



Land and Environment Court
New South Wales

Case Name: Johnson Property Group Pty Ltd v Minister for Planning

Medium Neutral Citation: [2019] NSWLEC 1644

Hearing Date(s): Conciliation conference on 10 December 2019

Date of Orders: 24 December 2019

Decision Date: 24 December 2019

Jurisdiction: Class 1

Before: Dixon SC

Decision: The Court orders:
(1) Leave is granted to the Applicant to make the following minor amendments to the application to modify Concept Plan MP06_0309 (MOD3):
(a) Update the plans listed below to Version L of those plans dated 22 November 2019:
(i) 37429(4)-DA-001-L: Location & Marina Context of Proposed Helipad
(ii) 37429(4)-DA-001-L: Plan of Proposed Helipad
(iii) 37429(4)-DA-001-L: Typical Elevation of Proposed Helipad
(b) Include the Helipad Operations Plan dated December 2019, endorsed by Mr Brenton Davis, ATPL-H Aviation Advisor.
(2) The Appeal is upheld.
(3) The application to modify Concept Plan MP06_0309 (MOD 3) is approved, subject to the conditions in annexure "A".
(4) No order as to costs (apart from the order made under section 8.15(3) of the Environmental Planning and Assessment Act 1979 on 24 June 2019).

Catchwords: APPEAL – modification of Concept Plan – incorporation of helipad adjacent to the Marina – conciliation

conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
Land and Environment Court Act 1979

Cases Cited: Transport Action Group Against Motorways Incorporated v Roads and Traffic Authority and Another (1999) 46 NSWLR 598; [1999] NSWCA 196

Category: Principal judgment

Parties: Johnson Property Group Pty Ltd (Applicant)
Minister for Planning (Respondent)

Representation: Counsel:
A Galasso SC (Applicant)
M Staunton (Respondent)

Solicitors:
Sparke Helmore Lawyers (Applicant)
Department of Planning & Environment (Respondent)

File Number(s): 2018/207343

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of an application to modify Concept Plan MP–6_0309 under s 75W of the *Environmental Planning and Assessment Act 1979* (EPA Act) to incorporate a proposed helipad adjacent to the Marina approved under that plan in Bardens Bay, Lake Macquarie.
- 2 It relates to an amended proposal filed with the leave of the Court on 24 May 2019.
- 3 Briefly stated, the amendments at that time included:
 - Restriction of the helicopter movements over the residential areas of Bardens Bay and part of Sugar Bay, identified as an “exclusion area” for all helicopters (at any height) using the helipad;

- Removal of specific flight paths and a take-off and landing area (for movements over water below 500 feet) provided to the south and east of the helipad over water;
- Restriction of daily flight movements to 6 maximum per day with a 38 movements maximum per week;
- To reflect changing helicopter types within the Australian market since the original application, the Airbus 135 has been replaced by AS 355F. This is smaller and lighter than the design helicopter for the pontoon (being the Agusta Westland AW 109) which is unchanged.
- The size of the helipad pontoon has been increased to 25m x 25m (without change to the design helicopter) with a minor shift in location of the centre of the helipad and to the minimum 30m managed safety zone, to reflect that change.
- A maximum managed safety zone is introduced to reflect detailed downwash assessment when operations occur in strong winds, being a distance measured 66.5m radius from the centre of the helipad.
- Principles 11, 14 and 15 have been included as an amendment to approved Trinity Point Concept Plan revised principles, Objectives and Urban Design Guidelines seek to:
 - (a) reinforce environmental water management requirements for the helipad;
 - (b) identify siting and staging of the helipad relative to the Marina;
 - (c) reinforce the helipad exclusion and take-off and landing areas, as well as movement and timing restrictions;
 - (d) include requirements for on-site weather station, with trained staff, to provide weather data to pilots prior to landing and departure to enable informed landing in departure decisions to be made; and
 - (e) require various operational and management requirements to be documented with a helipad operational manual, with the manual to be approved and in place prior to commencement of the use.
- Supporting documentation is annexed to the further preferred Project report, including revised plans, reports on social, acoustic, ecological and downwash impacts, and revised Helipad Operations Manual.

