

2 April 2018

By email: council@begavalley.nsw.gov.au

The General Manager
Bega Valley Shire Council
PO Box 492
BEGA NSW 2550

Our Reference
180589

Your Reference
2017.445

Dear Madam

Development Application 2017.445 for Recreational Flight School at Lot 1 DP 109606, 1070 Princes Highway, Frogs Hollow

1. We act for Sports Aviation Flight College Australia Limited.
2. We have been provided with a copy of the Council's email correspondence to our client dated 15 March 2018. That correspondence indicates that the Council has formed the view that the development proposed by our client is prohibited and invites our client to make representations in response to that position. This letter contains those representations.
3. Our client disagrees with the Council's assessment of the permissibility of the development. For the reasons outlined in this letter, the proposed development is permissible on the subject land with development consent.

PERMISSIBILITY UNDER THE LEP

Framework

4. The land is within Zone SP2 under the *Bega Valley Local Environmental Plan 2013 (the LEP)*. On land within that zone development may be carried out with development consent for the following purpose:

The purpose shown on the Land Zoning Map, including any development that is ordinarily incidental or ancillary to development for that purpose. (emphasis added)

5. The purpose nominated on the relevant Land Zoning Map for the subject land is 'air transport facility'. That expression 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.

6. The LEP includes the following definition of "airport":

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. (emphasis added)

7. The word "associated" in the definition of "airport" is important and its meaning straightforward. Various dictionary definitions of "associated" reflect a common meaning along the lines of: "correlated with, allied with, related to" and "connected with something else" (these examples from the Oxford English dictionary). The key consequence of the use of the word "associated" is that use of the word "associated" does not import notions of subservience or dominance,

which are irrelevant to that concept – it is, rather, a concept centred on a form of connection or relationship of any type.

8. When its components are read together, and having regard to the straightforward meaning of the word "associated" in the definition of "airport", the effect of the drafting in the LEP is that development may be carried out with development consent under the LEP if the proposed development satisfies any of the following four criteria:

- (a) it is for the purpose of a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes ("**criteria 1 – a place used for the taking off and landing etc of aeroplanes**") ; or
- (b) it is for the purpose of buildings, installations, facilities and movement areas that are correlated with, allied with, related to or connected with [by virtue of the word "associated" in the definition of "airport"] a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes ("**criteria 2 – buildings/facilities, including for flight training, related to a place used for the taking off and landing etc of aeroplanes**") ; or
- (c) it is ordinarily incidental or ancillary to development for the purpose of a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes ("**criteria 3 – ordinarily incidental or ancillary to a place used for the taking off and landing etc of aeroplanes**") ; or
- (d) it is ordinarily incidental or ancillary to development for the purpose of buildings, installations, facilities and movement areas that are correlated with, allied with, related to or connected with a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes ("**criteria 4 – ordinarily incidental or ancillary to buildings/facilities etc, including for flight training, that are related to a place used for the taking off and landing etc of aeroplanes**").

Characterising development

9. We agree that *Chamwell Pty Ltd v Strathfield Council* [2007] 151 LGERA 400 sets out the principles relevant to the characterisation of development and that, in planning law, use must be for a purpose. As Preston CJ explained in that case, the purpose of a use is the end to which the development is seen to serve and which describes the character which is 'imparted to the land at which the use is pursued'.
10. The crux of the Council's argument in its letter of 15 March 2018 is where the Council states:

While the proposed development involves [taking off and landing etc of aeroplanes] the sole purpose of those activities and the building proposed to house those activities is the training of future pilots. The purpose of the proposed development is not the landing, taking off etc of aeroplanes.

In advancing this argument, and especially when the Council says, as the basis for its decision, "*the purpose of the proposed development is not the landing, taking off etc of aeroplanes*", the Council has presented an analysis based on an erroneous assumption that this (the mere "landing, take off etc of aeroplanes") is the full extent of the definition of "airport". The Council has overlooked the fact that the definition of airport explicitly also includes 'buildings, installations, facilities and movement areas that are related or connected in some way (by virtue of the inclusion of "associated" in the definition of airport, as outlined in paragraphs 7 and 12) with a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes'. That is:

- (a) the Council has focused its analysis on only:
 - (i) criteria 1 outlined in paragraph 8 ("a place used for the taking off and landing etc of aeroplanes"); and

