

MRSC: Proposed Kyneton Airfield - Local Law No. 12**Submission**

7 February, 2019

EXECUTIVE SUMMARY

The Association has taken an interest in the Shire's local laws for over 20 years. Based on this experience, the Association considers this local law is not well thought through or executed, and appears to be attempting to give Council powers it is not entitled to have. The previous Council initiated the local law (the local law's Appendix 1 is dated February, 2016) as a "management" tool associated with its ill-conceived plans for substantial economics-focussed expansion of Kyneton airfield operations. It is disappointing to see the current Council pursuing it.

The local law is put forward in the absence of any objective assessment of the appropriateness of the airfield's location and function (previous consultant assessments for MRSC prioritised expanded economic development opportunities at the current location). It is an unregistered airfield, and presently operates in a vacuum of voluntary regulation with no formal plan or planning for either current or future operations.

Justification for the local law is said to be "community safety". The Association agrees safety is very important, but so too is recognising residents' rights, adhering to proper processes and avoiding land use conflicts. In reality the local law's benefits are substantially accrued by airfield users. Others (including businesses and residents) are unfairly expected to carry the cost in terms of penalties, financial burdens and loss of existing legitimate rights - apparently without being individually notified of the local law's existence or effect. Another alternative available to Council, to address safety concerns on an interim basis, is to close the airfield to all but declared emergency situations until a planning scheme amendment or other legitimate control is in place.

An unspoken but obvious aim of the local law is to provide Council with new powers to facilitate removal of trees at the northern end of the north-south runway. However, the local law's scope and application goes much further, and is not only excessive but unexplained. Most of those reading the local law will not find sufficient information in the local law to ascertain what height restrictions the local law proposes, and therefore what constitutes an offence.

The array of land use zones affected by the local law confirm the airfield's inappropriate location. Additional to Farming and Rural Living Zones, large areas within the Kyneton town boundary are affected, including established township residential areas, the town core commercial areas (including Piper St, and Mollison St to the High St corner) and an expanse of industrial zoned land in the north (including an existing IN2 offensive industry zone). The local law also affects operations of large and important existing public utility infrastructure in public zones - Coliban Water's sewerage treatment works, a waste transfer station, and the Calder Freeway.

The Community Impact Statement erroneously states that there are no current planning scheme provisions applying to airfields, when there are, including two long-standing provisions specific to Kyneton airfield. 'Non-airfield' planning scheme overlay provisions also apply to the airfield. The Statement identifies a planning scheme amendment as a solution, but laments the time it would take to produce one and promotes the local law as an expedient alternative. Council has had some 3 years to introduce a planning scheme amendment, but instead has directed time and resources to this local law. Even now, there is still no commitment by Council to commence a planning scheme amendment.

A local law is subordinate legislation and there are strong limits on what a local law can do. To the extent that a local law exceeds the limits, it is inoperable. In the Association's view, the local law exceeds those limits, and is *ultra vires* (exceeds Council's powers) on a number of fronts. If the local law is approved, the Association's advice to resident enquiries will be to challenge its legitimacy.

1 PRINCIPAL ISSUES NOT ADDRESSED

Poor management over time has resulted in the use of Kyneton airfield becoming an on-going, unresolved mess of conflicting interests, objectives, information, actions and outcomes. It is beyond time for Council to seek objective, well-informed, equitable and transparent resolutions to Kyneton airfield's role, location, operation, management, use of public land, and compatibility with surrounding land uses.

Kyneton airfield is not a planned airfield, as is evident by the lack of land available to provide either a buffer to other land uses, or room for expansion. It started life as a dirt track catering for seasonal crop dusting operations, and has grown to what it is today without formal consultation or planning processes, an example being introduction of night operations in 2014. Too often complaints about airfield operations have been dismissed because neighbouring property owners 'knew what they were buying into', regardless of how long ago they may have 'bought into it'. This approach fails to recognise that the airfield's operations have increased substantially over recent years, or that lawfully commenced land uses provide legal rights to owners and occupiers to continue to use their land in accordance with the laws that apply to it, including the planning scheme. Some blame historic planning approvals for creating land use conflicts, but these continue to be created. Approval of Amendment C99 (Kyneton Structure Plan) in 2017 provided for further subdivision of residential zoned land immediately south of the Freeway, and created new residential zones slightly further south – both areas are proximate to the flight approach to the airfield.