4 The amended application was developed during the onsite conciliation conference which I facilitated under s 34 of the *Land Environment Court Act 1979* on 29 January 2019, and at the further s34 conference held on 9 December 2019. It is responsive to the Minister's Statement of Facts and Contentions filed on 19 October 2018, and the oral and written submissions

received from the local objectors at the site and later at the Court house in Sydney.

- 5 Ultimately, the January 2019 s34 conference held onsite did not resolve the appeal so it was terminated and the parties requested that I hear and determine the matter after a further hearing at a later date. To that end, the appeal was listed for a Court hearing on 9 December 2019 in Sydney under s 34(4)(b). The delay between the termination of the first s34 conference and the scheduled hearing allowed the Minister to undertake public notification of the amended application in accordance with the relevant statutory framework. The adjournment also provided the parties with an opportunity to receive additional aviation, acoustics and town and social planning expert evidence. In that regard, I note that the applicant engaged a new aviation expert.
- 6 After taking evidence from several objectors at the Court house in Sydney on 9 December 2019, the parties asked that I adjourn the hearing and ask the Chief Judge to reallocate the matter to me for a second s34 conciliation conference. This happened on 10 December 2019. At that time, the parties said that the contentions between them had been resolved by the amendments to the flight path as notified to the residents and the further expert assessments and subject to the imposition of the agreed conditions they were satisfied that all reasonable objections raised by the local residents and community groups about unacceptable safety, noise, and the loss of a sense of place had now satisfactorily been dealt with by the proposal now before the Court.
- 7 To that end, during the conference, the parties filed an executed s34 agreement which stated that they had reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties, being a decision that the Court could have made in the proper exercise of its functions.
- 8 The terms of the decision are as follows:
 - (1) Leave is granted to the Applicant to make the following minor amendments to the application to modify Concept Plan MP06_0309 (MOD3):
 - (a) Update the plans listed below to Version L of those plans dated 22 November 2019:

- (i) 37429(4)-DA-001-L: Location & Marina Context of Proposed Helipad
 - (ii) 37429(4)-DA-001-L: Plan of Proposed Helipad
 - (iii) 37429(4)-DA-001-L: Typical Elevation of Proposed Helipad
 - (b) Include the Helipad Operations Plan dated December 2019, endorsed by Mr Brenton Davis, ATPL-H Aviation Advisor.
 - (2) No order as to costs (apart from the order made under section 8.15(3) of the *Environmental Planning and Assessment Act 1979* on 24 June 2019).
 - (3) The Appeal is upheld.
 - (4) The application to modify Concept Plan MP06_0309 (MOD 3) is approved, subject to the conditions in annexure "A".
- 9 Pursuant to s 34 of the *Land and Environment Court Act 1979*, there is a requirement that the Court dispose of the proceedings in accordance with the parties' decision, if the parties' decision is a decision that the Court could have made in the proper exercise of its function. The parties identified the jurisdictional prerequisites of relevance in these proceedings in a statement which they filed with the agreement.
- 10 Following consideration of the jurisdictional matters as outlined in the statement, I am satisfied that the parties' request to dispose of these proceedings in accordance with the terms of the decision set out in clause 2 of their agreement can legally be made. In that regard, I make the following comments.
- 11 The Concept Plan is a transitional Part 3A project as defined in cl 2 of Schedule 2 to the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (EPA Savings Regulation).
- 12 In accordance with cll 3 and 3C of Schedule 2 to the EPA Savings Regulation, the former Part 3A of the EPA Act, including s 75W, continues to apply to the Concept Plan. Section 75W(7) provides:
- "This section does not limit the circumstances in which the Minister may modify a determination made by the Minister under Division 3 in connection with the approval of a concept plan."
- 13 No provisions of s 75W prohibit or restrict proposed modifications to the Concept Plan approval.

