

11 December 2018

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Dear Madam,

RE: 2017STH027 DA PROPOSED RECREATIONAL FLIGHT SCHOOL 1070 PRINCES HIGHWAY, FROGS HOLLOW

We refer to the Council Assessment Report prepared by Bega Valley Shire Council in respect of 2017STH027 DA for a proposed recreational flight school at 1070 Princes Highway, Frogs Hollow. In response to Council's recommendation, we provide the following information for the consideration of the Southern Regional Planning Panel.

This information has been prepared at short notice, as you can appreciate; however, we trust that it assists the Planning Panel in its determination of this matter.

Yours sincerely,
NGH Environmental

A handwritten signature in black ink, appearing to read 'Stephanie Anderson'.

Stephanie Anderson
Town Planner
Ph. 6923 1538

That development application 2017.445 be refused for the following reasons:

1. ***For the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 (as amended), comments on revised information submitted by the applicant has not been received from the NSW RMS to determine the accessibility of the site concerned and any potential traffic safety, road congestion or parking implications of the development, in accordance with Schedule 3 of the SEPP (Infrastructure) 2007.***

1. Council's basis for refusal in respect of Item 1 cites Schedule 3 the State Environmental Planning Policy (Infrastructure) 2007 (ISEPP). However, Schedule 3 does not contain provisions in relation to establishing "the accessibility of the site concerned and any potential traffic safety, road congestion or parking implications of the development", as stated by the Council. Schedule 3 only lists the specified traffic-generating developments that are to be referred to the RMS.

The matters relevant to Schedule 3 are contained in clause 104 of the ISEPP. With respect to the RMS, this clause requires the consent authority to notify the RMS within 7 days of the application being made and to consider any submission provided by RMS within 21 days of their receipt of the notification. Should a submission from the RMS not be forthcoming within 21 days, contrary to Council's opinion, clause 104 does not require the application to be refused. There is no requirement for RMS concurrence under clause 104 of the ISEPP, only the opportunity for RMS to make a submission to the Council. There are no provisions within clause 104 that prevent the Council from granting consent.

Additionally, clause 104 requires the *consent authority* to consider accessibility of the site and any potential traffic safety, road congestion or parking implications of the development. The Council Assessment Report does not discuss the matters outlined in clause 104(3)(b), as is required under Section 4.15(1)(a)(i) of the *Environmental Planning & Assessment Act 1979*. Instead, Council states that concurrence has not been received at the time of reporting. As outlined above, there is no requirement for concurrence under clause 104 of the ISEPP. While consent will be required for the construction of any works within the road, under s.138 of the *Roads Act 1993*, this is no bar to the approval of the development application.

It is considered that Council's recommendation under Item 1 is flawed for the following reasons:

- i. The recommendation relies on Schedule 3 of the ISEPP, but the Schedule does not prescribe any matters for consideration or satisfaction, as detailed above.
- ii. The recommendation states that RMS comment on "accessibility of the site concerned and any potential traffic safety, road congestion or parking implications of the development" had not been received. The absence of RMS comment on these matters under clause 104 is not a reason for refusal under the ISEPP.
- iii. The matters of "accessibility of the site concerned and any potential traffic safety, road congestion or parking implications of the development" under clause 104 of the ISEPP are a matter the consent authority must consider. The Council Assessment Report does not raise concerns with these matters.
- iv. The Council Assessment Report incorrectly determines that concurrence is required by virtue of clause 104 of the ISEPP. It appears the Council considers clause 4.47 of the *Environmental Planning & Assessment Act 1979* to require refusal based on the absence of RMS concurrence at the time of reporting, although this is not substantiated in the Council Assessment Report. As outlined above, it is section 138 of the *Roads Act 1993* that triggers a requirement for RMS consent, but this does not preclude the granting of consent to the DA.

It is considered that for the reasons outlined above, the Council has not adequately established Item 1 as a reason for refusal.

2. ***For the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 (as amended), the development would be inconsistent with the following aims of Clause 1.2(2)(a)(b)(c)(d)(e)(f) and (h) of the Bega Valley Local Environmental Plan 2013 in terms of:***
- ***The Socio-economic Impact Assessment report does not demonstrate a net benefit to the economic, natural and social resources of the Bega Valley, because the report relies upon the noise and amenity impacts being below acceptable thresholds, and this has not been demonstrated in the noise assessment report,***
 - ***The biodiversity assessment reports provided to Council do not adequately consider the full extent of vegetation clearing proposed, or the extent of impacts upon native remnant vegetation from effluent disposal on the site and required CASA's civil aviation advisory publication (CAAP) 92-1 (1) in terms of available approach and take-off areas. Inadequate consideration has been given to the impacts upon biodiversity with regard to the proposed use of other airports,***
 - ***Inconsistency with the intent for compact and efficient development,***
 - ***The intensity of development is inconsistent with the existing character of Frogs Hollow and would detract from the natural landscape and built form environment of the Bega Valley,***
 - ***The development has not adequately addressed potential impacts on Aboriginal cultural heritage at the site.***
2. It is considered that Council has incorrectly applied the provisions of clause 1.2 of the Bega Valley Local Environmental Plan 2013, given:
- The Aims of the Plan do not control development. The Aims are an aspirational statement of what the Council seeks to achieve through the development control provisions of the LEP,
 - The provisions of clause 1.2 make no requirement for development to address or to be consistent with the Aims of the Plan.

This opinion was confirmed with BAL Lawyers and is included as an attachment to this report. BAL advise:

"The stated aims of a local environmental plan are just that: an aspirational statement of what the Council seeks to achieve through the development control provisions of the LEP. The aims themselves do not control development and there is no statutory requirement for a development application to address or to be consistent with them".

It is considered that for the reasons outlined above, the Aims of the Plan have been incorrectly relied upon by the Council as a reason for refusal.

3. ***For the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 (as amended), the development is inconsistent with the SP2 Infrastructure zone objectives as it will:***
- ***Significantly increase air traffic within the Frogs Hollow Airport without providing any infrastructure to improve operations or safety at the site.***
 - ***Significantly limit the provision of future infrastructure and development at the site.***
3. It is considered that Council's recommendation under Item 3 is erroneous because:
- The Council has misapplied the zone objectives, given the zone objectives do not themselves control development or dictate permissibility
 - The Council has disregarded the zone objectives
 - The Council Assessment Report does not detail that sufficient weight has been given to the zoning of the subject land, thereby seriously threatening the integrity of the planning process.

Point 1

While the consent authority is required to have regard to the objectives for development in a zone when determining a development application, it is important not to lose sight of the fact that the zone objectives do not themselves control development or dictate permissibility. Rather, they set the framework in which the LEP operates: *Abret Pty Ltd v Wingecarribee Council* (2011) 180 LGERA 343 at [42] – [43] (per Beazley JA).

The relevant objectives here are those for the SP2 zone, which are:

- **To provide for infrastructure and related uses.**
- **To prevent development that is not compatible with or that may detract from the provision of infrastructure.**

These objectives refer to the provision of “infrastructure and related uses”. The particular purpose shown on the Land Zoning Map for this land is “*air transport facility*” and the proposed development is entirely consistent with the objective of providing air transport facility infrastructure.

To give effect to the zone objective does not require that the application include any proposal to “remediate or seal the runways, establish communications infrastructure or provide air traffic control facilities or structures” as the assessment report claims (at p.35).

Point 2

The recommendation states the development is inconsistent with the SP2 Infrastructure zone objectives as Council considers the proposal would not provide infrastructure to improve operations or safety at the site and would limit the provision of future infrastructure and development at the site. These statements indicate a disregard for the zone objectives, as the reasons listed by Council are irrelevant to the stated zone objectives.

The basis for Council's recommendation for refusal is that it considers the proposal would “*significantly increase air traffic ... without providing any infrastructure to improve operations or safety at the site*”. However, the zone objectives do not indicate a desired outcome for development to provide operational or safety improvements.

Council's recommendation also states that the proposal would “*significantly limit the provision of future infrastructure and development at the site*”. The proposed development is permitted in the zone. It is illogical that Council would consider that the zone objectives prioritise future infrastructure, which may never arise, over the proposal.

It is important to note the range of permitted infrastructure uses in the SP2 zone is heavily restricted; thus, it would be difficult to argue that a permitted use was inconsistent with the zone objective of providing for infrastructure and related uses. It is considered unrealistic that Council suggests that the proposed aircraft hangars, workshops and buildings used in connection with flight training are inconsistent with the zone objective of providing infrastructure, given the Zoning Map designates the purpose of the site as air transport facility.