The perceived need for a local law, and the scale of the area to which it is proposed to be applied, is a timely reminder of the airfield's inappropriate proximity to the town, particularly in terms of existing and potential future levels of use, and the very substantial land use conflicts it creates.

Other issues that have arisen over time that remain to be satisfactorily addressed and resolved include the legality of hangar construction (built without a permit) resulting in privately owned structures on public land; use of land received as public open space under the Subdivision Act for airfield structures and operations; unlawful commercial operations; and inadequate charges set by Council for use/lease of this public land. Another persistent issue is loss of amenity for those who don't use the airfield, a loss which increasingly challenges legislative requirements for amenity, well-being and human rights.

These issues aren't addressed or resolved by the local law, which introduces penalties for land use and activities that are lawfully able to be undertaken.

In relation to emergency service use of the airfield, the previous Council's case for runway expansion to facilitate increased commercial and recreational operations at the airfield relied upon a spurious claim that expansion was required to facilitate firefighting bomber plane access, a claim in conflict with State emergency services protocols. The Association's understanding is that the airfield would need major (and possibly costly) upgrades to play a consistent or expanded or indeed extensive role in local firefighting activities. Such change could also necessitate revision of State policy/legislation. In order for Council to get the facts and make informed decisions, the Association strongly recommends Council invite the Minister for Emergency Services, and State-level management personnel who have responsibility for administering and co-ordinating Victoria's emergency air operations, to brief Council in regard to the State's position on deployment of emergency air resources, and Kyneton airfield's role in this at State level. The Victorian Aviation Services Unit, which has charge of all aerial firefighting craft, could be particularly helpful.

2 COMMUNITY IMPACT STATEMENT

2.1 Conflicts with Macedon Ranges Planning Scheme

The Statement is framed around a claim that the Macedon Ranges planning scheme currently includes no provisions applying to airfields. Even the flawed 2016 draft Kyneton Airfield Masterplan recognised there are provisions relating to airfields in the scheme, including provisions specific to Kyneton airfield.

Additional to State policy Clause 18.04-1S *Planning for Airports and Airfields*, the planning scheme currently includes the following provisions which apply to the airfield:

*Macedon Ranges: an **ENDANGERED** environment*

2.1.1 **Airport Environs Overlay Schedule 2 (AEO2)**

The AEO has five Purposes, one of which is:

- *“To ensure that land use and development are compatible with the operation of airports in accordance with the appropriate airport strategy or master plan and with safe air navigation for aircraft approaching and departing the airfield.”*

2.1.2 **Design and Development Overlay 2 (Kyneton Airfield) DDO2**

“DDO Schedule 2 has the following Design Objectives:

- *To maintain the efficiency and safety of the Kyneton airfield.*
- *To prevent development that is incompatible with airfield operations.*
- *To ensure that development is appropriately sited with respect to the operation of the Kyneton airfield.*
- *To ensure that all building and works are sited to take account of and minimise any off site effects of the Kyneton airfield.*
- ***To recognise any adopted Obstacle Limitation Surface Plan (OLS).”***

Under DDO2, an application is required (among other things) to provide a site plan showing the relevant Obstacle Limitation Surface and the height of the OLS above a site.

2.1.3 **Environmental Significance Overlay 7**

ESO7 is applied as a buffer for the adjoining Sewerage Treatment Plant, to protect the Plant’s operations. Parts of the airfield land, and parts of the 2.75km area affected by the local law, fall within the ESO7 buffer zone, resulting in the local law creating conflicting priorities within the ESO7 buffer.

2.1.4 **Environmental Significance Overlay 4 Eppalock Catchment**

The overlay applies to all land in Kyneton. The local law attempts to take precedence over the planning scheme’s requirement for a planning permit to lop or remove any vegetation on land where this overlay is applied, a requirement which would also apply to Council if it undertook vegetation removal works, then billed the landowner. This clearly creates a conflict with the planning scheme. Although the scheme lists some situations where a permit is not required (i.e. exemptions) none appear relevant to the local law. The planning scheme does not authorise Council or others to remove vegetation within the overlay area without a planning permit, or remove native vegetation without providing an offset of new native vegetation. The local law does.

