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15 March 2022

Tasman District Council
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Att: Paul Gibson

By email: paul.gibson@tasman.govt.nz

Dear Paul

Further Information Request for Resource Consent Applications RM210785 & RM210786 – Ruru Building Limited at 54 Green Lane, Motueka

1. Thank you for confirming that the further information sought by way of the above Request For Further Information (RFI) can be provided by 15 February 2022. Further to that, please find below and **enclosed** the response and further information, which consists of:
 - a. Planning: Supplementary Report by Landmark Lile in view of the amendments made to the applications and the additional mitigation now included;
 - b. Noise: Noise Effects Assessment by Marshall Day Acoustics;
 - c. Flood Hazard: Inundation Assessment by Envirolink;
 - d. Stormwater:
 - i. Surface Water Control Update by Gary Stevens Consultant;
 - ii. Stormwater Surface Water Layout Overview.
 - e. National Environmental Standards Contaminated Soil: Affidavit of Philip Smith, former owner of 54 Green Lane, see also Landmark Lile Supplementary Report;
 - f. Transport: Updated Traffic Assessment from Traffic Concepts, see also Landmark Lile Supplementary Report;
 - g. Hazardous Substances: Hazardous Substances Inventory List, see also Landmark Lile Report;
 - h. Obstacle Limitation Surface:
 - i. Report of Mike Haines Aviation Ltd;

- ii. Email from Civil Aviation Report on Mike Haines Report
- iii. Email from Ben Smith, Surveyor of Newton Survey;
- iv. Email from Mike Haines confirming OLS vagueness;
- v. Illustrative OLS with Road Clearance.

AMENDED APPLICATION

2. Included in the **enclosed** documents are some amendments to the application and a planning assessment of the impacts of the amendments on the key matters to be assessed by the Council when processing the application. By way of summary, the key features of the amendments are:
 - a. Removal of the proposed 7.5m high shed on the site and replacement with a container shelter of less than 8m above natural ground level. Although there is a very minor increase in height (a few cm), this is only at the top of the arch of the cover. Importantly, the shelter covers considerably less area and for most of its area is well below 7.5m its overall bulk is less than the originally proposed shed. It is also below the thresholds mentioned by Mr Mike Haines in his 28 October 2021 report on the Obstacle Limitation Surfaces, which was first provided to the Council on 28 October 2021 in connection with a s325A abatement notice cancellation application;
 - b. Significant modification of the earth bunds that had been proposed as noise mitigation. These now have gaps that will allow the passage of any floodwater. A combination of shipping containers and acoustic barriers will ensure improved noise mitigation, but are placed in a manner that, together with the gaps in the bunds will remove the floodplain-related effects the RFI requested be assessed. This is identified and assessed in full by the report of Envirolink. This is also within the scope of the original application, as it further reduces the potential effects;
 - c. Reconfiguration of the activities on site so that the key noise-producing activities within the site will take place within the noise barriers now proposed. This significantly reduces the noise effects, as assessed by Marshall Day and has consequences for the assessments under ss95D, 95E and 104, commented on further below and in the Landmark Lile report. This also reduces the effects of the activity as originally sought, so remains within the scope of the original application.
3. It is important to note that the various reports enclosed, including the Landmark Lile supplementary cover letter and planning assessment, address the issues identified in the RFI and provide their assessment of the effects, on the basis of the application as amended by the above amendments and the accordingly reduced effects. That includes the mitigation measures such as the proposed noise management plan condition now proffered (see details of Marshall Day Report).
4. It is that reduced set of effects that the Council is required to use for its assessments of effects under ss95D, 95E and 104.

FURTHER INFORMATION PROVIDED

5. I set out below the headings used in the RFI document, identify the further information provided and then comment on the legal implications. However, as indicated above, the amendments and the resultant assurance as to reduced effects affect the planning

assessment as well. For that reason, there is also an supplementary report from planner Mr Mark Lile of Landmark Lile (“Landmark Lile Report”), which I list below in addition to the information sought under the RFI.

Noise

6. Please find **enclosed** an updated noise assessment by Marshall Day. As identified above, this assessment addresses the effects as reduced by the additional mitigation provided as a result of the amendments referred to above.