- 14 The parties agree, and I also accept that the application to modify the Concept Plan complies with the Secretaries environmental assessment requirements dated 6 July 2016. The parties agree and I also accept that the Concept Plan has not lapsed and the landholders consent has been provided to the application to modify the Concept Plan.
- 15 Section 75(3) of the EPA Act applies when the Minister is deciding whether or not to give approval for the concept plan. That provision is not therefore applicable to the modification of a concept plan. Similarly, there are no provisions of the EPA Act or associated Regulations that prohibit or restrict the modification of the Concept Plan.
- 16 There is no State environment or planning policies on local environmental plans that prohibit or restrict the modification of the Concept Plan.
- 17 Notwithstanding the above, the relevant provisions of the environment or planning instruments applicable to the site are addressed in and before the Court in Land and Environment Court Proceedings No. 2018/207364.
- 18 In dealing with this modification application, there is no requirement that the development be substantially the same as understood when assessing an application for modification under Part 4 of the EPA Act. The parties agree, and I am satisfied on the evidence before the Court that, in this case, the difference between the original unchanged activities is not so radical as to preclude a modification to incorporate the helipad having regard to the jurisdictional requirements: *Transport Action Group Against Motorways Incorporated v Roads and Traffic Authority and Another* (1999) 46 NSWLR 598; [1999] NSWCA 196 at [76] per Mason J.
- 19 While I accept that the local residents and the representatives of the sailing club association and Brightwater Christian College hold genuine beliefs that an approval of the helipad will generate unacceptable safety and amenity concerns, the Minister is satisfied after assessment of the expert evidence and the imposition of the agreed conditions that the proposal is acceptable on its merits. To that end, the agreed conditions now stipulate the maximum hours of operation for the helipad from:

- 8AM to 5PM Monday to Saturday, extended to 8AM to 7PM during daylight hours saving time, provided that only two helicopter movements occur between 5PM and 7PM during daylight saving time.
 - 9AM to 5PM Sunday.
 - 9AM to 5PM Public holidays, extended to 9AM to 7PM during daylight saving times, provided that only two helicopter movements occur between 5PM and 7PM during daylight saving time.
- 20 The consent conditions require a maximum number of movements being six movements per day (three landings and three departures) with 34 helicopter movements per week will (17 landings and 17 departures).
- 21 The consent incorporates the proposed Helipad Operations Management Plan dated December 2019 (or as revised under condition A8) prepared by the parties' aviation experts to assist the safe operation of the helipad. It requires the installation of a GPS tracking system (spider tracks or similar) on all helicopters accessing the helipad to verify compliance with the concept approval. All incoming pilots are to provide a digital output from their on-board tracking software or handheld tracking application to the manager within 48 hours of a flight movement, confirming the time, date of the flight approach and departure path altitude and rate of descent/ascent. The manager is to keep a record of this information for minimum of two years. Access by the Secretary to the data captured by the GPS tracking system and noise loggers to assess compliance with the conditions of approval is required.
- 22 The parties also explained to me that any failure by pilots in companies to comply with the prior permission protocol, all the procedures set out in the Helipad Operations Management will be the subject of internal investigations. Any non-compliance, for whatever reason, may be reported to Council, the Department of Planning and Environment, Civil Aviation Safety Authority and/or Airservices Australia. The helipad operator may provide any information it receives about any flight, helicopter pilot or company to the relevant authority. Pilots in companies are to be made aware that in addition to aviation safety regulations, non-compliance may result in prosecution under the EPA Act with potential maximum penalties of:
- (1) in the case of a corporation:
 - (a) \$5 million, and

- (b) a further \$50,000 for each day the offence continues; or
- (2) in the case of an individual:
 - (a) \$1 million; and
 - (b) a further \$10,000 for each day the offence continues.