As the Community Impact Statement does not recognise these planning scheme provisions, they appear not to have been considered in production of the local law. This has the effect of circumventing the Local Government Act’s restriction that a local law *must not duplicate or be inconsistent with a planning scheme*.

The Association’s conclusion is that the local law both duplicates the planning scheme (including addressing OLS issues) and is inconsistent with it. Under the Local Government Act (S111 4A), a local law is inoperative to the extent that it duplicates or is inconsistent with a planning scheme.

2.2 **Lack Of Commitment To A Planning Scheme Amendment**

The Community Impact Statement says *“Council is also exploring the application of State planning laws”* as an alternative to a local law, stressing the length of time a planning scheme amendment might take. At the same time, again stressing a lengthy time factor, the Statement also acknowledges a planning scheme amendment could resolve issues:

“If Council sought a planning scheme amendment, it could achieve the desired level of control but this could take a considerable amount of time.” Community Impact Statement, page 2

Despite this acknowledgement, and existing planning scheme provisions as a starting point, only an interim local law is on offer, with no commitment from Council to a planning scheme amendment or other action.

Council has had some three years to “explore” and produce a planning scheme amendment which could achieve the outcome now sought by the local law. Other than relocating the airfield or suspending its operations, this surely is the path Council should be (and should have been) taking.

Note: the Community Impact Statement, at page 3 Existing Legislation, refers to the local law as “the proposed amendment”.

3 LEGISLATIVE SETTINGS FOR MAKING LOCAL LAWS

3.1 Council’s Powers To Make The Local Law

The Association challenges Council’s powers to make Local Law 12.

- a) The local law states it is made under Section 111 (1) of the Local Government Act, which provides for a local law to be made but only in respect of an act, matter or thing for which the Council has a function or power under the Local Government Act or other Act.

The local law’s Community Impact Statement says there is no Federal or State legislation applicable to airfields which address the issues in the local law. In this case, Council is attempting to control airspace (the action) to improve community safety (the effect). The Act which gives Council a function or power to control airspace is not cited.

- b) Part 5 and Schedule 8 apply to local laws under the current Local Government Act (a draft new Act presented to parliament in 2018 has now lapsed). Schedule 8 of the current Act sets specific requirements for what local laws must, and must not, do. In the Association’s view, the local law is in breach of several of these requirements, rendering it *ultra vires*.

LGA Schedule 8 – 2 (a) requirement: *A local law must not exceed the powers conferred by the Act under which the local law purports to be made.*

LGA Schedule 8 – 2 (d) requirement: *A local law must not make unusual or unexpected use of the powers conferred by the Act under which the local law is made having regard to the general objectives, intention or principles of that Act.*

LGA Schedule 8 – 2 (e) requirement: *A local must not embody principles of major substance or controversy or contain any matter which principles or matter should properly be dealt with by an Act and not by subordinate legislation.*

3.2 Non-Compliance With Legislative Requirements

The draft local law:

- a) **Is not presented in plain English**

The diagrams apparently intended to supply information about height restrictions for the OLS and the area affected by the local law are small to the point of being indecipherable, are technical in nature and lack an explanation of what they mean, with the result it is impossible to understand what constitutes the offences to which Council is applying a maximum 20 unit penalty.

Appendix 1 – a map showing Kyneton Airfield and presumably the area of the local law’s operation – is so small as to be unreadable, contains technical information, and doesn’t have a legend or explain its meaning.

Appendix 2 – an OLS diagram – appears to be upside down (i.e. where is north, because from the runway layout it appears to be at the bottom rather than the top of the diagram). The OLS diagram’s relationship to surrounding land and the local law’s area of operation is not identified, and the OLS height limits which are not to be penetrated are not clearly expressed in plain English. The local law also sets a requirement to obtain a permit to temporarily penetrate the OLS but insufficient information is provided to determine the relevant applicable OLS height in metres above which the OLS would be penetrated.