Section 95E

7. This section requires the Council to determine whether there are any persons on whom the effects are minor or more than minor, but not less than minor. When doing so it may disregard an adverse effect on a person if a rule or national environmental standard permits an activity with that effect¹ (the “permitted baseline”, to which I refer further below). If it determines that any effects on any person are less than minor, then no-one is adversely affected by the proposal. That means that no written consents are required to avoid the need for a limited notification process.
8. The RFI had identified that all owners and occupiers of all properties located within 150m from the application site boundaries. In my letter to you of 2 November 2021 I pointed out why this was a premature determination and must be disregarded. In addition to that, that determination was based on the initial version of the application as unamended, without the further mitigation and assessments of reduced effects now provided.
9. For the purposes of noise, MDA has assessed the noise effects on 43-55 (odd numbered properties), 63 and 65 Queen Victoria Road and 44,45 and 47 Green Lane, given that these contain the closest noise receivers. The MDA report assesses the noise effects on these properties as follows:
 - a. There would be a “nil” or “negligible” change in average ambient noise levels;
 - b. The noise emissions, including a 5dB special audible character (SAC) penalty would comply with the 55dB limit in the District Plan.
 - c. The noise will be comparable to that produced by a permitted home occupation such as panel beating, vehicle repair or other type of workshop, which complies with the applicable district plan noise levels; and
 - d. The receiving environment contains considerable existing non-rural noise and relatively high ambient noise levels.
10. The Courts have defined the term “less than minor” as follows:

*“An effect is “less than minor” if it is insignificant in its effect in the overall context and is so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons”.*²
11. I refer you to the Landmark Lile Supplementary Report’s conclusions reached in reliance on the MDA report. The nature, character and level of non-rural ambient noise in the existing receiving environment is particularly relevant to the “context” in which the noise is emitted.

¹ Section 95E(2)(a)

² See However, *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, cited with approval in *Trilane Industries v QLDC* (2020) 21 ELRNZ 956.

The Landmark Lile Report finds that the noise effects of this proposal on other properties will be less than minor. That is the only conclusion that is open on a proper assessment of the noise effects on other persons using the correct legal tests.

12. In addition, that same Report also concludes that a home occupation involving panel beating, vehicle repairs or some other type of workshop with machinery and noise sources similar in character and level to the proposed activity is very much plausible on the subject site. Therefore the permitted baseline is applicable, as an activity that is not “fanciful”, but has comparable noise levels and character, can be carried out as of right on the site³.
13. Therefore, even if there had been a finding of some effects that are not less than minor on adjoining properties, the fact that the district plan expressly allows an activity with those effects would render it unreasonable not to disregard those effects under s95E(2)(a). With those disregarded, that provides an additional/alternative ground on which to conclude there is no basis to find noise effects that are not less than minor on any person on any other site.
14. As a result, when the test in s95E is correctly and reasonably applied to the proposal, the noise effects on other persons are at worst less than minor and at best nil. There are therefore no persons adversely affected by the noise effects of this proposal.

Section 95D

15. Under this section the Council is required to determine whether the effects on the environment, when excluding any person who occupies or owns an adjacent site⁴ and any person who has provided their written consent⁵, are minor or more than minor. This test is different from the test under s95E as to whether a person is adversely affected, under which a person is not adversely affected if the effects on them are less than minor. Because of this it is possible and quite normal for the overall effects to be assessed as “minor” under s95D and the effects on other persons as “less than minor” under s95E.
16. You will note that the MDA Report provides an assessment of the overall noise effects and concludes that they are “reasonable”. This cannot provide any basis for a finding that the effects are “more than minor”. As a result, there is no triggering of the need for public notification. Because no written consents are required as a result of the s95E assessment, there is no basis on which the noise effects can, on the application of the correct legal tests, reasonably trigger the need for public or limited notification.
17. For completeness, the issues arising from the applicability of the permitted baseline as addressed in paragraphs 12 and 13 above apply equally to the assessment of the overall effects and would provide further grounds for excluding any reasonable possibility of the noise effects being more than minor.