Point 3

The Council Assessment Report does not give appropriate weight to the zoning of the subject land in the assessment of the proposal. As McClellan CJ said in *BGP Properties v Lake Macquarie Council* (2004) 138 LGERA 237 (at [117]) (omitting references):

“In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site. Although the fact that a particular use may be permissible is a neutral factor, planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects. Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened.”

Council acknowledges that the proposed development is permissible in the zone, as outlined in the Assessment Report (at page 34).

Between February and April 2018, Council contended that the proposal was not permissible and sought withdrawal of the development application. This caused delay to the assessment and finalisation of the development application. It is noted that this matter is not acknowledged in the Council Assessment Report, except to state that Council sought legal advice from Senior Counsel and was advised that the land use is permissible in the SP2 zone (p.34).

4. For the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 (as amended), the proposed development is inconsistent with the objectives of Clause 4.3(a) of the Bega Valley Local Environmental Plan 2013 with regard to retaining the existing character and landscape of the locality.

4. The Council has incorrectly applied the objectives in the assessment of the proposal. Clause 4.3(a) is not relevant to this application as the total height of buildings proposed does not exceed the maximum height of buildings permitted by the LEP. The objectives of the clause only outline what the clause seeks to achieve and do not constitute a statutory requirement for development to observe or to be compliant with. Because the application complies with the minimum height of building standard, the objective of clause 4.3(a) is irrelevant.

Furthermore, Council's recommendation for refusal on these grounds is inconsistent with the provisions of Section 4.15(2) of the *Environmental Planning & Assessment Act 1979*, whereby, if an environmental planning instrument (EPI) contains a non-discretionary standard and the development complies with that standard, then the consent authority

"(a) is not entitled to take those standards into further consideration in determining the development application, and

(b) must not refuse the application on the ground that the development does not comply with those standards, and

(c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards. "

Therefore, the *Environmental Planning & Assessment Act 1979* prevents the development from being refused on these grounds.

5. For the purpose of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 (as amended), inadequate information has been provided to consider the potential impact on Aboriginal Archaeology over the site given the moderate to high possibility of it being present within the site and failure to identify mitigation measures required by Clauses 5.10 and 6.2 of Bega Valley Local Environmental Plan 2013.

5. The recommendation states that Council has inadequate information to consider Aboriginal Archaeology in respect of clause 5.10 Heritage conservation of the BVLEP 2013 and a failure to identify mitigation measures. However, an Aboriginal Cultural Heritage Due Diligence Assessment (ACHDDA) was prepared and provided to the Council and is included as an Appendix to Council's report. The ACHDDA details the results of database searches, literature reviews and field survey that involved the Bega Local Aboriginal Land Council. According to the ACHDDA, there are no identified or registered Aboriginal objects on the site and the site is not an Aboriginal place of heritage significance.

Given the low visibility provided by the groundcover and the professional knowledge of the consultant of how Aboriginal groups occupied landscapes, the ACHDDA made a recommendation to carry out subsurface investigations as subsurface objects are considered to have potential to occur on the site. Subsurface investigations are governed by OEH provisions outlined in the OEH 'Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales'.

The Aboriginal Cultural Heritage Due Diligence has identified an entirely appropriate way forward that would identify any subsurface objects, should they be present. This accords with the appropriate assessment strategy outlined in the *National Parks and Wildlife Act 1974* and associated Regulations, Codes of Practice and Guidelines. The proponent has committed to undertake further investigations prior to commencing any works on-site. The implementation of such a condition of consent will ensure any impacts on Aboriginal Archaeology would be appropriately managed.

It is considered that consent authority is able to make an assessment on Aboriginal cultural heritage with regard to the relevant statutory considerations. As outlined above, the development application is not integrated development, as the Environmental Planning & Assessment Act 1979 (EP&A Act) recognises Aboriginal objects as those that are known prior to the making of the development application. This would also apply with regard to the provisions of clause 5.10 of the BVLEP 2013.

Additionally, the Council has not correctly interpreted the provisions of clause 5.10 of the BVLEP in its assessment. It is noted that provisions of clause 5.10 of the BVLEP 2013 that are relevant to Aboriginal Archaeology include subclauses (2) (8) and (10). However, pursuant to subclause (2) there is no requirement that the consent authority *consider* any matters. Subclause (2) is a provision that requires consent be sought by a proponent to undertake any of the actions identified. As previously outlined, the subclause is not relevant as the development does not propose any such actions.

Subclauses (8) and (10) relates to the carrying out of development in an Aboriginal place of heritage significance, which is not applicable to the subject land as it is not a declared or registered Aboriginal place of heritage significance.

The recommendation cites inadequate information to consider the potential impacts on Aboriginal Archaeology and failure to identify mitigation measures required by clause 5.10 of the BVLEP 2013. However, clause 5.10 does not contain such provisions.

(1) Objectives	The objectives outline what the clause seeks to achieve and do not constitute a statutory requirement for development to observe or to be compliant with.
(2) Requirement for consent	Development consent is required to be sought where the development proposes any action referred to in subclause (2)(a) to (2)(f). It does not specify matters to be considered in assessing any application. It is not proposed to demolish or move an Aboriginal object as there are no known/registered Aboriginal objects on the subject land.
(3) When consent not required	Not applicable.
(4) Effect of proposed development on heritage significance	Not applicable. This subclause relates to the consent authority granting consent in respect of a heritage item or heritage conservation area. Neither a heritage item or conservation area would be affected by the proposal.
(5) Heritage assessment	Not applicable. This subclause relates to the consent authority granting consent in respect of a heritage item or heritage conservation area. Neither a heritage item or conservation area would be affected by the proposal.
(6) Heritage conservation management plans	Not applicable. This subclause relates to the consent authority granting consent in respect of a heritage item. A heritage item would not be affected by the proposal.
(7) Archaeological sites	Not applicable. An archaeological site is defined under the BVLEP 2013 as “a place that contains one or more relics”. A relic is defined under the <i>Heritage Act 1977</i> as “any deposit, artefact, object or material evidence that: (a) relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement, and

	(b) <i>is of State or local heritage significance.</i> An archaeological site would not be affected by the proposal.
(8) Aboriginal places of heritage significance	Not applicable. The subject land is not an Aboriginal place of heritage significance.
(9) Demolition of nominated State heritage items	Not applicable. A State heritage item would not be affected by the proposal.
(10) Conservation incentives	Not applicable. This subclause relates to the consent authority granting consent in respect of a heritage item or an Aboriginal place of heritage significance. Neither a heritage item or an Aboriginal place of heritage significance would be affected by the proposal.

The recommendation also states that Council has inadequate information to consider Aboriginal Archaeology in respect of clause 6.2 Earthworks in the BVLEP 2013. However, the Council's assessment has also incorrectly applied the provisions of this clause. Council considers "relics" to refer to Aboriginal objects; however as outlined in the table above, relics are defined by the *Heritage Act 1977* as

"any deposit, artefact, object or material evidence that:

- (a) relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement, and*
(b) is of State or local heritage significance."

Clause 6.2 of the BVLEP 2013 prescribes no matters that are related to Aboriginal objects, only deposits, artefacts, objects or material evidence of State or local heritage significance as related to non-Aboriginal settlement. The development would not be considered to have any impact on any items of NSW non-Aboriginal settlement and the Council Assessment Report raises no concerns in relation to these matters. It is considered that the Council has not correctly interpreted the provisions of clause 6.2.

In any event, the potential impacts from earthworks can be appropriately addressed by conditions of consent.

6. For the purpose of Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 (as amended), the proposal does not satisfy the criteria of Sections 5.4 and 5.7 of the Bega Valley Development Control Plan 2013 pertaining to the socio-economic impacts of the development and onsite sewerage management.

6. Firstly, it is noted that, under the *Environmental Planning and Assessment Act 1979* and relevant case law, development control plans are considered to be guiding provisions only. Section 4.15(3A) of the Act provides the following:

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and*
(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and
(c) may consider those provisions only in connection with the assessment of that development application

In any event, Section 5.4 Social and economic impacts under the BVDCP 2013 does not contain standards, controls or performance criteria dictating what a proposal must achieve. Section 5.4 outlines in what circumstances a Socio-Economic Impact Assessment (SIA) would be required by the Council, what the objectives of requiring a SIA are and what the SIA will address. It is noted that the SIA was prepared in accordance with a brief supplied by the Council on Friday 16 February 2018.

The Council Assessment Report provides discussion in relation to Section 5.4 of the DCP (p.39); however, the assessment considers the proposal against the points under Section 5.4.1 of the DCP, being what the objectives of requiring a SIA are. These provisions are not relevant to assess the proposal itself.