- (ii) criteria 3 outlined in paragraph 8 ("development ordinarily incidental or ancillary to a place used for the taking off and landing etc of aeroplanes"), but
- (b) the Council has failed to have any regard to:
 - (i) criteria 2 outlined in paragraph 8 ("buildings/facilities, including for flight training, related to a place used for the taking off and landing etc of aeroplanes"); or
 - (ii) criteria 4 outlined in paragraph 8 ("ordinarily incidental or ancillary to buildings/facilities etc that are related to a place used for the taking off and landing etc of aeroplanes"),

and as outlined in paragraph 8, the framework in the LEP permits development satisfying any one of the four criteria outlined in paragraph 8, and so the Council is required to consider all of them (including criteria 3 and 4, which it overlooked) when assessing the permissibility of the proposed development.

11. In *Chamwell*, the Court did not accept an argument that proposed ramps, driveways and forecourt areas were actually a "road" (which was clearly a very long bow for the developer to draw on the facts in that case). The Court held that those things were for the purposes of a [prohibited] shopping centre. The Court's approach in *Chamwell* is reasonable on its facts, but in our view a correct application of the principles in *Chamwell* would not produce the same result suggested by the Council in its letter of 15 March 2018, especially when all four criteria from paragraph 8 are considered, as required.
12. As noted in paragraph 7, the key consequence of the use of the word "associated" is that use of the word "associated" does not import notions of subservience or dominance. Subservience and dominance are irrelevant to that concept. Instead, the word "associated" introduces a concept centred on a form of connection or relationship of any type. An abattoir, for example, would not be considered to be something associated with a place used for the taking off and landing etc of aeroplanes, as there is simply no connection between the two; nor would a scuba diving school or a fishing school or a dental school be considered to be associated with a place used for the taking off and landing etc of aeroplanes.
13. On the other hand, a flight training school clearly would be related to or otherwise allied, connected or associated with a place used for the taking off and landing etc of aeroplanes. This is because, in order to learn to become pilots, trainee pilots need to (amongst other things):
 - (a) learn about and master the layout and operation of the place used for the landing, taking off, parking, maintenance and repair of aeroplanes;
 - (b) learn about the aspects and physical configuration of the aircraft located at the place used for the landing, taking off, parking, maintenance and repair of aeroplanes;
 - (c) conduct mandatory pre-flight safety briefings in the presence of the aircraft as part of their flight training;
 - (d) conduct mandatory pre-flight physical safety inspections on the physical aircraft as part of their flight training;
 - (e) take off, land, taxi and park at the place used for the landing, taking off, parking, maintenance and repair of aeroplanes; and
 - (f) learn about, and conduct, the service and repair of aircraft located at the place used for the landing, taking off, parking, maintenance and repair of aeroplanes.

All these activities are clearly in some way related to, or associated with, a place used for the landing, taking off, parking, maintenance or repair of aeroplanes. These activities cannot be

conducted anywhere else. For example, it is not possible to conduct, anywhere other than at an airport as defined, a mandatory pre-flight inspection of an aeroplane that is about to be flown. Conversely, an airport is not necessary or appropriate for the conduct of other forms of training – for example, a scuba diving training facility could not be said to be related in any way to an airport, as noted above. The point here is that there is an undeniably clear association between a flight school and a place for the landing, taking off, parking, maintenance or repair of aeroplanes (as per the definition of "airport" in the LEP).

14. Accordingly, development for the purposes of a flight training school is development for the purpose of buildings, installations, facilities and movement areas that are *related to, or otherwise associated with*, a place used for the landing, taking off, parking, maintenance or repair of aeroplanes. We note this satisfies criteria 2 ("related to a place used for the taking off and landing etc of aeroplanes") and arguably even criteria 1 ("a place used for the taking off and landing etc of aeroplanes", especially if one considers that an airport can be a training airport). There is no requirement in the definition that an airport only, or predominantly, provides for regular passenger transport.
15. The proposed use does not change the character which is, per *Chamwell*, "imparted to the land at which the use is pursued". Specifically, the land will still be used by planes taking off and landing etc and, moreover, will continue to be available for use by existing users of the airport and other members of the public for the purposes of taking off and landing their aircraft etc, in the way they have been and will be doing prior to the establishment of any flight school by our client. Even if the proposed flight school could be said to change the character imparted on the land (which is not accepted), the character that would be imparted would still be consistent with the purpose of the use of the land as an airport.
16. This approach to characterisation is consistent with the approach in *Chamwell*. At paragraph [46] in *Chamwell*, the Court said:

The retail customers who [use the driveways/ramps/parking facilities etc] would not consider they had driven on a road.... The customers of the supermarket who [use the forecourt/tramps/parking etc] would not describe the route they had passed as a road. Similarly, customers using the ... forecourt ... would not consider that they were sitting on a road.