S104

18. With the reduction in noise resulting from the improved mitigation and the meeting of the noise standards:
 - a. The overall noise effects on the environment for the purposes of s104(1)(a) are significantly reduced and are at the very low end of the scale;

³ See *QLDC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424(CA)

⁴ Section 95D(a)(i)

⁵ Section 95D(a)(ii)

- b. That level is within the limits considered to be appropriate for the rural zone by the applicable methods (rules) that give effect to the policies for the rural zone, which in turn give effect to the applicable policy statements. As such that would be consistent with the provisions of the documents listed in s104(1)(b). That matter also emerges from the analysis undertaken in the Landmark Lile AEE and Supplementary Report; and
 - c. It is appropriate to disregard those noise effects under s104(2) because the TRMP expressly allows a non-fanciful home occupation with those effects, rendering those something that is not an adverse effect to be considered under s104(1)(a).
19. The information now supplied provides all the further information regarding noise effects that might be required to determine the application as modified by the amendments and further mitigation that now forms part of the proposal.

Flood Hazard

20. As indicated above, the proposal has been amended to redesign the bunds that triggered the request for the further assessment under this heading of the RFI. The **enclosed** report from Envirolink (being a suitably qualified flood hazard scientist or rivers engineer) confirms that the gaps between the bunds as well as the gaps left between the noise mitigation barriers will ensure that the proposal will have a less than minor effect on flood hazard. This means that:
- a. There can be no adverse flood hazard effects on any person that are above the “less than minor” threshold in s95E;
 - b. The overall flood hazard effects of the proposal as assessed in accordance with s95D, cannot be more than minor for the purposes of ss95D&95A(b).
21. You will also note that for the reasons explained by him and the Landmark Lile Report, those effects are entirely consistent with the applicable TRMP policies. On this basis the Council now has all the information requires on flood hazard and stormwater to determine the application.

Stormwater

22. I refer to the Landmark Lile supplementary report, which refers to the assessment provided by Mr Gary Stevens and relies on this to confirm that the stormwater effects will be less than minor, therefore will be less than minor on other persons and cannot be more than minor. This confirms that the effects fall below the critical thresholds in ss95E and 95D/95A(b).

NES CS

23. You will note that a sworn statement has been provided by the site’s previous owner regarding pesticide use (also **enclosed**). It is noted that the Council’s HAIL register is identified as an up to date register of what amounts to HAIL activities and that there is no record of this site on that register. On the basis of this and the statement in the affidavit, the Council does not have sufficient evidence to show that it is more likely than not that site was used for an activity on the Hazardous Activities and Industries List. The evidence shows that it is more likely than not that it was NOT used for such an activity.

24. As such, using the approach specified in Regulation 6 of the NESCS, the site is not a “piece of land” for the purposes of Regulation 5(7), which is therefore not triggered and no PSI is required. No adverse effects are established.
25. The Council therefore also has sufficient information on the NES CS to be able to determine this activity and to determine that the effects relating to the NESCS are nil and cannot lead to any effects on any other person for the purposes of s95E or overall effects on the environment for the purposes of ss95D&95A(b).

Traffic and Hazardous Substances

26. I refer to the Landmark Lile supplementary report, which addresses the responses provided and importantly, confirms that these raise no effects that that would exceed the “less than minor” threshold in s95E or “more than minor” threshold in ss95D&95A(b).

Obstacle Limitation Surface

27. I had already written to you on 2 November 2021. By way of confirmation, that letter observed that s92 Resource Management Act 1991 does not provide the power to require written consents. Thank you for confirming in your email of 26 November 2021 that the written approval mention was “information only”, that you “keep an open mind” and that you will make the determination of affected persons only once the further information has been received. I have accordingly taken the request under this as a request for further information to enable you to determine the effects of the proposal on aircraft activity.
28. To that end, please find **enclosed** for your information a copy of a report prepared by aviation safety consultant Mr Mike Haines, assessing the effects of the proposal on aircraft activity. Please find also **enclosed** a copy of the Civil Aviation Authority’s (CAA) written response, provided after it had been provided with a copy of Mr Haines’ report. As also pointed out in my 2 November 2021 letter, the position of Motueka Airport Manager is not an official Civil Aviation safety role and requires no formal civil aviation qualifications or experience.
29. As you will note, Mr Haines’ qualifications and experience in the area of civil aviation safety and regulatory matters is considerably beyond that of the current Motueka Airport Manager. As such Mr Haines’ report provides a more reliable assessment of the effects on aircraft activity than the written response from the Airport Manager that you had requested. Together with the response from the CAA it more than adequately provides the further information reasonably required to assess the effects of the proposal on aircraft activity.

