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Ref: 2017.445

13 December 2018

Attention: Joint Regional Planning Panel – Southern
C/- Planning Panels Secretariat
By email only: enquiry@planningpanels.nsw.gov.au

Dear Madam,

2017STH027 DA Proposed Recreational Flight School 1070 Princes Highway, Frogs Hollow

Council acknowledges the response (hereafter referred to as “the response”) to Council’s Assessment Report and Recommendation provided by NGH Environmental on behalf of the applicant and dated 11 December 2018.

Council has provided its response, attached, for consideration of the Panel.

Yours sincerely,

Anna Bowman
Town Planner

Reasons for Refusal

- 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.**

Since finalisation of Council's assessment report, the applicant has provided additional information to NSW RMS who have provided final comments supporting the proposed intersection design to the Princes Highway. The additional information highlighted intersection upgrade requirements and identified works to occur on Lot 101 DP 1218164 to accommodate the upgraded intersection. The owner of that land has provided owners consent for those works to occur. This item can be removed from the reasons 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.**

Council disagrees with the applicant's position. In accordance with normal practice, Council has assessed the application against the Aims of the Plan. The Aims of the Plan provide an overarching perspective of what the plan seeks to achieve and makes direct statements regarding development, for example aim (e) "to ensure that development contributes to the natural landscape and built form environments that make up the character of the Bega Valley".

Any inconsistency with the Aims of the Plan indicates issues with the design of the development.

Furthermore, despite the applicant taking this position, it is noted that in the response prepared by Judith Stubbs & Associates (p.10) the applicant continues to purport consistency with Aim (2)(b) to justify the proposal.

- 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.**

Clause 2.3 (2) details “The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone”. The SP2 zone objectives follow:

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

Council maintains its position as detailed on page 35 of Council’s Assessment Report that the proposal in its current form does not demonstrate consistency with the zone objectives. Council contends that the zoning of the land is for the purposes of an air transport facility. The proposed recreational flight school is considered to be ancillary to the existing airport. The airport has been identified as being an important emergency airfield, particularly given the undulating topography of the region which severely limits suitable sites for airports. However should the proposal be approved in its current form (including a 10m instead of 15m wide runway, significantly increasing traffic at the site without improvement to the safety of the site, and irrigation of effluent water over the runways) then the proposed ancillary use would resultantly detract from the main purpose of the site as an air transport facility, and would detract from the provision of infrastructure by limiting the types and sizes of aircraft that may use the site into the future.

- 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.**

Clause 4.3 Height of buildings provides:

(1) The objectives of this clause are as follows:

- (a) to retain the existing character and landscape of the locality and to encourage a low-set building form,*
- (b) to protect residential amenity, views, privacy and solar access.*

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The applicant contends that consideration of Clause (1)(a) above would be inconsistent with Clause 4.15(2) of the Environmental Planning and Assessment Act 1979 (EP&A Act). The matter is one of merit and Council maintains its position as detailed in the assessment report.

- 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.**

The applicant details a technical application of Clause 5.10(2) and concludes that further assessment is not required prior to development consent being issued, because the site is not known to contain Aboriginal objects and is not an Aboriginal place of heritage significance. Council has given consideration to the objectives of the clause, which state:

(1) The objectives of this clause are as follows:

(a) to conserve the environmental heritage of Bega Valley,

(b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,

(c) to conserve archaeological sites,

(d) to conserve Aboriginal objects and Aboriginal places of heritage significance.

Council's reference to Clause 5.10 is a reference to the objectives of the clause, particularly with reference to conserving Aboriginal objects. Council maintains its position that in order to "conserve Aboriginal objects" further investigation of the site, in accordance with the Due Diligence Code of Practice is warranted in this instance. This position is supported by the applicant's own Due Diligence Assessment which details that, "There are topographic elements present in the study area, and that would be disturbed by the proposed development that have moderate to high archaeological potential". Based on the Due Diligence Assessment, Council considers that it is likely that the site contains Aboriginal objects. Council contends that the reason no Aboriginal objects have been registered over the site is because very little development has taken place at the site since proper consideration has been given to Aboriginal archaeology. A review of AHIMS indicates the presence of a scattering of registered artifacts in the vicinity of the site, including a scarred tree. Given the footprint of the impact being 6.7ha, it is considered likely that Aboriginal objects would be harmed by the proposal.

With regard to Council's reference to Clause 6.2 Earthworks, the applicant has contended that the word "relic" featuring in Clause 6.2(3)(f) has been misinterpreted by Council staff. Council acknowledges that for the purposes of the LEP the definition of the word "relic" is provided from the Heritage Act 1977 rather than the National Parks and Wildlife Act 1974. However Council's assessment does not rely on the word "relic". The Objectives of Clause 6.2 follow:

(1) The objective of this clause is to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.

Clause 6.2(3)(h) provides that:

(3) Before granting development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters:

(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

Therefore Council's maintains its position and recommendation as detailed in the assessment report.

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.