The recommendation cites that the proposal does not satisfy the criteria of Section 5.4 of the DCP. Whilst the Council may consider the proposal would result in a detrimental impact as outlined in its conclusion in respect of Section 5.4, the Council Assessment Report does not establish the reason for refusal in respect of Section 5.4. There are no identified criteria to be achieved under Section 5.4, only proposal types for which Council would require a Socio-Economic Impact Assessment (SIA), what the objectives of requiring a SIA are and what the SIA will address.

In respect of Section 5.7 On-site Sewerage Management of the DCP, it is noted that the Council Assessment Report does not include an assessment of the proposal against the requirements contained in this section. It is considered that this reason for refusal has not been adequately established.

It is noted that the installation and operation of an on-site wastewater management system is subject to two further approvals from Council and would be accompanied by a detailed geotechnical and engineering assessment. It is considered that an acceptable outcome can be achieved by way of implementing a condition of consent in this regard.

7. ***For the purpose of Section 4.15(1)(b) the development will have an adverse impact on the amenity of the area due to noise generation. Insufficient information has been provided to describe the extent and nature of the likely impacts of the development on surrounding areas. Therefore there is inadequate information to determine that the noise impacts are acceptable.***
7. The Council relies on advice provided by their consultant Marshall Day in arriving at this conclusion. Renzo Tonin & Associates, who prepared the Noise Impact Assessment (NIA), has provided a written response to the matters raised by Marshall Day and the noise impacts cited in the Council Assessment Report. It is included as an attachment to this submission.

In response to Council's question:

"Whether the assessment report adequately describes the likely noise impacts at each of the sensitive receivers"

Marshall Day provides the following response:

"The information format in the updated RTA report is not considered sufficient to describe the likely noise impacts at each of the noise sensitive receivers. Aircraft noise can be, and is, described in many ways. It is considered best practise, that when using and selecting aircraft noise descriptors, they be selected to match the needs of the proposal. In this case, areas proposed to be subjected to relatively low noise levels but a high number of movements. Aircraft noise is highly variable and complex to communicate to affected communities. It is for this reason that a range of publications, including SA HB 149, provide recommendations for information to provided in a range a range of formats that are related to the way in which the aircraft noise impacts are perceived".

It is considered that the response from Marshall Day is vague and does not assist Council to conclude there is insufficient information to describe the extent and nature of the likely impacts of the development on surrounding areas. Marshall Day states that aircraft noise can be described in many ways, indicating a difference of opinion.

Marshall Day states that it is considered best practice to select aircraft noise descriptors to match the needs of the proposal. As established in the response provided by Renzo Tonin, the aircraft noise descriptors are considered to be appropriate to the proposal. They account for the surrounding receptors being newly exposed to this level of noise. LAeq,24hr 55dB(A) is a noise level that is a conversion of ANEF20. ANEF20 is considered to be appropriate for residential uses according to AS2021. However, Renzo Tonin accounts for the surrounding receptors being newly exposed to this level of noise by providing an additional safeguard of a 7dB(A) reduction in the noise criteria to LAeq,24hr 48dB(A). LAeq,24hr 48dB(A) is a conversion of ANEF13. It is considered that the information supplied by Renzo Tonin in the NIA and in the attached response outlines how the selected aircraft noise descriptors match the needs of the proposal and align published industry documents.

Marshall Day states that SA HB 149 provide recommendations for information to be provided in a range of formats that are related to the way in which the aircraft noise impacts are perceived. It is acknowledged that SA HB 149 provides guidance on how to present information about aircraft noise to the community and stakeholders to assist them in making their own judgement about aircraft noise. The handbook specifically states:

“It is not a standard and does not propose any absolute value for when aircraft noise is acceptable or unacceptable.”

It is considered that the Marshall Day advises recommends *additional* formats that the results of the noise impact assessment (NIA) could be provided in but does not establish that the NIA is insufficient.

Marshall Day considers the use of AS2021 and the LAeq,24hr 55dB(A) criterion in the NIA to be an issue. However, as established by Renzo Tonin, the NIA does not specifically use AS2021; it only discusses AS2021 in outlining the suitability of the criteria LAeq,24hr 48dB(A) to assess the proposal. As indicated above, LAeq,24hr 55dB(A) is a noise level that is a conversion of ANEF20, which AS2021 advises is appropriate for residential land uses. Additionally, Renzo Tonin accounts for the surrounding receptors being newly exposed to this level of noise by reducing this criterion by 7dB(A) to LAeq,24hr 48dB(A). LAeq,24hr 48dB(A) is a conversion of ANEF13.

Importantly, this approach was supported in a recent NSW Land and Environment Court matter *Nessdee Pty Ltd v Orange City Council* (NSWLEC 158, Decision date 28 November 2017). The matter related to a heliport offering a large number of joy flights from a winery in a rural locality. The use of the criterion of LAeq,24hr 48dB(A) as a conversion of ANEF13 was agreed upon by both the applicant's and the defendant's aircraft noise experts.

Where Marshall Day consider the Renzo Tonin and 'Nessdee' criteria to be unsuitable, it is suggested that the noise impacts should be presented as N- contours. However, the NIA presented information that is easily interpreted, certainly by an acoustic expert, as an N70 contour, being assessment of the measured aircraft noise levels against an LASmax 70dB(A) noise level. As can be seen from the NIA, there are no receptors that would be exposed to a level above LASmax 70dB(A) noise level (the equivalent of the N70 contour). Only a receiver sited on the runway would be exposed to this noise level.

Marshall Day states that in a rural area *“an aircraft flying overhead at a noise level of 70 dB LASmax would likely be perceived or as intrusive as an aircraft flying overhead at a noise level of 60 dB LASmax”*. Therefore, they suggest the 60 dB LASmax be used. However, it is considered that this “perception” between 70 and 60 dB LASmax is not substantiated by Marshall Day. Further, Marshall Day do not establish why they consider 70 dB LASmax to be inappropriate when they acknowledge that 70 dB LASmax *“is based on Table E1 of AS 2021 can be directly used to assess in-air activities of small aerodromes, which recommends a LASmax < 70dB(A) limit for more than 30 flights per day. As discussed above, AS 2021 is primarily concerned with land use planning, and this table is included in AS 2021 to inform land use planning requirements around aerodromes which do not have an ANEF prepared”*. These conditions are consistent with what is being proposed.

Renzo Tonin notes *“that the N70 or N60 contours are not noise limits or assessment criteria, instead they are intended as information that is provided to the community and stakeholders to provide an understanding of potential noise levels over LASmax 70dB(A) or 60dB(A), respectively, for areas in the vicinity of an aerodrome / airport.”*

Renzo Tonin stand by the approach taken in the NIA and this approach is also substantiated independently in the Nessdee matter. It is considered that the matters raised by Marshall Day are a difference of professional opinion. It is considered that no evidence has been presented that undermine the suitability of the criteria utilised by Renzo Tonin in the Noise Impact Assessment. The results of the NIA indicate that the surrounding receptors would be exposed to a level of noise that is acceptable with regard to their new exposure and residential nature.

As indicated in the information supporting the development application, it is proposed that the facility would be established over nine progressive stages. Accordingly, the intended flight training would commence with a low level of activity and corresponding low levels of noise. The flight training would progress incrementally.

It is considered that noise impacts can be monitored at regular intervals throughout the life of the proposal and compliance with the criteria ensured prior to progressing to the next stage of the development. This could be appropriately addressed by way of consent conditions.

8. ***For the purpose of Section 4.15(1)(b) the development is not consistent with the following actions of the South East and Tablelands Regional Plan 2036: 9.2, 23.3, 23.5 and 28.3, in relation to:***
- ***The types of nature or eco-based tourism activities endorsed by the plan,***
 - ***Protection of the region's heritage, and***
 - ***Managing land use conflict.***
8. The South East and Tablelands Regional Plan 2036 is a strategic document that “*is an overarching framework to guide more detailed land use plans, development proposals and infrastructure funding decisions*”. The Regional Plan guides land use planning priorities and decisions but does not require that development be consistent with its aims and actions.
- Section 4.15(1) of the *Environmental Planning & Assessment Act 1979* details the matters for consideration in evaluating the application. The Regional Plan, as a strategic document that is not an environmental planning instrument nor a development control plan, should not be given significant or determinative weight in determining the application. It is considered that the Regional Plan has been incorrectly relied upon by the Council as a reason for refusal.
9. ***For the purpose of Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 (as amended), the application has not adequately considered the full extent of likely impacts upon the natural environment, including:***
- ***The clearing of identified Endangered Ecological Community Lowland Grassy Woodland in order to comply with the physical dimensions of CASA's civil aviation advisory publication CAAP 92-1 (1).***
 - ***The disposal of effluent upon identified Endangered Ecological Community Lowland Grassy Woodland at the site.***
 - ***The required works to the runways to comply with the physical requirements of CAAP 92-1 (1).***
9. The recommendation cites that the full extent of likely impacts have not adequately been considered as compliance with the physical dimensions of CASA's civil aviation advisory publication CAAP 92-1 (1) would require earthworks as well as clearing of identified Endangered Ecological Community (EEC) Lowland Grassy Woodland on the site. This reasoning relies on compliance with CAAP 92-1(1) being a mandatory requirement. However, as detailed to Council by CASA in their correspondence dated 13 November 2017 and acknowledged in Council's assessment report CAAP 92-1 is an advisory publication only.