Amendment of Proposal

30. The amendments identified at the beginning of this letter indicate that the shed initially proposed is now no longer sought, but instead container shelters with a much smaller bulk and a limited area in which there will be a minimal increase in height (of a few cm) will be built. You will note that it was the shed that was identified as potentially contravening the height restrictions in rules 16.11.1 & 2.
31. The amendment does not result in a change of the activity status, which remains fully discretionary. In any event, given that the amendment will occur prior to the s95A-E assessments, it raises no issues with scope. Importantly, it results in no intrusions into the CAA obstacle limitation surfaces as applied by the Haines Report.

Extent of Alleged Rule Breach

32. The RFI requests a site plan and cross sections of each proposed building, each tiny house (proposed location), each bund and all vegetation/screening measured against the TRMP OLS Rule 16.11.2.1 permitted heights showing what the actual breaches are proposed.
33. Attempts have been made to determine the appropriate OLS under Rule 16.11.21, however both Mr Mike Haines and Mr Ben Smith (Licensed Surveyor at Newton Survey) advised that it is not possible to determine the OLS to which that rule applies (see enclosed email).
34. Critical to the issue is Schedule 16.11A, which contains the words “do not scale”. It provides no:
 - a. Dimensions, including for the width of the runway, the length of the “runway strip” and thus the actual location of the end of the “runway strip”;
 - b. Definition of the terms “runway strip” or “runway”. This cannot mean the tar seal only, because that is only some 11m wide, which would result in a very different diagram than included in Schedule 16.11A; and
 - c. The terms “runway strip” and “runway”⁶ appear to be used interchangeably, which leads to further confusion.
35. In the absence of these critical pieces of information and due to the express prohibition on scaling, it is impossible to determine:
 - a. The exact location of the “end of the runway/runway strip”, from which the 1:50 slope referred to in Note 1 to the schedule is to be measured; and also
 - b. The distance between the points at the end of that runway/runway strip at which the 1:6.6 side splay of the OLS begins.
36. In the absence of this information it is simply not possible to tell with any certainty the exact location or width of the OLS at any point and therefore the Rule 16.11.2.1 “permitted heights” or distance between those heights and any structures.
37. Part 7.9.2 of the current Motueka Aerodrome Management Plan (MAMP) requires that to determine “Heights in Vicinity of Aerodrome” the OLS has to be surveyed every three years. The current OLS survey was undertaken by Mr. Ben Smith (Licensed Surveyor at Newton Survey) in 2020 and approved by Council. The fact that this survey does not use the OLS approach in Schedule 16.11A is entirely consistent with the observations above and strongly suggests that that OLS is not fit for purpose.
38. It is my view that due to the matters raised in paragraphs 31-33 above, Rules 16.11.2.1 and 16.11.2.2 (which applies if the former rule is breached) void for uncertainty. If the Council were to rely on the absence of the cross sections and in particular the permitted heights as a grounds for refusing consent or the s95A-95E determinations, RuRu would be left with little choice to challenge that either through an appeal, declaration or Judicial Review.
39. The current application is nevertheless for a fully discretionary activity, which therefore renders it academic for the purposes of activity status or the matters that can be considered when determining the consent, whether or by what extent the OLS is breached. The key

⁶ “Runway” and “Runway Strip” have two different technical meanings and refer to different locations in aeronautical regulatory documents, from which the term “obstacle limitation surface” is derived.

issue is the effect of the height of those structures on aviation, which, due to the fully discretionary status irrespective of Rule 16.11.2.1, can be considered. That is addressed below.