LGA Schedule 8 – 1 (f) requirement: *A local law must be expressed plainly and unambiguously.*

- b) **Imposes a further penalty** by requiring property owners and occupiers to pay a cost to comply with the local law. It empowers Council to force owners, and take action itself, to remove a “hazard” – at the owner/occupier’s expense.

LGA Schedule 8 – (2) (b) (ii) requirement: *A local law must not impose any tax or fee, or any fine, imprisonment or other penalty.*

- c) **Has a retrospective effect.** This undoubtedly would be one of the main attractions of the local law. It is trying to give Council powers to act retrospectively against existing (lawful) conditions. Legislation generally does not have a retrospective effect, and it is prohibited in a local law.

LGA Schedule 8 – (2) (b) (i) requirement: *A local law must not have any retrospective effect.*

- d) **Trespasses on rights and liberties previously established by law.** The excessive area within which the local law is to be applied includes land in Farming, Rural Living, Industrial, Commercial, Residential and Public Use zones, the current use of which is presumed to be valid, and within the laws and rights attached to the activities occurring on the land. The local law seeks to interfere with and curtail (extinguish) some of those rights and liberties, and others established under other legislation.

LGA Schedule 8 – 2 (f) requirement: *A local law must not unduly trespass on rights and liberties of the person previously established by law.*

- e) **Relies upon administrative decisions.** Notwithstanding that the restrictions in relation to the OLS in the local law are not comprehensible, the local law places the onus for reporting “hazards” on the landowner, and applies the maximum penalty available for failure to do so. It then empowers Council alone to determine whether the “hazard” requires remedial action and to demand rectification, including empowering Council to remove anything it deems a “hazard”, at the landowner’s cost.

LGA Schedule 8 – 2 (g) requirement: *A local law must not make rights and liberties of the person dependent upon administrative and not upon judicial decisions*

- f) **Restricts competition.** This is confirmed in the Community Impact Statement. The primary beneficiaries of the local law are airfield users, not the community as a whole. The objectives of the local law can also be achieved by closing the airfield’s operations.

LGA Schedule 8 – 2 (j) requirement: *A local law must not restrict competition unless it can be demonstrated that:*

- *the benefits of the restriction to the community as a whole outweigh the costs, and*
- *the objectives of the local law can only be achieved by restricting competition.*

In addition, the proposed local law:

- g) **Imposes the highest available penalty** (20 penalty units, or \$2,000) that it is possible to apply for local laws (only primary legislation can impose a higher penalty). This maximum penalty requires justification, a matter which should have been addressed in the Community Impact Statement. The local law itself does not identify the Act from which the penalty unit is derived i.e. the Sentencing Act 1991 S110 (2) which is \$100 per penalty unit, or the Monetary Units Act 2004 which currently indexes a penalty unit at \$161.19.
- h) **Includes “incorporated documents” and/or matters addressed by them**, but fails to even name these documents (which also were not exhibited with the local law), but instead refers to an apparently anonymous and open-ended collection of such documents. The local law then declares noncompliance with these unidentified documents and matters to be an offence and liable to a penalty (page 9).
- i) **Unduly impacts on business operations** The Community Impact Statement acknowledges there are activities in close proximity which attract birds, including Coliban Water’s abutting Sewerage Treatment Plant, and a waste transfer station. This isn’t further addressed but the local law outlaws and requires management to avoid activities which attract birds, and imposes a 20 unit penalty for failure to do so. This has potential to impinge on the operations of and increase costs to Coliban Water’s Sewerage Treatment Plant, the waste transfer station, and also to the meatworks as the local law is applied to the Shire’s only Industrial 2 zone, a zone which provides for offensive industry.

- j) **Affects thousands of people, and businesses, outside what most would regard as the Kyneton airfield precinct.** The area affected by the local law (within a 2.75km circle of the airfield) includes large areas of residential, commercial (including Piper St, and Mollison St to the High St corner), public and industrial zoned land within the Kyneton township boundary, as well as rural zoned areas. The Community Impact Statement does not indicate that these people and businesses received individual notice that they are directly affected and potentially disadvantaged by the local law.

LGA Schedule 8 – 2 (h) requirement: *A local law must not be inconsistent with principles of justice and fairness.*

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