The development proposal has considered and advised Council of proposed tree clearing required in association with the development. In the unlikely event additional tree clearing is proposed, the legislative framework of the *Biodiversity Conservation Act 2016* and Vegetation in Non-Rural Areas SEPP require that consent be sought from the Council. In this regard, there would be no tree clearing without associated impacts and acceptability being first assessed by the Council and a permit being obtained.

As outlined above, the disposal of wastewater on-site is expected to have no adverse impacts on the vegetation communities present. All wastewater will be treated to an advanced secondary standard with disinfection, as described in the accompanying On-site Wastewater Management Plan and Addendum report. These reports demonstrate that the size and nature of the site, combined with the intended disposal areas/procedures allow for sufficient phosphorus absorption capacity.

As noted in the SEE Addendum, the Lowlands Grassy Woodland EEC that is present on the subject site can tolerate soils with a reasonable level of fertility and nutrients. The *Conservation Advice for Lowland Grassy Woodland in the South East Corner Bioregion* (2013) provides a description of the EEC and states:

Former strongholds include the Bega and Cobargo valleys and the Moruya area with smaller patches at Belowra, in the upper Towamba Valley and a few locations (with higher soil fertility) closer to the coast (e.g. Coila, Bingie Bingie, Tanja and Goalen Head) (Miles, 2006; NSW Scientific Committee, 2007; Tozer et al., 2010) including basalt derived clay loams in coastal areas of the Eurobodalla Shire (e.g. Congo) (NGH Environmental, 2007).

*The ecological community is associated with rainshadow areas (mean annual rainfall 750 – 1100 mm/year) on undulating terrain at altitudes below 500 metres above sea level (asl). These areas usually occur on relatively **fertile soils on granite substrates** or other igneous rock (e.g. adamellites, granites, granodiorites, gabbros) or occasionally on soils derived from Ordovician metasediments and basalt, where they occur within granite areas (e.g. acid volcanic, alluvial and fine-grained sedimentary substrates).*

The Committee's advice above clearly indicates that the EEC is found in area of fertile soils derived from igneous geology. The EEC is not found on poor sandy soils and as such is not sensitive to higher levels of fertility. Australian native plants that are sensitive to high soil fertility occur on soils with low fertility that or often very sandy or have little soil.

The subject land is recorded on the Bega – Murrumbidgee Geological Sheet (SJ55-4) as a Kameruka Granodiorite. The soils associated with the site are relatively fertile due to the nature of the granite geology. This is not surprising given the occurrence of the EEC above and provides a strong indication of the subject lands fertility. The vegetation in the derived grassland on the runways is unlikely to be sensitive to higher soil fertility due to its nature. The treated wastewater proposed to be irrigated to the runway areas would have some phosphorus but is low in other nutrients.

The clayey nature of the soils on the site also have the ability to absorb phosphorus and bind it chemically making it unavailable for plants. The disposal area has been sized by consulting engineers to meet the NSW guidelines for on-site sewage disposal. This includes ensuring that the site can absorb the nutrient loads applied.

The Committee's advice on the threats to the Lowlands Grassy Woodland EEC identify:

- *weed invasion;*
- *inappropriate fire regimes;*
- *inappropriate grazing regimes;*
- *dieback;*
- *land clearing, particularly for rural residential development; and*
- *other impacts associated with fragmentation of remnants.*

The threats above are centred on impacts from the disturbance and clearing of vegetation. The proposed development would eliminate grazing by livestock, as part of the offsets accepted by OEH. This would also minimise weed invasion from moving stock and soil disturbance. The site would be actively managed by way of a Vegetation Management Plan to OEH satisfaction and implemented in perpetuity. As stated in the Council Assessment Report *"Council considers that securing the protection of the endangered Lowland Grassy Woodland community outside the main development footprint would be an important measure to offset the proposed impacts. Importantly, if the condition of the vegetation is improved and maintained overtime through a vegetation management plan (VMP) the offset would be of greatest value and consistent with conserving and enhancing the vegetated EEC located onsite [emphasis added]."*

10. For the purpose of Section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 (as amended), the application has not adequately considered the social and economic impacts in the locality, as the Socio-economic Impact Assessment is based on a Cost Benefit Analysis that is for a different sector (transport), and not appropriate to the sector (education) that the proposal relates to.

10. The recommendation relies on Council's contention that the Cost-Benefit Analysis is incorrect because it is based on the transport sector, whereas Council considers the education sector to be the more appropriate sector for the proposal. A response from Judith Stubbs & Associates, the consultant who prepared the Socio-economic Impact Assessment (SIA), is attached and copied below.

At a number of places, Council states that the Cost Benefit Analysis cannot be relied upon because it is for transport rather than education. There are a number of problems with this statement. First, concerns regarding safety and amenity impacts are related to the nature of the use in the locality (flying) and not to classroom based activities. Transport guidelines take these types of impacts into account as their consideration is integral to this use, noting also that there are no guidelines regarding how to consider or value these types of impacts in relation to an educational facility, most likely because these are not generally associated with classroom-based activities.

Secondly, the Social Impact Assessment prepares a Cost Benefit Analysis using the widely accepted methods of Cost Benefit Analysis. The methods do not change with the type of project or development being assessed. The SIA relies on the methods found in NSW Government Guide to Cost-Benefit Analysis. That document states (at page ii) that:

This Guide clarifies that the CBA principles and framework apply to all Government policies and projects – not just capital expenditure. This Guide applies to any new or altered capital, recurrent or regulatory action for any policy, program, project, proposal or initiative. The terms above are used interchangeably as necessary throughout this Guide, but the overall premise is that this Guide applies to all significant Government actions and decisions. (Emphasis added).

The universality of application is noted.

Thirdly, the Cost Benefit Analysis relies, in part, on data from Principles and Guidelines for Economic Appraisal of Transport Investment and Initiatives.¹⁰ This is because this document provides publicly accepted and widely used estimates of cost for a range of externalities associated with transport projects (and similar to the externalities that will be generated by the approval of the development application). Externalities valued in that document and used in the Benefit Cost Analysis are:

- Amenity costs
- Willingness to pay to avoid death or injury.

These impacts are relevant considerations, a point with which many resident submissions would appear to agree.

11. For the purpose of Section 4.15(1)(c) of the Environmental Planning and Assessment Act 1979 (as amended), the application fails to demonstrate that the development site is suitable for the intended use, in relation to the following matters:

- **Impact on the amenity and character of the Frogs Hollow Area and also to the amenity around other airports that would be utilised for the flight school.**
- **The capacity of the site to undertake the required quantity of flight circuit training for the number of students proposed, and lack of certainty that the excess can be accommodated at the other nominated airports.**
- **Whether the site is capable of complying with CASA's civil aviation advisory publication (CAAP) 92-1 (1) in terms of available approach and take-off areas.**
- **Whether the site is compliant with Recreational Aviation Australia's Operations Manual with regard to topography and surrounding vegetation.**
- **Proximity to the central waste facility (Council landfill site) at Wanatta Lane, Frogs Hollow which, within a distance of 3kms, is an incompatible land use to an aerodrome according to Airport Practice Note 6: Managing Bird Strike Risk Species Information Sheets released by the Australian Airports Association.**
- **Consideration of the meteorological constraints of the site, including sunrise/sunset times in winter, wind, rain and fog, or how the proposed scale of flight training operations, with regard to the limitations of the aircraft, can be adequately performed at the site or at other airports that would support the proposed flight school.**

11. Section 4.15(1) of the Environmental Planning and Assessment Act 1979 states that the consent authority is to take into consideration the suitability of the site for the development.

Item 11(a)

The Council Assessment Report considers that the amenity of the Frogs Hollow area would be impacted by noise from the proposed development and that there is insufficient information to determine the acceptability of these impacts. This is addressed in relation to Recommendation Item 7 above.

It is also noted that whilst the locality is considered to be rural or rural residential, the subject land is zoned SP2 Infrastructure. An air transport facility and related uses are permitted on the site and these should not be expected to be consistent with the character of adjacent land. It is considered the Council Assessment Report does not give appropriate weight to the zoning of the subject land in the assessment of the proposal.