Any unjustified non-compliance with the prior permission protocol or the manager may result in the perpetrator being temporarily or permanently restricted from using the helipad. The helipad operator may, if the operator considers it appropriate after an internal investigation to undertake, usual warning before taking any further action. The helipad operator will take action to temporarily or permanently exclude the perpetrator from using the helipad if the perpetrator has previously been issued with a warning.

- 23 The consent incorporates the Trinity Point Marina Community and Stakeholder Engagement Plan (Plan) which sets out procedures to address grievances in relation to problems associated with the operation of the helipad. Relevantly, there will be a hot line phone number to school and the sailing club that is directly connected to the helipad operator. The nature of the complaint and the action to be taken is required to be logged in the complaints register kept by the helipad operator and the operators to investigate the complaint within 14 days of receipt. Procedures for resolution of the complaints are set out at page 89 of that Plan.
- 24 In the first 12 months of operation, the operator will contact an appropriate qualified and independent external auditor to audit helicopter operations. The audit will be made available to Council and used as a template for internal audits in following years. Any audit of the operators will include review of complaints logged to determine whether any repetitive complaints about matters are received. If so, the audit will include a review of complaints and make recommendations for addressing the issues raised in the complaints. Any such recommendations will be implemented by the operator.
- 25 To assist in addressing noise concerns and amenity impacts raised by the residents and users of Bardens Bay and in Sugar Bay, an exclusion area for all helicopters using the Trinity Point HLS has been identified in the consent. It can be understood from the Figure 6 – Exclusion Area plan below.

