matters, involve the use of buildings for the parking, servicing or maintenance of helicopters and will require the grant of the EPL as described in the EIS. A *helipad* does not allow the establishment of such facilities.
11. The EIS usefully provides a list of existing helipads in the Blue Mountains and I am familiar with these sites:
 - *Blue Mountains Hospital Helipad.*
 - *Glenbrook Office & Depot – NSW National Parks & Wildlife Service.*
 - *Blackheath NSW National Parks & Wildlife Service site.*
 - *Valley Heights RFS Site – Great Western Highway.*
 - *Katoomba – Scenic World Helipad – top deck of multi-story carpark.*
12. If the Commission is familiar with any of these sites, the list provided by the Applicant throws into stark relief the clear distinction between a "*helipad*" as defined and a "*heliport*" as defined.
13. None of the helipads identified by the Applicant are self-sufficient and self-sustaining developments. The helipad in each case is a facility that serves either a NSW Government facility or a much larger development, conducted for entirely different purposes than the purpose of a helipad.

Open to the Public?

14. We understand the EIS to submit on behalf of the Applicant that the proposed new facility will not be "*open to the public*". On this basis the EIS suggests that the proposed new facility (regardless of the infrastructure that it will incorporate) is a "*helipad*" and not a "*heliport*". For the reasons given above, we disagree with that conclusion, but it is appropriate to consider whether the new facility will be "*open to the public*".
15. The Applicant's website confirms that the Applicant is inviting the public to utilise the Applicant's services by booking tours and charter flights. The Applicant extends an invitation to treat, in the classic business sense, any member of the public who

wishes to deal with it and who is prepared to pay the fees that are charged by the Applicant for that service or experience.

16. In that context, it is immaterial whether the Applicant owns all the helicopters that it operates or stores those helicopters at a secure facility. The Applicant offers to transport members of the public and utilise its helicopters in doing so.
17. Adopting the wording of the Applicant's legal advice, the Applicant's proposed facility on the Property is intended to be one (and I quote) "*which the public may access and use for air transport purposes*". As proposed, (and I quote) "*the general public [will be] able to enter and use the facility*".
18. The issue of public access was usefully and further considered by the Full Court of the South Australian Supreme Court in the decision of *Zerella Holdings Pty Ltd & Anor v Williams & Anor* [2012] SASCF 100 (24 August 2012)
19. Adopting the reasoning of the Full Court of *Zerella* the Applicant's proposed facility will be "*open to the public*" because the Applicant has extended and will continue to extend an express invitation to members of the public to utilise the Applicant's facility. The Applicant's helicopters stored, parked and maintained at the facility, will be available for booking and use by members of the public for the purpose of tours, charters and point-to-point flights.

In Conclusion

20. "Council's submission is that the Applicant's Proposed Development is not a "*helipad*". This is consistent with the submission made previously by Blue Mountains City Council but is also an issue identified by Penrith City Council in its submission to the Department dated 2 December 2021 in relation to the development application.
21. Our conclusion that the proposed development is prohibited is also consistent with the submission made by Urbis to the Department on 11 May 2020. In section 2 of that submission under the heading "*PERMISSABILITY AND PLANNING PATHWAY*" Urbis then stated:

"The principal purpose of Sydney Helicopters operation is a commercial facility open to the public for hire and recreational flights, the provision of emergency services and the repair and maintenance of aircraft. Given this, the proposal is more consistent with the definition of a Heliport than a Helipad."
22. Urbis was correct. The Proposed Development "*is more consistent with the definition of a Heliport than a Helipad*". The EIS prepared by Urbis, in support of the development application, simply reverses that submission.
23. The EIS appears to advance the proposition that as the proposed development, when operated, will not be open to the public then it must follow that the proposed development is a "*helipad*" not a "*heliport*". That conclusion is a fallacy.

24. The conclusion does not address the nature of the development and the reality that helicopters will be stored, parked and maintained. Although we consider that there are very sound reasons for concluding that the proposed development will be open to the public, the appropriate characterisation of the development will not be determined solely by reference to that factor.
25. The suggestion in the Applicant's legal advice that the various facilities making up the proposed development (the large hangar and maintenance facilities) the offices, lounge, etc, are "*ancillary*" to the conduct of a helipad. In our opinion, the contrary conclusion should be reached. They are essential to its conduct. The capacity of the site to accommodate those facilities is the substantive reason why the Applicant proposes to relocate its entire operation.
26. In our opinion, the proposed development is appropriately characterised as a "*heliport*". As a result, the proposed development is prohibited in the Tourist zone regulated by the SEPP. Given that circumstance, the development application must be refused.

The Council will provide its full legal advice to the Commission. It is requested in the public interest that any legal advice secured by the Department on characterisation and permissibility should also be released given the significance of this matter for environmental planning generally.

The Council thanks the Commission for the consideration of its submission.



Will Langevad
30 June 2022