Item 11(b)

As indicated in the attachment from BAL Lawyers:

Section 4.15(1)(b) of the EPA Act requires the consent authority to consider the likely impacts of proposed development both on the development site itself but also more broadly, including in the locality in which the development will be carried out and elsewhere. The Report has considered the likely impacts to the Land and the locality, but also to other airfields which are proposed to be used for training associated with the flight school. However, the impact associated with the landing and taking off of aircraft at another airport in another town is something that must reasonably be expected to have been taken into consideration in the approval process for that other airport and is not something that is a relevant matter for consideration in the assessment of this application.

Item 11(c)

The recommendation cites that the full extent of likely impacts have not adequately been considered as compliance with the physical dimensions of CASA's civil aviation advisory publication CAAP 92-1 (1) would require earthworks as well as clearing of identified Endangered Ecological Community (EEC) Lowland Grassy Woodland on the site. This reasoning relies on compliance with CAAP 92-1(1) being a mandatory requirement. However, as Council acknowledges in their report and as CASA itself has stated, CAAP 92-1 is an advisory publication. Further, the physical dimensions outlined in Section 5 of the advisory publication is entitled "Recommended minimum physical characteristics of landing areas and water alighting areas".

Item 11(d)

It is considered that matters referenced in the Recreational Aviation Australia Operations Manual would be a matter for RAA to consider in its evaluation of certification for the proposed flight training school.

Item 11(e)

"Airport Practice Note 6: Managing Bird Strike Risk Species Information Sheets released by the Australian Airports Association" was originally adapted from "Guideline C of the National Airport Safeguarding Framework released by the Department of Commonwealth Department of Infrastructure, Regional Development and Cities". It is noted that the Biodiversity Addendum includes consideration of the potential for bird strike and proposes mitigation measures to manage any residual risks. Additionally, vermin risks and the attraction of birds was considered in Section 3.11.3 of the Environmental Impact Statement relating to the Council landfill site at Wanatta Lane. Mitigation measures were proposed in the EIS and it is anticipated that they are implemented at the landfill site.

Item 11(f)

In relation to the meteorological constraints Council cites, it is noted that there is considerable flexibility in the flight training schedule given only 15 flight training days are proposed each month of flight training. In addition, Council's assessment of the constraints of the daily schedule of flight training relies on the average time of take-off and landing to be 2.5 minutes; however as previously advised, this can safely occur in a timeframe of 1 minute. It is noted that proposal would be bound by operational times and aviation regulations.

In respect of meteorological constraints at other airports, it is noted in the attachment from BAL Lawyers:

Section 4.15(1)(b) of the EPA Act requires the consent authority to consider the likely impacts of proposed development both on the development site itself but also more broadly, including in the locality in which the development will be carried out and elsewhere. The Report has considered the likely impacts to the Land and the locality, but also to other airfields which are proposed to be used for training associated with the flight school. However, the impact associated with the landing and taking off of aircraft at another airport in another town is something that must reasonably be expected to have been taken into consideration in the approval process for that other airport and is not something that is a relevant matter for consideration in the assessment of this application.

- 12. In accordance with Section 4.15(1)(d) of the Environmental Planning and Assessment Act 1979 (as amended), Council has reviewed the submissions received, and note that several matters were raised of relevance to the assessment of this application. The development as proposed is not in the public interest.**
12. The Council Assessment Report relies on the precautionary principle in concluding that the proposal is not in the public interest. However, it is considered that the Council has incorrectly interpreted and applied the precautionary principle. Council cites the Telstra decision; for which we have sought legal advice from BAL Lawyers who advises the following

"The Telstra decision referred to in the assessment report (Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256) held that the application of the precautionary principle and the associated need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds which are cumulative: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage.

Neither condition exists here. First, there is no threat of serious or irreversible environmental damage. Secondly, there is no relevant scientific uncertainty as to any environmental damage. The likely noise impacts of the proposed development do not relevantly constitute "environmental damage" and, even if they did, those impacts have been fully assessed by the applicant's noise expert and could not be described as being either "serious" or "irreversible". As there is no threat of serious or irreversible environmental damage, there is no occasion to evaluate any "scientific uncertainty" (Telstra at [137] and [138]).

In any event a difference of views between noise experts about the appropriate methodology to use in evaluating noise impacts does not equate to "scientific uncertainty" about any environmental damage. The Panel is clearly required to consider the likely noise impacts associated with the proposed development but the precautionary principle has no part to play in the circumstances here."

It is considered that the Council has not adequately established Item 12 as a reason for refusal as it has incorrectly interpreted and applied the precautionary principle in concluding the proposal is not in the public interest.

- 13. For the purpose of Section 4.15(1)(e) of the Environmental Planning and Assessment Act 1979 (as amended), there is a threat of serious environmental damage and therefore the precautionary principle applies. In this instance, refusal of the application based on a lack of information is considered to be the most appropriate option and affords the appropriate degree of precaution.**

13. The recommendation states there to be a threat of serious environmental damage. In the Council Assessment Report, it is stated that the noise impacts and impacts to the EEC constitute environmental damage. However, the noise impacts do not relevantly constitute environmental damage and the concerns for impacts on the EEC would not constitute "a threat of serious or irreversible environmental damage". Additionally, the Telstra decision cited that the application of the precautionary principle and the associated need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds which are cumulative: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. As there is no threat of serious or irreversible environmental damage, there is no occasion to evaluate any "scientific uncertainty" (Telstra at [137] and [138]).

It is considered that for the reasons outlined above, the precautionary principle has been incorrectly relied upon by the Council as a reason for refusal.



10 December 2018

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Our Reference
180589

Your Reference
2017STH027 DA

Dear Panel

Development Application 2017.445

We act for the Sports Aviation Flight College Australia Ltd, the applicant for the above development application for a Recreational Flight School (**the DA**) at Lot 1 DP 109606; 1070 Princes Highway, Frogs Hollow (**the Land**).

The DA has been assessed by the Bega Valley Shire Council under s.4.15 of the *Environmental Planning and Assessment Act* (**the EPA Act**). We have been provided with a copy of the Council's Assessment Report (**the Report**).

As set out below, the Council's assessment is flawed in a number of respects.

1. State Environmental Planning Policy No 33

- 1.1 The Council has considered the State Environmental Planning Policy No 33—Hazardous and Offensive Development (**SEPP 33**) in the Report (at p.30). SEPP 33 applies to the assessment of development proposals for potentially hazardous and offensive industry or storage.
- 1.2 SEPP 33 does not apply to the proposed development. The proper characterisation of the development is as a recreational flight school. It is not an 'industry' under the *Bega Valley Local Environmental Plan 2013* (**the BVLEP**) and any storage facilities are merely ancillary to the airport or flight school.

2. Consistency with Zoning

- 2.1 The Land is subject to a very specific zoning – SP2 Infrastructure – Air Transport Facility under the BVLEP. This zoning was applied to the Land as recently as 2013, when the BVLEP was made. Within the SP2 zone, development for the purpose shown on the Land Zoning Map, in this case, air transport facility, and any development that is that is ordinarily incidental or ancillary to development for that purpose is permissible with consent.
- 2.2 The zoning of the Land should be given significant weight in the consideration of the DA. As McClellan CJ said in *BGP Properties v Lake Macquarie Council* (2004) 138 LGERA 237 (at [117]) (omitting references):

'In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site. Although the fact that a particular use may be permissible is a neutral factor, planning decisions must generally reflect an

assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects. Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened.'

- 2.3 In our view, the Land's very specific zoning as being suitable for air transport facilities, such as the proposed flight school, should therefore be given significant weight in determining the DA.

3. Inappropriate application of the precautionary principle

- 3.1 The precautionary principle provides that, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation: *Environmental Planning and Assessment Regulation 2000*, sch. 2, cl. 7.

- 3.2 The Report states that the precautionary principle applies to the DA due to the likely impacts of the noise generated by the proposed development (at p.97). In particular, the Report states 'the assessing officer has not been satisfied that the threat of environmental harm (impacts upon EEC) can be adequately mitigated as the likely impacts have not been adequately quantified'.

- 3.3 The Report refers to the decision in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 (***Telstra***) concerning the application of the precautionary principle. In *Telstra*, the Court held that the application of the precautionary principle and the associated need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds, which are cumulative:

- (a) a threat of serious or irreversible environmental damage; and
- (b) scientific uncertainty as to the environmental damage.

- 3.4 Neither condition exists here. First, there is no threat of serious or irreversible environmental damage. Secondly, there is no relevant scientific uncertainty as to any environmental damage. The likely noise impacts of the proposed development do not relevantly constitute 'environmental damage' and, even if they did, those impacts have been fully assessed by the applicant's noise expert and could not be described as being either 'serious' or 'irreversible'. As there is no threat of serious or irreversible environmental damage, there is no occasion to evaluate any 'scientific uncertainty': *Telstra* at [137] and [138].