40. While s104(6) & (7) allow the Council to refuse consent if it considers that it has inadequate information on which to determine the application, this discretion should be exercised reasonably and proportionately⁷. In this case it is patently obvious that due to the very detailed assessment of the effects on aviation that is provided, there is more than sufficient information to determine the application. In view of this and the impossibility of providing exactly what was sought, refusing the consent due to the absence of that information would be disproportionate and unreasonable.
41. It would of course be necessary to raise the voidness of these rules as part of the inevitable appeal that would follow against such a refusal of consent, which, if successful, would result in a Court ruling that the rules are void for uncertainty.

Effects on Aircraft Activity

42. You will be aware that the effects on the environment are relevant for three key purposes:
 - a. Ascertaining whether the overall effects on the environment are more than minor for the purposes of ss55A & 95D;
 - b. Ascertaining whether there are effects on other persons that are not less than minor for the purposes of ss95B & 95E; and
 - c. Determining the effects on the environment for the purposes of s104(1)(a) as one of the matters to be considered when determining the application.
43. The effects are also to be assessed against the existing lawful environment and the reasonably foreseeable future environment⁸. That environment cannot include activities that require further authorisations before they can occur lawfully, or are not reasonably likely to occur for some other reason.

Existing Environment

44. There are three key features of the existing lawful environment between the legal boundary of the airport land and the legal boundary of the site on which the proposed activity is to occur:
 - a. Queen Victoria Street, Green Lane and Marchwood Park Road on which vehicles of up to 5m are lawfully entitled to travel, unimpeded; and
 - b. Power lines, which are at about 7.5m above ground level.
 - c. A light pole at 5.7m above ground level
45. As is evident from Mr Haines' report, these features physically limit the space that aircraft can actually use lawfully.
46. As you will be aware, a consent authority cannot take into account effects on activities that are occurring unlawfully⁹. Mr Haines' report leaves no doubt that under current CAA

⁷ RJ Davidson Family Trust v Marlborough District Council [2016] NZEnvC 81 upheld by RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52

⁸ *Hawthorn Estate*, *Supra*

⁹ *Graham v Dunedin CC* EnvC C043/01

circulars, no aircraft can lawfully use the airspace between where it seems the Council interprets the TRMP OLS as being and the OLS imposed by those CAA circulars.

47. It is also evident from the Assessment of Effects provided with the application, that no object, be that a structure or otherwise, is proposed to be used on site, that will or is likely to impinge on the current CAA circulars' OLS. Mr Haines' conclusion, confirmed by the CAA and relied on by Landmark Lile's supplementary report, is unequivocal; because of that factor, the Proposal will not have an adverse effect on aircraft activity in the present environment.
48. For legal purposes, Mr Haines' conclusion on that point demonstrates that the effects of the proposal on aircraft activity, as measured against the existing lawful environment, are nil. This is reinforced by the Landmark Lile supplementary report.

Reasonably Foreseeable Future Environment

49. Included in the definition of "environment" is the reasonably foreseeable future environment¹⁰.
50. I note that the applicable policies identify the future needs of the airport as well. For this reason Mr Haines has considered the reasonably foreseeable future environment. He has considered whether it is reasonably possible that a 1:50 OLS would be imposed under CAA Circulars. It is evident from his observations that that would require the closure of roads and the acquisition of more land for the airport, to extend the runway. Due to the further approvals required for that, as a matter of law such an extended runway cannot form part of the reasonably foreseeable future environment.
51. In addition, the physical constraints such as the existence of the roads (which require a clearance of 5m), the powerlines and the lamppost render it impossible to apply a 1:50 OLS to the current runway in any practicable way in the absence of such an extension and such closures. This is because that OLS must not be intersected at any point by any existing lawful structures and must provide 5m clearance above any road. To achieve this, the beginning of the 1:50 must be shifted sufficiently far inwards along the runway to ensure that it provides the requisite clearances for those existing lawful features. For illustrative purposes only I **enclose** a copy of a plan prepared by Newton Survey indicating what a 1:50 slope that provides 4.5m clearance for the roads might possibly look like.
52. From that plan it becomes immediately apparent that:
 - a. Such an OLS would result in a runway length that effectively renders the runway unusable; and
 - b. In any event, would have clearances above the site on which no part of the proposal could impinge.
53. It is also noted that neither the Motueka Aerodrome Management Plan (MAMP) nor the Motueka Aerodrome Development Plan (Appendix E of the MAMP) make mention of the imposition of an OLS than other than that established in accordance with 7.9.2 of the MAMP, or of the prospect of any upgrade of the aerodrome that might trigger different CAA requirements.

