

## 15.1 Confidential Report – Update on Aldinga Airfield

*Council at its 31 July 2012 meeting resolved to seek clarification of legal advice obtained for Aldinga Airfield.*

*This is an update on a previously reported project, concept or issue.*

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Attachments: 1. Minutes of Council meeting 31 July 2012 (2 pages)  
2. Aldinga Airfield Fact Sheet (4 pages)  
3. Norman Waterhouse legal advice dated 30 August 2012 (13 pages)

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### 1 Executive summary

#### 1.1 Topic

Council at its 31 July 2012 meeting resolved to seek clarification of legal advice obtained for Aldinga Airfield.

#### 1.2 Context

At its meeting of 31 July 2012, Council resolved:

- 1. That Council note this report and await a subsequent report for consideration from Pulse Aero applying for the revocation of condition 8 of development application 145/7150/1977.*
- 2. That Pulse Aero be advised that maintenance of aircraft is currently limited to aircraft permanently located on the airfield only, pending the outcome of the request to revoke condition 8 of development approval 145/7150/1977.*
- 3. That Council seeks clarification and explanation of the previous legal advice in relation to Aldinga Airfield.*

*This clarification involves and is not limited to:*

- a. advice that discussed if the variation to the LMA is a threshold question*
- b. should the LMA consideration come before the Development Act assessment*
- c. will deletion of condition 8 change the 'nature' of the development i.e merits of the development as opposed to nature of the development*
- d. if condition 8 is integral or otherwise to the 1977 approval; and*

*e. if condition 8 is revoked consideration on the practicality and enforceability of such conditions eg five additional non-permanent aircraft.*

This report provides legal advice in response to resolution 3.

### **1.3 Financial implications**

There are no financial implications for Council, other than staff resource time within the existing budget.

### **1.4 Suggested outcome**

It is suggested that Council consider this item in Confidence. Section 90(3)(h) of the *Local Government Act 1999* is suggested as the most appropriate clause for this purpose.

This item is presented as a confidential item as it contains legal advice.

The possible implications of not considering this item in confidence are that our legal position may be jeopardised given the possibility this matter may end up in the courts, although we are trying to avoid this.

It is recommended that Council receive the update, pending provision of a further report and advice on our legal position.

## **2 Recommendations**

### **1. That**

- a. Under the provisions of Section 90(2) of the *Local Government Act 1999* an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**
- b. The Council is satisfied that it is necessary that the public be excluded to enable Council to receive the information at the meeting on the following grounds:**
  - Section 90(3)(h) legal advice.**
- c. Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.**

**2. That Council note this report and await a subsequent report for consideration once all relevant material has been considered by our lawyers and a position on the validity of the 1977 Development Approval relating to Aldinga airfield has been determined.**

**3. That the matter of the Confidential Report - Aldinga Airfield having been considered in confidence under Section 90(3)(h) of the *Local Government***

**Act 1999 an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the Confidential Report - Aldinga Airfield and the attachment, minutes and the relating discussion of the subject matter be kept confidential for a period of two months after Council determines the validity of Development Application 7150/1977 and its conditions.**

## Key factors

### 3 Status of development approval 7150/1977

Council staff met with Aldinga Aviation representatives in late July 2012 to discuss some additional documents that Aldinga Aviation advised were discovered in their records. At this meeting Aldinga Aviation produced a development approval dated 5 July 1977 that provided approval for the Authorised Landing Area (ALA) and hangar without conditions attached. We do not have this document within our records.

Aldinga Aviation contests the validity of the decision notification relating to the Development Approval dated 26 July 1977 and the ten conditions identified.

During the meeting it was agreed that both parties require all documentation in order to ensure the legal advice obtained is based on the full facts. A Freedom of Information (FOI) request has been received from Aldinga Aviation seeking copies of Council's current file. Aldinga Aviation advised that they will provide Council with their documents they have once the FOI process is completed.

As advised in an update to Elected Members it is expected that a report presenting all facts and legal advice will be provided in either November or December 2012.

#### 3.1 Aldinga Airfield in the media

We have become aware of discussion of this topic in the media including social media on Facebook with incorrect information being promoted, including the incorrect statement that Council want to close the flying school and airfield.

We have provided a fact sheet in response to these discussions which outlines the facts (attachment 2).

#### 3.2 Legal advice

Legal advice has been obtained from Norman Waterhouse and a summary of the advice follows (attachment 3):

*a. Advice that discussed if the variation to the LMA is a threshold question*

The threshold questions considered in Smith's case no longer applies to the *Development Act 1993* and were not in place in the *Planning and Development Act 1966* and therefore do not apply.

*b. Should the LMA consideration come before the Development Act assessment?*

This decision can be placed in any order. There is nothing inappropriate or unlawful with the decision relating to the LMA clause that Council has already made and does not preclude it from any further decision against the *Planning and Development Act 1966* or *Development Act 1993*, if applicable.

*c. Will deletion of Condition 8 attached to the 1977 development approval relating to servicing of non-domiciled aircraft change the 'nature' of the development ie merits of the development as opposed to nature of the development?*

The approval of an airfield includes incidental activities including maintenance of aircraft both domiciled and non-domiciled. Therefore, deletion of Condition 8 will not change the nature of the development as the scale of the Pulse Aero operation, in terms of flight numbers attributed, is small compared to overall flight numbers.

*d. If Condition 8 is integral or otherwise to the 1977 approval?*

Under the *Planning and Development Act 1966* all conditions were 'integral', however this does not mean that varying such conditions was a change of use in every case. Given aircraft maintenance is considered as part of the operations of an airfield, it does not appear that the removal of Condition 8 was integral to the granting of the 1977 consent.

*e. If Condition 8 is revoked, consideration on the practicality and enforceability of such conditions eg five additional non-permanent aircraft.*

Council has power under the *Development Act 1993* to ensure the clauses of the LMA are not breached. Therefore, should more than five non-domiciled aircraft per week (averaged to 20 per month) be serviced, if condition 8 is revoked, Council can take action under the *Development Act 1993* to enforce the provisions of the LMA.

In terms of practicality there may be some difficulty in determining whether there is a breach of the LMA condition due to reliance on log book monitoring and complaints based monitoring. However, the Civil Aviation Safety Authority (CASA) requires logbooks to be kept and Council officers have the power to check these records. This seems to be the most practical way of monitoring operations.

Should any legal questions arise from this advice we will provide these to Norman Waterhouse and obtain feedback.

#### **4 Summary**

This update information is provided for Council consideration. A report will be provided in November or December 2012 once all relevant information and legal advice has been obtained, relating to the status of the development approval applying to the site.