- 3.5 In any event, a difference of views between noise experts about the appropriate methodology to use in evaluating noise impacts which has occurred in this case does not equate to 'scientific uncertainty' about any environmental damage. The Panel is clearly required to consider the likely noise impacts associated with the proposed development, but the precautionary principle has no part to play in the circumstances here.

4. Aims of the Local Environmental Plan

- 4.1 Part 1.2 of the Report addresses the aims of the BVLEP. However, the stated aims of a local environmental plan are just that: an aspirational statement of what the Council seeks to achieve through the development control provisions of the LEP. The aims themselves do not control development and there is no statutory requirement for a development application to address or to be consistent with them. In our view, the aims of the BVLEP should not be given significant weight in the consideration of the DA.

5. Zone Objectives

- 5.1 Pursuant to cl. 2.3 of the BVLEP, the consent authority is required to have regard to the objectives for development in a zone when determining a development application. The Report addressed this requirement (at p.39). However, it is important not to lose sight of the fact that the zone objectives do not themselves control development or dictate permissibility – rather, they set the framework in which the LEP operates: *Abret Pty Ltd v Wingecarribee Council* (2011) 180 LGERA 343 at [42] – [43] (per Beazley JA).
- 5.2 In any case, the relevant objectives in relation to the DA are those for the SP2 Zone. These objectives refer to the provision of 'infrastructure and related uses'. The particular purpose shown on the Land Zoning Map for the Land is 'air transport facility' and the proposed development is entirely consistent with the objective of providing an air transport facility.
- 5.3 Further, to give effect to the zone objective does not require that the application include any proposal to 'remediate or seal the runways, establish communications infrastructure or provide air traffic control facilities or structures' as the Report claims (at p.35).

6. Consideration of Off-Site Impacts

- 6.1 Section 4.15(1)(b) of the EPA Act requires the consent authority to consider the likely impacts of proposed development both on the development site itself but also more broadly, including in the locality in which the development will be carried out and elsewhere. The Report has considered the likely impacts to the Land and the locality, but also to other airfields which are proposed to be used for training associated with the flight school. However, the impact associated with the landing and taking off of aircraft at another airport in another town is something that must reasonably be expected to have been taken into consideration in the approval process for that other airport and is not something that is a relevant matter for consideration in the assessment of this application.

We request that the Panel considers these issues when looking at the Council's s.4.15 assessment of the application

Yours sincerely
BRADLEY ALLEN LOVE



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11 December 2018

TJ958-03F03 Response to Council (r0)

MS LIZZIE OLESEN-JENSEN

NGH Environmental

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Frogs Hollow Recreational Flight School - Response to Council's Assessment Report

Renzo Tonin & Associates has reviewed the peer review (dated 18 October 2018) undertaken by Marshall Day (MD) on behalf of Bega Valley Shire Council for the noise assessment reports prepared by Renzo Tonin & Associates for the proposed Frogs Hollow Recreational Flight School.

The following responses are provided.

- The MD peer review references the following documents for the assessment of noise impacts from the recreational flight school:

1. *Guidance Material for Selecting and Providing Aircraft Noise Information, 2003 and Expanding Ways to Describe and Assess Aircraft Noise, 2000*

These two documents provide guidance in presenting aircraft noise information, rather than using the information to determine if the aircraft noise complies or exceeds a set noise limit. Also, it is intended for existing airports, rather than new proposed airports.

Nevertheless, Part 2 Section 13 of the 2003 document suggests the use of aircraft noise measurements to prepare a measured N70 chart. N70 refers to an aircraft noise event louder than 70dB(A). As part of the noise assessment presented in the Renzo Tonin & Associates report (ref. TJ958-01 Noise Assessment (r3), dated 11 May 2018), noise measurements of aircraft noise were measured at strategic locations and the results presented in Table 8 of the report indicates that only one (1) measurement was higher than 70dB(A) – when the aircraft was climbing at 200ft and the measurements were conducted directly under the aircraft.

Furthermore, Part 3 Section 16 of the 2003 document suggest that for airports without ANEF contours, “...carry out ‘one-off’ surveys to establish the general location and spread in flight paths and typical aircraft noise levels at nominated monitoring sites.”. The Renzo

Tonin & Associates assessment included noise measurements at nominated locations considered to be representative of the residences most affected by the flight paths or training circuits.

2. *National Airports Safeguarding Framework Guideline A: Measures for Managing Impacts of Aircraft Noise, 2016 (NASAG)*

This document provides guidance for planning authorities in determining if land surrounding an existing airport is suitable for residential development. Therefore, for the purpose of the noise assessment for the proposed Frogs Hollow Recreational Flight School, this guideline is not applicable.

3. *SA HB 149:2016 Acoustics – Guidance on producing information on aircraft noise (SA HB 149)*

This handbook provides guidance on how to present information about aircraft noise to the community and stakeholders to assist them in making their own judgement about aircraft noise. The handbook specifically states:

"It is not a standard and does not propose any absolute value for when aircraft noise is acceptable or unacceptable."

Based on the above statement, the handbook cannot be used to determine if noise from the operation of the Frogs Hollow Recreational Flight School is acceptable or unacceptable.

- The Renzo Tonin & Associates report uses ANEF20 as the noise criterion, which is the defining noise standard. Australian Standard AS2021 is complimentary to the ANEF standard. In order to provide a quantitative assessment, the ANEF20 was converted to an $L_{Aeq,24hr}$ 55dB(A) noise level. However, it was recognised that the flight school would result in people being newly exposed to aircraft noise, so a further 7dB(A) reduction in the noise limit was applied, resulting in an $L_{Aeq,24hr}$ 48dB(A) noise level limit. This noise limit is the same as an ANEF13 when converted accordingly.

MD's peer review questioned the origin of using $L_{Aeq,24hr}$ 48dB(A), or ANEF13. We refer a recent NSW Land and Environment Court case hearing – *Nessdee Pty Ltd v Orange City Council* (NSWLEC 158, Decision date 28 November 2017) – where Paragraph 31 states the following:

"... 13 ANEF (Leq 48dB(A) 24 hour) limit (the noise criterion suggested for persons newly exposed to aircraft operations)."

Therefore, a noise criterion of $L_{Aeq,24hr}$ 48dB(A) was conservatively used in the Renzo Tonin & Associates noise assessment, which provides an absolute noise limit that would achieve acceptable aircraft noise exposure for persons newly exposed to aircraft noise.

- The MD peer review recommends the use of N-contours. Typically, N70 contours are produced for airports, which represents areas where maximum noise levels (ie. L_{ASmax}) are above 70dB(A). The Renzo Tonin & Associates report presents an assessment of the measured aircraft noise levels against an L_{ASmax} 70dB(A) noise level, which is consistent with the use of N70. Table 8 of the report shows that for the measurement of an aircraft climbing at 200ft, it exceeds the 70dB(A) limit. All noise measurements for the other flight activities are less than the L_{ASmax} 70dB(A) noise limit.

Further to this, the MD peer review recommends the use of L_{ASmax} 60dB(A) rather than L_{ASmax} 70dB(A). With this in mind, Table 8 of the Renzo Tonin & Associates report shows only one (1) measurement to be marginally over the 60dB(A) limit (ie. L_{ASmax} 62dB(A) was measured).

It should be noted that the N70 or N60 contours are not noise limits or assessment criteria, instead they are intended as information that is provided to the community and stakeholders to provide an understanding of potential noise levels over L_{ASmax} 70dB(A) or 60dB(A), respectively, for areas in the vicinity of an aerodrome / airport.

Furthermore, we refer to Paragraph 62 of the *Nessdee Pty Ltd v Orange City Council* court case hearing (NSWLEC 158, Decision date 28 November 2017), which states the following:

"I do not agree that specification of a maximum noise level is appropriate or helpful in the circumstances of this case"

In addition, Paragraph 63 states the following:

"...the appropriate criterion was the LAeq 24 hour criterion, which averages the noise contributions over a 24 hour period rather than the few seconds used for a maximum noise level. Use of the LAeq 24 hour criterion enables the assessment of compliance with the 13 ANEF criterion, but the maximum noise level does not."

and

"Specifying a maximum noise level has, therefore, no action-forcing utility."

Therefore, the assessment against maximum noise levels was previously found to be inappropriate. However, Renzo Tonin & Associates recommended an assessment against the L_{ASmax} 70dB(A) noise level as a precautionary measure consistent with the use of N70.