This is all very reasonable and highlights the long bow the developer was drawing in that case. On the other hand, it is eminently reasonable to assert that a trainee pilot would consider that they were learning to fly "at the airport". A reasonable statement would be "I'm learning to fly at Frogs Hollow airport", as opposed to what would be a ridiculous "I'm on the road [while seated in the forecourt]" in the *Chamwell* case, as identified by the Court. This analysis is consistent with the requirement in *Chamwell* that "*the characterisation of the purpose of development must also be done in a common sense and practical way*" (at [45]) and further reinforces the satisfaction of criteria 2 and arguably criteria 1 as noted in paragraph 14.

17. The Council has placed emphasis on the difference in scale of the proposed development compared to the activities undertaken at the existing aerodrome. However, a comparison of the scale of the existing use against what is proposed does not assist in determining the characterisation of the development. If a hangar housing one aeroplane is characterised as falling within the defined permitted uses, then a hangar housing 10 aeroplanes is also permissible. The same applies to characterisation of all other features of the flight school, which in our view all satisfy at least criteria 2 and arguably also criteria 1 as outlined in paragraph 14.

Ancillary use

18. In the SP2 zone under the LEP the purpose for which development may be carried out includes both the purpose shown on the Land Zoning Map and also development that is ordinarily incidental or ancillary to development for that purpose.

19. A use is "ancillary" to another primary use if it is inspired by the same purpose as the other use, or if it subserves the other use or if the use could not function without the primary use (*Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157). We also draw Council's attention to the decision of the NSW Court of Appeal in *Macquarie International Health Clinic Pty Ltd v University of Sydney* (1998) 98 LGERA 218. In that case Stein JA held (with Mason P and Meagher JA concurring) [at 223]:

... an ancillary use does not necessarily need to be a subordinate or subservient one. It may be more than a minor use. It seems to me that an ancillary or incidental use is not capable of being reduced to a mathematical formula. It may also be noted that among the relevant dictionary meanings of ancillary are "auxiliary" and "accessory".

20. As a use will be ancillary if it is inspired by the same purpose as another use or requires another use to function, or is auxiliary or an accessory to another use (as per paragraph 19), then the flight school's activities and uses can be considered:

- (a) ancillary to development for the purpose of a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes ("**criteria 3**" from paragraph 8); or
- (b) ancillary to development for the purpose of buildings, installations, facilities [including for flight training] and movement areas that are correlated with, allied with, related to or connected with a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes ("**criteria 4**" from paragraph 8).

Only pilots will be trained. Only material relating to flying and airports will be taught. It cannot happen anywhere other than at an airport, including for the reasons outlined in paragraph 13. The activities are therefore properly characterised either as being for the purposes of an "airport" as defined (and as outlined in paragraphs 9 to 17), or as ancillary to that purpose (as outlined in (a) and (b) in this paragraph 20).

21. Furthermore, in the context of the development proposed by our client, only those who are involved in the pilot training will make use of the proposed accommodation facilities, and only for the duration of their involvement in the training. No other person will be able to make use of the accommodation facilities. This all means they are not general accommodation facilities. This fact, and the fact that housing trainee pilots learning to fly at remotely located airports is inspired by the same purpose as training them, further reinforces that the accommodation is ancillary to the flight training school, consistent with criteria 4 as outlined in paragraph 20 above (ie "ordinarily incidental or ancillary to buildings/facilities [including training facilities] that are related to a place used for the taking off and landing etc of aeroplanes").
22. We draw the Council's attention to recent decision of the Land and Environment Court of NSW in *Nessdee Pty Limited v Orange City Council* [2017] NSWLEC 158 (*Nessdee*). In that case Preston CJ considered a development application for a heliport at Fredricks Valley. Significantly, in addition to helicopter flights the development for which consent had been sought included classroom-based pilot training and accommodation for trainee pilots. Preston CJ accepted that these components could be understood as being ancillary components of the heliport and that a condition of consent could be imposed which limited the use of the pilot accommodation and classrooms to pilots undergoing training. The same reasoning applies to our client's application.
23. The classroom-based pilot training and pilot accommodation approved in *Nessdee* was of a smaller scale than that proposed by our client. However, the Council would be wrong to use this as a basis to distinguish the case from the development proposed, as outlined at paragraph 19.