¹⁰ *Hawthorn, Supra*

54. Mr Haines has also assessed the most restrictive OLS that might reasonably be imposed by the CAA in the future (1:40), which is based on a change of certification to night or instrument approaches. He has done so despite there being no indication that this is imminent or reasonably likely.
55. Nevertheless, his report indicates that even if such a slope were to be imposed, none of the activities on site would impinge on that slope and as such the Proposal would have nil adverse effects on aircraft activity in the only reasonably possible future environment.
56. For legal purposes therefore, his report demonstrates that it is not possible that the Proposal could have any adverse effects on aviation activity in any reasonably foreseeable future environment. On that basis those effects are nil also.

Tasman Gowland Surveyors "Review"

57. On 11 March 2022 the Council's Mr Nick Chin forwarded a copy of a review by Tasman Gowland Surveyors of the OLS, concluding that the TRMP's specified 1:50 slope *"protects the aerodrome approach/take off surfaces for future uses which in my opinion is sensible."*
58. I note that the review was conducted in the absence of and makes no reference at all to the:
 - a. Matters raised by the Haines Report;
 - b. The unresolvable uncertainty of the applicable schedule, including the impossibility of determining the proper heights. I note that it recommends a "Runway Definition Survey", which tends to confirm this point;
 - c. In particular, Mr Ben Smith of Newton Survey's views on the impossibility of determining the OLS, in view of which it is inevitable that if Tasman Gowland were to attempt to do a "Runway Definition Survey", it would encounter the same problems; and
 - d. The legal matters concerning the reasonably foreseeable future environment. Importantly, the Haines report clearly demonstrates that the proposal will not impinge on any reasonably foreseeable future OLS that may need to be imposed to deal with future needs. That demonstrates that the proposal will also have nil adverse effects on the aerodrome's future uses.
59. I also note that the review:
 - a. Appears to address simply whether a 1:50 or 1:20 OLS would be "prudent", not where the 1:50 would begin or whether it would be necessary to avoid adverse effects of this proposal on aviation in the reasonably foreseeable environment; and
 - b. Is conducted by a surveyor, who, under the rules of expert evidence, would have to defer to Mr Haines' superior expertise when it comes to current and future adverse effects on aviation.
60. As such that review alters nothing in respect of the conclusions reached above and below with regards to existing and future effects on aviation and the aerodrome. It provides no proper basis for a finding of adverse effects on aviation or the aerodrome.

Consequences

Overall Effects – s95D

61. Since the overall effects of the proposal on aircraft activity are nil, they cannot be more than minor. As a result the requirement for public notification in s95A is not triggered.

Effects on Other Persons – s95E

62. Likewise, since the proposal has no adverse effects on aircraft activity, those effects on other persons are by definition less than minor. That means that under s95E, the effects on aircraft activity cannot form the basis on which to find that any other person, including the airport, is adversely affected. Since the airport is not adversely affected (or, relevantly, not affected beyond the s95E “less than minor” threshold), it does not need to be notified of the application if its written consent is not provided. Put differently, the finding that there are nil adverse effects on aviation means that the airport Manager’s written consent or comment cannot, as a matter of law, be a prerequisite for avoiding limited notification.
63. On this basis, any determination that the airport is adversely affected by the proposal’s effects on aircraft activity or that its manager’s written consent would be required, will be a fatally flawed determination that would be overturned by the High Court on Judicial Review (should an application for review be made), for more than one of the following grounds of Judicial Review:
- a. It would be based on an error of law, in that it would result from either:
 - i. An uncertain and therefore invalid Rule 16.11.1 & 2;
 - ii. Failing to apply correctly the current lawfully existing environment or reasonably foreseeable future environment; or
 - iii. A failure to apply the test in s95E correctly;
 - b. It would be a decision not open to the decision maker on the evidence before him or her, given the absence of any evidence of a real adverse effect on aviation arising from the proposal; and
 - c. It would evidence of a failure to take into account a matter that ought to be taken into account, such as:
 - i. The existence of the road and power lines and light pole in the existing lawful environment;
 - ii. The restrictions imposed by the CAA circulars on aircraft use below the CAA–imposed OLS; and
 - iii. The physical constraints of the existing airport, which exclude the application of a future 1:50 OLS by the CAA circulars from the reasonably foreseeable future environment.
64. Each of these errors would be material to the determination, which is not available in the absence of these errors.