Regards,



Michael Chung

Principal Engineer

Response to Council Assessment Report:

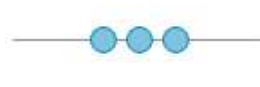
Proposed Flight College Frogs Hollow



9 December 2018

This report has been prepared for
Sports Aviation Flight College Australia

by

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Table of Contents

1	Introduction.....	1
2	The basis for evaluation.....	2
3	The SIA is based on noise impacts being within normative standards	3
4	The Cost Benefit Analysis is based on the transport sector rather than the education sector	4
5	Negative externalities are likely to be undervalued or are unquantifiable in the SIA.....	5
6	Wilderness Coast Branding.....	6
7	Employment in tourism is underestimated	7
8	Net gain in employment	9
9	Council and Other Policies	10

1 Introduction

Sports Aviation Flight College Australia proposes to establish a flight training school for Recreational Pilots operating from Frogs Hollow Aerodrome. A development application has been submitted to Council and is being assessed by the Joint Regional Planning Panel (JRPP). Judith Stubbs and Associates (JSA) prepared a Socio-Economic Impact Assessment to accompany the development application.

Following the issue of the *Council Assessment Report* to the JRRP, JSA has been asked to respond to social and economic matters raised in the *Council Assessment Report*.

The following reports have been reviewed:

- *Council Assessment Report*; and
- *Appendix 1 – Section 4.15 (previously 79C) Assessment Report*.

Common themes raised by Council have been identified and are set out below along with a response or clarification.

It is noted that Council has not provided draft conditions to the applicant, even though there are many opportunities to mitigate amenity impacts as set out in Section 1.6 of the *Socio-Economic Impact Assessment: Proposed Flight College Frogs Hollow*.¹

¹ Judith Stubbs and Associates (2018) *Socio-Economic Impact Assessment: Proposed Flight College Frogs Hollow*, section 1.6.

2 The basis for evaluation

At a number of places Council relies on the Precautionary Principle as a basis for refusal.² We understand that invoking the Precautionary Principle requires the following:

- Threat of serious or irreversible environmental damage
- Scientific uncertainty

We would contend that the Precautionary Principle does not apply in this instance because:

- Any environmental damage from the approval of the development application can be stopped or reversed at any time if the flying school ceases operation; and
- There is scientific certainty around all points of contention, such as noise generated, the size and location of the tourist industry, the location of sensitive receivers, and the quantification of costs and benefits.

At other places Council states that the test is whether social and economic impacts are satisfactory.³ In fact, Section 4.15b) of the *Environmental Planning and Assessment Act 1979*, requires a consent authority to consider ‘the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality’. It is our understanding that this requires a definition of ‘locality’ (or localities), a proper assessment of the likely positive and negative impacts in the locality or localities based on best available evidence, the development of appropriate mitigations, the identification of any negative impacts that so severe that they are unacceptable and not able to be mitigated, and ultimately a balancing of the positive and negative impacts in its decision-making process. This is the approach that has been undertaken in our SIA.

The Council states that the application has not quantified or adequately considered social and economic impacts in the locality and broader region.⁴ We cannot agree with this statement. The SIA contains an extensive scoping of potential social and economic impacts based on a detailed review of submissions, literature and reports; provides an evaluation of those impacts most likely to be substantive and significant, and uses a wide range of data and other information from appropriate and referenced sources accompanied by transparent calculations to assess social and economic impacts, and to quantify these wherever possible.

In undertaking this assessment, we have also assessed the reasonableness of community concerns, and have found these to be variously reasonable or unfounded based on available evidence. Where they appear to be reasonable, we have proposed relevant mitigation.

² *Council Assessment Report* page 13, 82, 84, 87; *Appendix 1 – Section 4.15 (previously 79C) Assessment Report* page 67.

³ *Council Assessment Report* page 70

⁴ *Council Assessment Report* page 84, 86

3 The SIA is based on noise impacts being within normative standards

At a number of places Council states that the SIA conclusions are based on noise impacts being satisfactory.⁵ However, our SIA takes the position that noise impacts, whether or not they are within normative standards, are likely to lead to amenity impacts within the immediate locality and residential areas that experience significant overflying.

We consider that these amenity impacts may be regarded as significant by residents in areas which are immediately overflown, as evidenced by submissions and of complaints from residents of airports in urban areas. As such, we proposed appropriate mitigations with regard to the circuit patterns in the immediate locality, the avoidance of built up areas and tourist attractors, and increased restriction on the times that the school will operate its training flights to preserve quiet enjoyment of the environment, for example, no flying on Sundays. We consider that these mitigations, if implemented, will further reduce noise impacts and social and economic impacts to a level that is more acceptable.

Further, the SIA, in its Cost Benefit Analysis, places a dollar value on these amenity impacts using accepted methodologies and finds that the costs of amenity impacts are exceeded by the benefits from increased employment. An unknown is the extent to which amenity impacts will lead to job losses in other tourist industries (noting that by definition the proposal is in fact a tourist industry⁶). Tourist industries and attractors are concentrated in a few key areas, so that again, our proposed mitigations are likely to minimise adverse impacts on other tourist industries.

It is also noted that the SIA conducts a sensitivity analysis, and even in the worst (and highly unlikely case) of major job losses in existing tourist industries, the proposed flying school is likely to provide for a net gain in tourist jobs in the wider locality.

The Council further states that the SIA submits that the noise impacts will be below acceptable thresholds, and therefore satisfactory or similar statement.⁷ This is a misrepresentation. The SIA says (at page 2):

While there is likely to be a diminution of amenity in the immediate locality, the level of amenity with respect to noise, visual impacts and loss of privacy will be in accordance with regulatory standards with regard to noise generation and height of overflying.

We defer to the expertise of the applicant's noise expert with regard to thresholds and compliance, but clearly acknowledge that there may nonetheless be amenity impacts arising from this activity, and that these should be mitigated.

⁵ Council Assessment Report page 29, 85; Appendix 1 – Section 4.15 (previously 79C) Assessment Report page 65.

⁶ Judith Stubbs and Associates (2018) Socio-Economic Impact Assessment: Proposed Flight College Frogs Hollow, page 73.

⁷ Council Assessment Report page 40, 43, 55; Appendix 1 – Section 4.15 (previously 79C) Assessment Report page 9, 22, 24.

4 The Cost Benefit Analysis is based on the transport sector rather than the education sector

At a number of places, Council states that the Cost Benefit Analysis cannot be relied upon because it is for transport rather than education.⁸ There are a number of problems with this statement. First, concerns regarding safety and amenity impacts are related to the nature of the use in the locality (flying) and not to classroom based activities. Transport guidelines take these types of impacts into account as their consideration is integral to this use, noting also that there are no guidelines regarding how to consider or value these types of impacts in relation to an educational facility, most likely because these are not generally associated with classroom-based activities.

Secondly, the Social Impact Assessment prepares a Cost Benefit Analysis using the widely accepted methods of Cost Benefit Analysis. The methods do not change with the type of project or development being assessed. The SIA relies on the methods found in *NSW Government Guide to Cost-Benefit Analysis*.⁹ That document states (at page ii) that:

This Guide clarifies that the CBA principles and framework apply to all Government policies and projects – not just capital expenditure. This Guide applies to any new or altered capital, recurrent or regulatory action for any policy, program, project, proposal or initiative. The terms above are used interchangeably as necessary throughout this Guide, but the overall premise is that this Guide applies to all significant Government actions and decisions. (Emphasis added).

The universality of application is noted.

Thirdly, the Cost Benefit Analysis relies, in part, on data from *Principles and Guidelines for Economic Appraisal of Transport Investment and Initiatives*.¹⁰ This is because this document provides publicly accepted and widely used estimates of cost for a range of externalities associated with transport projects (and similar to the externalities that will be generated by the approval of the development application). Externalities valued in that document and used in the Benefit Cost Analysis are:

- Amenity costs
- Willingness to pay to avoid death or injury.

These impacts are relevant considerations, a point with which many resident submissions would appear to agree.

⁸ *Council Assessment Report* page 30, 42; *Appendix 1 – Section 4.15 (previously 79C) Assessment Report* page 9, 23, 66.

⁹ The Treasury (2017) *NSW Government Guide to Cost-Benefit Analysis*

¹⁰ Transport for NSW (2018) *Principles and Guidelines for Economic Appraisal of Transport Investment and Initiatives*.

5 Negative externalities are likely to be undervalued or are unquantifiable in the SIA

Council states that negative externalities are likely to be undervalued or are unquantifiable.¹¹ The SIA adopts costs of externalities published by Transport NSW for passenger cars, using this as a proxy for the type of aircraft proposed on the basis that the engines are of similar size and type and so will generate similar emissions. That cost of externalities includes air pollution, greenhouse gas emission, noise, water pollution, nature and landscape, urban separation, and upstream and downstream costs. Externalities have been valued on an annual basis, that is it is assumed that they will be incurred for the life of the proposal.