PERMISSIBILITY UNDER ISEPP

24. Clause 23 of the *State Environmental Planning Policy (Infrastructure) 2007* ("**ISEPP**") provides that development for a range of additional purposes may be carried out on land within the boundaries of an existing "air transport facility", if the development is ancillary to the air transport facility. Those additional purposes include, relevantly: (d) "*premises for retail,*

business, recreational, residential or industrial uses"; and (e) "tourist and visitor accommodation".

25. We note that the operation of clause 23 of ISEPP, having regard to our comments in paragraphs 7 and 12 about use of the word "associated" in the definition of "airport" (which of course is part of the definition of "air transport facility" used in clause 23 of ISEPP) means that "premises for retail, business, recreational, residential or industrial uses" (subclause (d)) and "tourist and visitor accommodation" (subclause (e)) are permissible if ancillary to:

- (a) a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes; or
- (b) buildings, installations, facilities and movement areas that are correlated with, allied with, related to or connected with [by virtue of the word "associated" in the definition of "airport" in clause 21 of the ISEPP] any place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes.

26. As noted above, the visitor accommodation facilities in the proposed development are strictly and exclusively limited to those participating in the flight training activities and only for the duration of such participation, and so are clearly "visitor accommodation" (within the meaning of subclause (e) of clause 23 of the ISEPP) that is ancillary to:

- (a) a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes; or
- (b) buildings, installations, facilities (eg for pilot training) and movement areas that are allied with, related to or connected with [by virtue of the word "associated" in the definition of "airport"] any place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes.

This establishes permissibility under ISEPP, which permits ancillary use of this nature.

27. Similarly, the activities of the proposed flight school can be considered to be captured by the wording in subclause (d) of clause 23 of the ISEPP (namely, "premises for retail, business, recreational, residential or industrial uses"). Again, given that these activities are exclusively for the purposes of the operation of pilot training and the airport (and are not for general or unrelated retail purposes - such as a pet store or a car yard or fishing school for example - that have no connection to an "airport" as defined), then such premises and uses are ancillary to:

- (a) a place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes; or
- (b) buildings, installations, facilities (eg for pilot training) and movement areas that are allied with, related to or connected with [by virtue of the word "associated" in the definition of "airport"] any place that is used for the landing, taking off, parking, maintenance or repair of aeroplanes.

Again, this establishes permissibility under ISEPP, which permits ancillary use of this nature.

A NOTE ABOUT SCALE

28. In its letter of 15 March 2018 the Council has incorrectly placed significant weight on the "scale" of the proposed flight training school. However, the scale of a flight training school is, itself, necessarily limited by the scale of the airport at which the training takes place. This is because aviation regulations in Australia set limits on the number of aeroplanes that can take off and land within given airspace. As a result, the maximum scale of a flight training school at a small airport can never be the same as the maximum scale of a flight training school at a larger airport. Accordingly, it is not conceptually possible for the scale of a flight school to exceed the scale of the airport, as the scale of the flight school's activities will, itself, be limited by the scale of the airport. This relationship between the flight school and an airport further demonstrates

that a flight school cannot be dominant over an airport, given that it instead relies on and is limited by the airport itself.

SUMMARY

29. In summary, an analysis of the statutory framework regulating the permissibility of the proposed development together with a common sense appraisal of our client's application reveals that the flight school proposed by our client is permissible development on the subject site.
30. For the reasons outlined in this letter, our client urges the Council to reassess the permissibility of the development and, in due course, recommend that the regional planning panel approves the development application on its merits.
31. If the Council requires any clarification of the issues discussed in this letter, please contact the writer or Andrew Brickhill.

Yours faithfully
BRADLEY ALLEN LOVE



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