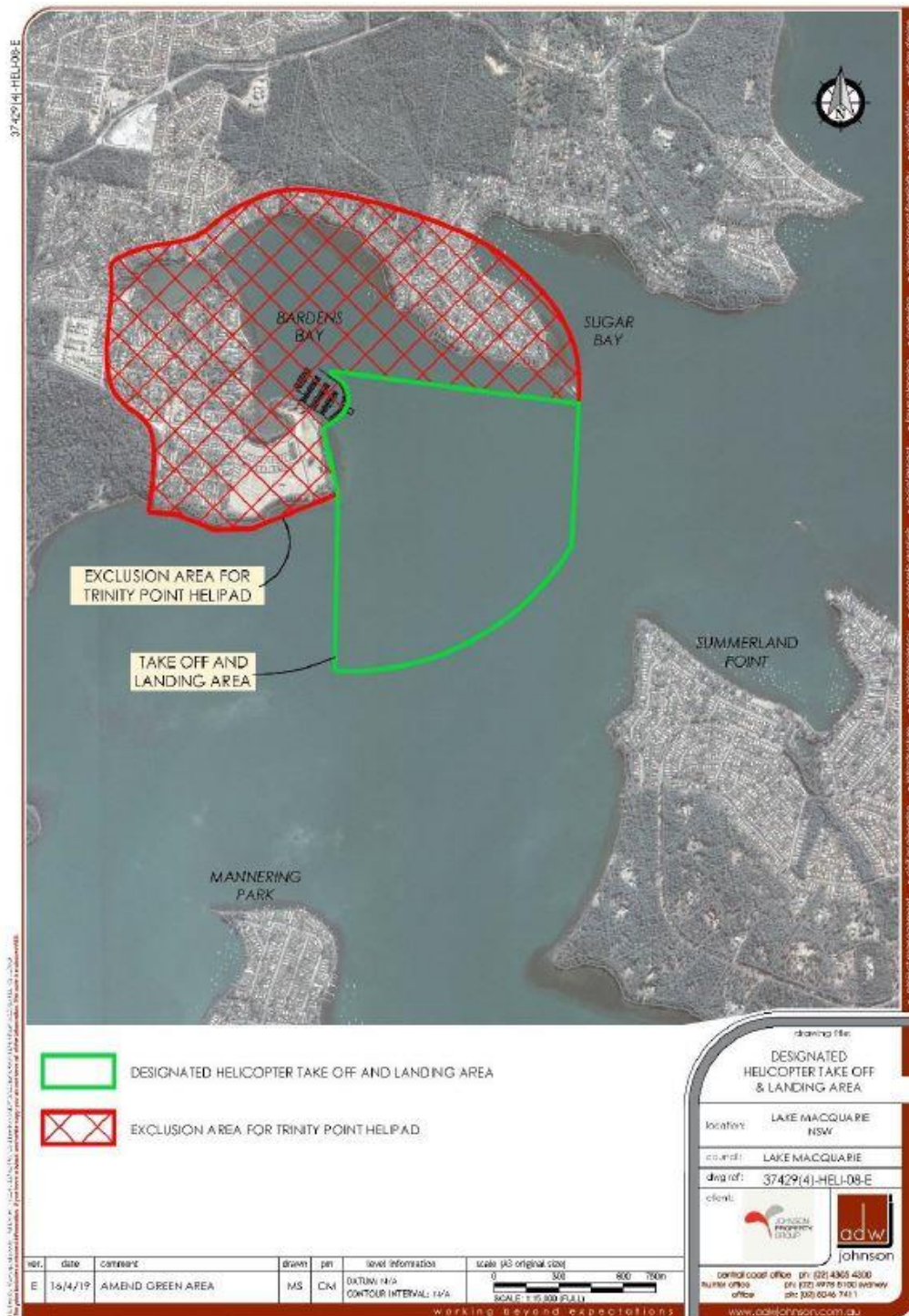


Figure 6 - Exclusion Area.

- 26 As a condition of use of the HLS, all helicopters must confine operations (where below 500 feet over water) to the designated take-off and landing area shown in Figure 6. Helicopters that use the HLS must not operate in the exclusion area shown in Figure 6. The exclusion area is bounded by a straight line east from the Marina to the south-east end of Bardens Bay, along the

western side of Sugar Bay, Bulgonia Road, Pillapai Road, Rhodes Parade, west of Lake Petite, Chifley Road, Morisset Park Road, Charles Avenue and the southern and eastern shores of Morisset Park to the Marina.

- 27 The consent incorporates provisions to address downwash and the Plan incorporates procedures to liaise with local schools, the local sailing club and local businesses including obtaining calendars of events for use to assist flight preferences to inform pilots' schedule.
- 28 Having explained some detail about the amended proposal I need to make clear the fact that the Court in giving effect to the agreement between the parties is not required to make, and has not made any merit assessment of the issues that were originally in dispute. As the presiding Commissioner, s 34(3)(b) of the LEC Act only requires that I must only be satisfied that the terms of the decision in the proceedings acceptable to the parties is a decision that the Court could have made in the proper exercise of its functions. Have formulated that view based on the evidence, s 34(3)(a) of the LEC Act mandates that I dispose of the proceedings in accordance with that decision.
- 29 Accordingly, the Court orders:
 - (1) Leave is granted to the Applicant to make the following minor amendments to the application to modify Concept Plan MP06_0309 (MOD3):
 - (a) Update the plans listed below to Version L of those plans dated 22 November 2019:
 - (i) 37429(4)-DA-001-L: Location & Marina Context of Proposed Helipad
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 - (b) Include the Helipad Operations Plan dated December 2019, endorsed by Mr Brenton Davis, ATPL-H Aviation Advisor.
 - (2) The Appeal is upheld.
 - (3) The application to modify Concept Plan MP06_0309 (MOD 3) is approved, subject to the conditions in annexure "A".
 - (4) No order as to costs (apart from the order made under section 8.15(3) of the *Environmental Planning and Assessment Act 1979* on 24 June 2019).

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S Dixon

Senior Commissioner of the Court

[Annexure A \(85.3 KB, pdf\)](#)

[Plans \(1.57 MB, pdf\)](#)

[Helicopter Operations Management Plan \(4.91 MB, pdf\)](#)

Amendments

02 January 2020 - Correction of Counsel in Representation

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