Of these externalities, nature and landscape (relating to infrastructure costs of roads) and urban separation (impact on pedestrians and other travellers of urban expressways) are unlikely to apply to aircraft and so, to this extent, the value used for negative externalities is an overestimate.

The following externalities were not quantified, but were identified in accordance with guidelines in the *NSW Government Guide to Cost-Benefit Analysis*:

- Impacts on the character of the area; and
- Displacement of existing recreational activities.

Again, we consider this to be reasonably based, and relevant to the potential impacts of the proposed flying school.

¹¹ *Council Assessment Report* page 30; *Appendix 1 – Section 4.15 (previously 79C) Assessment Report* page 9.

6 Wilderness Coast Branding

Council makes a number of statements related to Wilderness Coast Branding, compatibility of industry with tourism and trends in tourism employment.¹² In summary, Council appears to be of the view that the flying school is not compatible with the branding, which is viewed as a major diversification strategy to offset long-term downward trends in tourism. Council also appears to be of the view that manufacturing does not impact upon the wilderness coast due to its location.

However, the SIA notes that the Wilderness Coast branding and public image manages to coexist with a range of visible manufacturing uses, all of which are located within 'Australia's Coastal Wilderness' as mapped. Further, most tourism attractors are located in a few beach front areas, rather than wilderness areas, and we have recommended not overflying these areas, as noted above. To the extent to which the diversification strategy is focussed on national parks as genuine wilderness areas, we have again recommended that these areas be avoided in the flight paths.

Finally, we note that the flying school itself will be a major tourism-based employer in itself, and likely to be more effective in diversification with the regard to quantum of employment than Council's Wilderness Coast Branding has been to date.

With respect to these matters, the SIA authors stand by the views expressed in the SIA.

¹² *Council Assessment Report* page 41, 42; *Appendix 1 – Section 4.15 (previously 79C) Assessment Report* page 22, 23.

7 Employment in tourism is underestimated

Council states that tourism employment is underestimated.¹³ Council appears to rely on estimates of tourism employment prepared by Sapphire Coast Tourism. These estimates are problematic and appear to be overestimates for the following reasons:

- They are three times greater than values estimated independently by JSA and .IDCommunity and by a simple pro rata of published estimates by Tourism NSW for the South Coast Region;
- The amount of employment estimated is 15% greater than all the people employed in the key tourism sectors of Retail and Accommodation and Food Services in Bega Valley LGA in 2016; and
- The estimates show that Bega Valley has 24% of the tourism employment on the South Coast but contains 8% of the population and 7% of employment.

Sapphire Coast Tourism was contacted on 27 April 2018 and the draft text of the SIA at Section 8.2.2 critiquing their estimates was forwarded to them for comment.

The following response was received from the consultant who prepared the estimates for Sapphire Coast Tourism.¹⁴

The estimate is the average of two methods with some common elements. The first estimation method calculates the ratio of jobs:visitor expenditure related to the year 2013/14 for the South Coast Tourism Region. This is the latest available TSA for regions in NSW. Jobs for this year are as per the South Coast Tourism Satellite Account (SCTSA). Expenditure is published visitor expenditure for the same region. This jobs:expenditure ratio is then discounted by a notional amount (10%) as a conservative step. Visitor expenditure for the year 2016/17 was obtained for Bega Valley Shire (BVS) LGA. This is BVS-specific and the result of TRA's application of the Regional Expenditure Allocation model (REX). This expenditure is divided by the discounted jobs:expenditure ratio to produce an initial estimate of direct full time equivalent jobs. Indirect jobs are estimated by using the direct:indirect jobs ratio in the 2013/14 SCTSA. The second method calculates BVS's share of South Coast Region's expenditure in the year 2016/17 and apportions the same percentage of jobs calculated in the 2013/14 SCTSA. The difference in total jobs is just under 390. The estimates are then averaged. A final (optional) step is taken in the form of estimated total persons employed as opposed to FTE jobs. This uses the NSW FTE:persons employed ratio from 2011/12. Both methods, and similar, have been variously used by State and

¹³ Council Assessment Report page 30, 42; Appendix 1 – Section 4.15 (previously 79C) Assessment Report page 9, 23.

¹⁴ Email dated 7 May 2018.

Federal Departments/agency as an acceptable estimate (particularly in the absence of 'full-blown' LGA specific analysis.

It is acknowledged that the estimates produced by either method are higher than those output from models used by organisations such as Profile ID and Remplan. Explaining the difference between the two would require specific investigation. Such an investigation is strongly encouraged. Part of the difference may be explained by the model's use of BVS residents' industry of employment, as per Census, as a key element of their methodology. Census is always held in August - one of the quietest months in the year from a tourism perspective. This may result in less people reporting work in a tourism or tourism related industry than would be the case if Census was held in summer. On the other hand, this may be offset by the fact that the jobs:expenditure methods do not (currently) discount for residents of adjacent LGAs that may work in BVS. Differences may also come about as a result of changes in visitor profiles and associated expenditure patterns where an LGA has been effective in their efforts to attract a higher share of particular visitor types (particularly so-called 'higher yield' visitors). BVS has been one of the most successful LGAs in Regional NSW with such efforts. REX visitor expenditure data shows latest spend per visitor and spend per night are well above the longer term average (per visit domestic overnight spend in calendar 2017 was the second highest of all LGAs in Regional NSW).

It should be noted that another South Coast LGA recently incorporated LGA-specific expenditure estimates in one of the above models - the results of which were to decrease the difference in estimates from the model and those described above.

At the end of the day any estimate will have limitations and in the absence of detailed and sophisticated LGA-specific econometric modelling (which is likely to be unaffordable by even the largest Councils) alternative estimates - and the examination/investigation of each - should be encouraged to produce the best possible estimate. This may result in modifications to methodologies and models of the merging of these. No methodology or model output should escape scrutiny. This would assume that it has no room for improvement. I'd urge those involved in the current 'debate' to 'pull apart' all currently available estimates. I am certainly willing to cooperate in such a process.

No data or calculations were provided by the consultant so it was not possible to further evaluate the estimates. The estimates are said to be based on 2016/17 visitor expenditure in Bega Valley. This expenditure is likely to be estimated from sampling, and, depending on the size of the sample, may be subject to significant sampling error. There is also the possibility of gross error, but this is not possible to evaluate in the absence of calculations.

In the absence of transparent data and calculations from Council, we adhere to our method of calculation and findings.

8 Net gain in employment

Council is concerned that there would not be a net gain in employment, based on additional jobs being offset by job losses in existing tourist activities and in agriculture.¹⁵ We have not been able to identify any rational basis to support loss of jobs in agriculture as a result of the proposal. However it seems reasonable that the amenity impacts of the proposal could have some impact on tourism visitation. There is no data to estimate the size of effects, particularly as high rates of aircraft movements are associated with tourism such as Gold Coast Airport, so that any statistical analysis is likely to find a positive correlation between aircraft movements and tourism visitation.

In the absence of data, the SIA takes a sensitivity approach, and estimates the loss of jobs required in tourism industries to offset the jobs provided by the proposal. To offset the proposal, tourism visitation would need to reduce by 23%. As 87% of tourism employment is found in Bermagui, Tathra, Bega, Merimbula and Eden, an adverse impact on this tourism employment could be achieved by not overflying these areas and would ensure that there was a net gain in employment as a result of the proposal. It is further noted that no tourism industries were identified in the immediate locality of the development.

The mitigation proposed means that at least 87% of tourism jobs in the shire would be quarantined from the amenity impacts of the flying school, noting that even if all tourism jobs were lost in areas proximate to the flight path, there would still be a net gain in tourism jobs.

¹⁵ *Council Assessment Report* page 30, 68; *Appendix 1 – Section 4.15 (previously 79C) Assessment Report* page 10.

9 Council and Other Policies

Council makes a number of statements related to alignment with policy documents.¹⁶

However, we consider that the proposal does in fact align with key policy documents as noted in Sections 2.4 and 9 of the SIA, for example:

- LEP objectives related to ‘expanding the local economic base’; and RU1 zone objectives related to encouraging ‘tourism related activities’;
- Economic Development Strategy actions and outcomes related to ‘diversifying industry’, encouraging ‘start ups’, encouraging industries that employ ‘higher skilled workers’, and showcasing the best of the shire for domestic and international visitors’, etc

With respect to these matters, the SIA authors stand by the views expressed in the SIA.

¹⁶ *Council Assessment Report* page 44, 45, 85, 86; *Appendix 1 – Section 4.15 (previously 79C) Assessment Report* page 25, 26.