Clause 4.15(1) details that "In determining a development application, a consent authority is required to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a) the provisions of:

(iii) any development control plan". Therefore the application has been assessed against the relevant part of the Bega Valley Development Control Plan 2013.

Council maintains its position that the application has not satisfied the criteria of Clause 5.4 (specifically Clause 5.4.1 Social and Economic Impact Assessment) of the DCP, as detailed in Council's Assessment Report on page 39. The DCP provides that the objectives of requiring a Socio-Economic Impact Assessment are to ensure that certain outcomes are achieved. Council has assessed the Socio-Economic Impact Assessment against these objectives.

Clause 5.7.1 OSM Assessment requires that "before granting consent to development that will result in the generation of sewage or other effluent, consideration must be given by the consent authority to:

- ...the suitability of the site for on-site disposal of effluent and the ability of the effluent disposal system to function effectively over the long term without causing adverse effects to adjoining land or water, and...
- ...the likely cumulative environmental impacts of all on-site systems or works in the area with respect to water quality, soil degradation and odour".

Therefore Council has considered the application with regard to these relevant considerations, and maintains its position that the design of the on-site sewerage management system has not given adequate regard to these matters with respect to the identified Endangered Ecological Community – Lowland Grassy Woodland occurring on the site.

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.

This matter has been addressed by Marshall Day Acoustics, Council's expert noise consultant.

A key point in the assessment of aircraft noise impacts, are that operations can be variable and a simple pass/fail criterion is not likely to convey acceptability of impact.

Evidence has suggested that even relatively low levels of aircraft noise have the potential to be highly annoying to a person when they have been provided information that generates an expectation of there being no aircraft noise impacts at their home.

The primary purpose of a noise impact assessment, whether industrial, road, aircraft etc. is to demonstrate environmental impacts of the proposal are fully examined, and that the regulator (decision maker) are aware of the outcomes should the proposal proceed.

With regards to aircraft noise, the regulators are rarely expert in the field, and in order to make a fully informed decision (having regard to all factors, not just noise), the aircraft noise information needs to be presented in a transparent and comprehensible way. This information should be prepared to take the decision making process beyond having to rely on the expert advice. Similarly, the noise impact assessment should be prepared in a manner to assist the public and impacted communities on likely future noise exposure.

Australian government documentations/publications/guidelines have been prepared on the basis of best practice to describe aircraft noise impacts. For example, it is commonly cited that the ANEF (aggregated average noise metric) is limited in adequately describing aircraft noise impacts to community.

The use of and preparation of material in accordance with SA HB 149 is current best practice in Australia for adequately describing aircraft noise impacts and thus assisting both decision makers and communities to make an

informed decision on the development. It is recommended this minimum information be prepared for any proposed significant aircraft operations development such as proposed.

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.**

The applicant has stated that the Regional Plan does not fall into any of the categories of matters for consideration. In considering this issue further, Council notes the Land and Environment Court Planning Principle detailed in the *Direct Factory Outlets Homebush v Strathfield Municipal Council* [2006] NSWLEC 318 regarding "Assessing the role of non-statutory regional planning policies vis-a-vis statutory local plans".

It was noted in that judgement that "Regional planning policies provide a sense of purpose and direction to local plans; they are, as it were, the glue that binds local plans together. The fact that they are non-statutory is not an indication of their subservience to statutory plans. Planning policies usually do not lend themselves to statutory expression because they do not relate to specific parcels of land and do not contain numerical development standards. This fact however, does not mean that they have no relevance to individual development applications, particularly those that have impacts extending beyond the local area."

It is considered that in this instance the South East and Tablelands Regional Plan 2036 is relevant in the consideration of the application given the potential noise, environmental and amenity impacts this development would have within the Bega Valley and beyond the local area.

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).**

Council maintains its position as detailed on pages 58-60 and 63-67 of the assessment report.

Civil Aviation Orders (CAO) 95.10, 95.32 and 95.55 require flight training schools to be operated in accordance with the Recreational Aviation Australia (RAA) Operations Manual. This is a central tenant for CASA's delegation of authority to Recreational Aviation Australia. Specifically, the Operations Manual details that:

8. *The CFI [Chief Flying Instructor] must ensure that the aerodrome complies with the following minimum criteria:*
 - a. *The take-off and landing distance available in the prevailing conditions, is equivalent to the Flight Manual or the manufacturers calculated or stated distance requirement, plus 30%;*

- b. *The surrounding topography must be such that a standard circuit for the aeroplane type can be flown;*
- c. *There must be sufficient clear ground in the vicinity of the aerodrome that a successful forced landing, in the case of an engine failure, may be expected;*
- d. *If the aerodrome is classified as uncertified the physical dimensions of the aerodrome should comply with "LANDING AREA - AEROPLANES" CASA CAAP 92 – 1 (1);*
- e. *The aerodrome is serviceable;*
- f. *There is a method of determining the wind direction and velocity at the aerodrome; and*
- g. *If required, the owner or operators written consent has been given for the use of the aerodrome.*

CASA's referral response to Council details that the aerodrome is uncertified. Therefore, in contrast to the applicant's assertions, as the aerodrome is classified as uncertified, compliance with CAAP 92-1(1) is considered to be required.