Conflict of Interest

65. There is also a further matter to which it is appropriate to draw to your attention concerning the s95 notification/affected persons determination in respect of effects on aircraft. I am

aware that the Council is the owner of the airport. As such, whether the airport is determined to be adversely affected by the proposal's effects on aircraft activity is a matter in which the Council has a direct interest. In making the s95E determination it is therefore judge in its own cause.

66. To ensure administrative fairness and proper transparency, avoiding that conflict of interest is required. That can be achieved by appointing a truly independent commissioner to make the notification and affected person determinations. While this is not a determination for which the Council is obliged to delegate its decision to a commissioner if requested to do so by the applicant, it has the ability to do so if requested.
67. It is respectfully suggested that making use of that ability would be the appropriate means of avoiding a conflict of interest in this situation when it comes to the affected person and notification determinations. It is the only reasonable available proper course in this situation.

Section 104(1)(a)

68. As is evident from Mr Lile's amended assessment of the adverse effects of the proposal, provided on the basis of the amended proposal, since the proposal will have nil adverse effects on aircraft activity, there is no policy basis for relying on those effects either to refuse consent or impose restrictive conditions.
69. This is confirmed by Mr Lile's supplementary AEE comments, which were occasioned by the amendment of the proposal and the provision of the detailed assessment by Mr Haines of the effects on aircraft activity.

Impact of any Breach


70. Even if you were to take a different view and find that the amended proposal would still breach Rules 16.11.2. 1& 2 (a position that is in my view legally and practically unsustainable), the above analysis shows that the effects of any such breach would be nil in any event. That effectively renders the question as to whether there is a breach of those rules by this proposal academic for the current purposes.
71. It is noted that the Landmark Lile supplementary report confirms that the Haines Report indicates that "this amended proposal would have no impact whatsoever on aircraft activity" and that the information that the Council now has regarding aviation effects is sufficient to determine the application.

CONCLUSION

72. It is acknowledged that you now have a different set of information before you than when you initially formed your tentative views regarding the effects on aircraft activity and with those the status of the airport. However, several things have changed since that point in time, which require you to set aside your initial views on the effects on aircraft activity and the consequences thereof, which were based on a different set of information and assumption. Those changes are:
 - a. A detailed assessment of the effects on aircraft activity, provided by an expert better qualified to assess and comment on those effects than the Airport Manager, has now been provided together with the confirmation of the CAA, while this was absent from the initial application;

- b. A supplementary report from Landmark Lile has been provided, assessing the impact of that information on consistency of the proposal with the relevant objectives and policies; and
 - c. Some further legal clarity has been provided regarding the need to assess the effects on aircraft activities against the existing lawful environment and the reasonably foreseeable future environment.
73. You have now also been requested to refer the affected person and notification determinations to an independent external commissioner, due to the potential for conflict of interest arising from the Council's ownership of the airport land.
74. I look forward to receiving an acknowledgement of receipt of this amendment to the application, the further information provided and an agreement to refer the notification and affected persons determinations to an independent commissioner. I would also be grateful for your confirmation that you will provide any s42A report on affected persons and notification to such a decision maker devoid of any assumptions or predetermination that might arise from your previously stated views as to the airport's status and effects on aircraft activity.
75. I appreciate that this response contains a great deal of additional information and addresses a number of complex issues. In view of this it would be helpful if the applicant's director Mr Huelsmeyer), its planner (Mr Lile) and I (as counsel acting) could meet with you to explain and assist.

Yours Faithfully



Hans van der Wal

Barrister