Given that the entirety of the site is identified as Endangered Ecological Community – Lowland Grassy Woodland, Council strongly believes that assessment of the proposal against CASA's advisory publication CAAP 92-1(1) is essential to determine the extent of likely impacts from the proposal. It would have been negligent of Council to fail to undertake this assessment.

The applicant has had sufficient opportunity to consider the requirements of CAAP 92-1(1) and the likely clearing that would result from compliance with the publication. The detail provided in the biodiversity assessment reports fails to adequately consider the extent of clearing proposed or the impacts from effluent disposal. Despite the extent of clearing of moderate – good condition EEC shown on the development plans, and likely further clearing required in order to comply with CAAP 92-1(1), further assessment against the EPBC Act has not been undertaken. Therefore Council maintains its position that the extent of likely impacts from the development has not been adequately considered.

Council does not agree with the applicant where it is stated that the EEC – Lowland Grassy Woodland is not sensitive to higher levels of fertility.

Therefore Council maintains its position that adequate assessment has not been undertaken to know the full impact upon the identified EEC.

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.

Council maintains its position that the Cost Benefit Analysis (CBA) undertaken is not appropriate to the development type. Council maintains that the framework used (or part used as stated by the applicant), the Transport for NSW 'Principles and Guidance for Economic Appraisal of Transport Investment and Initiatives', is not appropriate given it is designed for application in public sector land-based transport cluster that produce public outcomes.

Cost-Benefit Analysis is widely acknowledged to be a valuable but not perfect tool and Council has no issue with a CBA being performed. Additionally, Council does not have an issue that the CBA has recognised that the externalities of Amenity Costs and Safety are of importance to our community and should be a part of any total cost calculation.

Examining the Transport for NSW framework shows that tables for use in CBA calculations are for land-based transport. The development will operate very differently. As such, calculations using the framework cannot give an accurate estimation of the social cost to be experienced. We acknowledge engine size similarity but must be guided by the obvious differences in where and how the engines will be operated in the development. This development is not in the scope of intended use of the Transport for NSW framework.

Council acknowledges the difficulties in identifying or developing a satisfactory framework that informs the Cost Benefit Analysis due to the complexities of this development. This is reason for caution against placing any reliance on the final calculated net benefit or permitting it to be persuasive in decision making.

Therefore Council maintains its position that the CBA methodology used is not appropriate for the development type and fails to capture and appropriately quantify the full extent of externalities, and therefore the total costs associated with the recreational flight school.

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.**

Item 11a

The applicant asserts that by considering the existing character of the locality, Council has not given appropriate weight to the zoning of the subject land in the assessment of the proposal. The response states "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 Council's position that while the proposed land use is permitted with consent in the SP2 zone, this does not negate the need to assess the design and scale of the proposal, including consideration of the existing character of the locality and any impacts the proposal would have upon it. Council maintains its position that

the proposal, in its current form and scale, fails to demonstrate that the development site is suitable for the intended use in relation to its impact upon the amenity and character of the Frogs Hollow area.

Item 11b

The applicant's response to item 11(b) does not address the reason for refusal, which relates to the lack of certainty that use of other airfields can be relied upon to provide for the full extent of circuit training required for the proposed scale of development, as detailed in Council's assessment report on pages 74-79.

Item 11c

Council maintains its position as detailed in Item 9, and in Council's assessment report on pages 63-67.

Item 11d

Council maintains its position, as detailed in Item 9, and in Council's assessment report on pages 63-67.

Item 11e

Council maintains its position, as detailed in Council's assessment report on page 79. The Airport Practice Note is clear in detailing that landfill sites and aerodromes within 3kms of one another are incompatible development. The Wanatta Lane Central Waste Facility (Council landfill site) is located 2.6km from the subject site. The document does not detail that mitigation is an acceptable solution. Council considers that the significant intensification of aircraft activity at the site as proposed in the application would contravene the advice provided by the Australian Airports Association in this document.

Item 11f

Council maintains its position, as detailed in Council's assessment report on pages 72-74.

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.

Council disagrees with the applicant's assertion that the precautionary principle has been applied incorrectly. Council's assessment report clearly details that inadequate consideration has been given to the likely extent of impacts to EEC identified on the site as a result of effluent disposal and further clearing required to comply with CAAP 92-1(1). Assessment against the EPBC Act 1999 has not been undertaken, despite considerable clearing proposed to Lowland Grassy Woodland in the south western part of the site which has been identified in the applicant's report as likely being in a condition to satisfy the criteria as a Critically Endangered Ecological Community.

Given that the whole impact is not known, Council maintains its position that there is a threat of serious environmental damage. Further Council considers that there is scientific uncertainty as to the environmental damage.

Therefore, Council stands by its application of the Precautionary Principle.

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.

Council maintains its position as per item 12.