

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1542/2015
PERMIT APPLICATION NO. PP879/2014

CATCHWORDS

Section 82 of the *Planning and Environment Act 1987*; Greater Geelong Planning Scheme; industrial site in township; application for 'use' approval for helicopter landing site; proposal supported by Council but neighbours have brought a joint application for review to the Tribunal; key issues of the 'noise impacts' and 'safety considerations' of the proposal; proposal refused.

APPLICANT FOR REVIEW	Jacqueline Sawyer and Others
RESPONSIBLE AUTHORITY	Greater Geelong City Council
RESPONDENT	JamCo Constructions Pty Ltd
SUBJECT LAND	85 Mill Road, LARA
WHERE HELD	Melbourne
BEFORE	Philip Martin, Presiding Member Catherine Wilson, Member
HEARING TYPE	Hearing
DATE OF HEARING	15, 16 and 17 February 2016 and 7 March 2016
DATE OF ORDER	22 April 2016
CITATION	Sawyer v Greater Geelong CC [2016] VCAT 619

ORDER

- 1 The decision of the Responsible Authority is set aside.
- 2 In planning permit application No. PP879/2014, no permit shall issue.

Philip Martin
Presiding Member

Catherine Wilson
Member

APPEARANCES

For Permit Applicant

Ms Mimi Marcus of Maddocks Lawyers. She called the following witnesses:

- Mr Stuart McGurn (expert independent town planner)
- Mr Jim Antonopoulos (independent acoustic expert)
- Mr Colin Clarke (expert helicopter pilot)
- Mr Jacobus du Toit (business owner and helicopter pilot)

For Responsible Authority

Mr Joshua Trowell

For Applicant for Review

Mr Frank Chalifour appeared in person. He called the following witnesses:

- Mr Richard Unkles (independent acoustic expert)
- Mr Lionel McWilliam
- Mr Tim Matthews

The Tribunal (with the consent of the parties) 'took as read' the balance of the sworn lay evidence provided by the Applicant for Review

INFORMATION

Description of Proposal

Helicopter landing site.

Nature of Proceeding

Application under Section 82 of the *Planning and Environment Act* 1987 – to review the decision to grant a permit.

Zone and Overlays

Industrial 1 Zone.

Design and Development Overlay Schedule 20.

Permit Requirements

Clause 33.01-1: A permit is required to use land as a 'Helicopter land site' on land zoned Industrial 1.

Relevant Scheme, policies and provisions

Clauses 13.04-1, 17.01-1 and also see clause 52.15.

Land Description

The subject land has a wedge-shape, is located next to the railway reservation, has a total area of 3852 sqm and features a frontage to Mill Road of about 128m. It is used as an industrial/commercial site by the company JamCo Constructions Pty Ltd. The subject land is improved by a two large sheds and an associated concrete pad. In recent periods and at the time of our inspection, a number of shipping containers have been located on the subject land, notably along the northern end of the Mill Road boundary. The subject land is relatively flat and has no vegetation of any consequence. There is a row of immature trees external to the subject land's northern fence line along Mill Road. There is a mixture of other uses in this locality, including residential properties either side of the railway line further to the north, but also other nearby industrial uses, ovals to the west and a school to the north-west.

Tribunal Inspection

The Tribunal inspected the site and surrounds in between the third and the fourth hearing days.

REASONS¹

INTRODUCTION/SUMMARY OF FINDINGS

- 1 The subject land is an industrial site of about 3852m² in size, owned and operated by the company JamCo Constructions Pty Ltd. The abutting Melbourne-Geelong railway lies to the east of the subject land. The review site is already improved by two large sheds and an associated concrete pad, with vehicle access to Mill Road. In recent periods and at the time of our inspection, a number of shipping containers have been located on the subject land, notably along the northern end of the Mill Road boundary. JamCo Constructions Pty Ltd we were told is a high voltage electrical construction firm which is involved in upgrading and maintaining power and terminal stations (as part of the operation of Victoria's power grid). As part of such operation, JamCo Construction Pty Ltd owns and already operates two Robinson R44 helicopters out of a number of other locations across Victoria. We understand these helicopters typically fly with one pilot and no passengers.
- 2 The other main features of the site, locality and relevant planning framework are already set out further above.
- 3 It is proposed that the existing concrete pad on the north side of the existing buildings on the subject land be used for a 'Helicopter landing site', which is defined in the Planning Scheme as:

Land used for the take off and landing of a helicopter, with or without a permanent landing pad, but without permanent facilities for the assembly and distribution of goods and passengers.
- 4 No works are proposed – it is merely 'use' permission being sought.
- 5 It is intended that helicopters must use a 50 metre wide nominated flight path, as follows. Helicopters coming in to land would fly just off to one side of the Melbourne-Geelong railway line, coming in from the north-east. This 'flight path' requirement would operate once the helicopter is below a height of 1000 feet. The take-off procedure would also generally follow the railway line, but with helicopters crossing over to the opposite (eastern) side of the line as part of rising up and moving in a north-east direction, with the nominated flight path to be follow up to 1000 feet in height. It is proposed that there be a limit of two helicopter movements per day ie one landing and one taking-off or vice-versa. We are told the approximate duration of any one take-off or landing event would be in the order of 3 and half to four and a half minutes. It is intended that the permitted times for such helicopter activities would essentially be 'daylight hours' seven days a week, albeit over a marginally longer basis on weekdays compared to the

¹ We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. We do not recite or refer to all of the contents of those documents in these reasons.

weekend. It is proposed that there would be a maximum of three take-off and landings per week.

- 6 When appropriate, one helicopter is proposed to be stored within one of the large sheds and the Permit Applicant is willing to make the proposed permit tied to the specific use of Robinson R44 helicopters.
- 7 As part of the permit application process, several amendments were made to the application. In its most recent format, Council supports the proposal, despite various objections from a number of neighbours. In addition VicTrack (whilst not a party) has objected to the proposal, although no objection was made by either the Victorian Environment Protection Authority (**EPA**) or by the Civil Aviation and Safety Authority (**CASA**). Clause 52.15 of the Planning Scheme specifically provides planning provisions to deal with proposals in Victoria involving helicopters. In the situation where Council has issued a Notice of Decision to Grant a Permit, the relevant neighbours have on a joint basis sought the Tribunal's merits review of this decision.
- 8 The hearing of this matter came before us for three scheduled days, over 15-17 February 2016. At this time we heard the submissions of Council and the Applicants for Review. In spite of the Tribunal extending sitting times on the on the second and third day it became clear that a further half day hearing day would be required, notably for Ms Marcus to present her main submissions to us. Accordingly, a further half day was allocated on 7 March 2016. We allowed for certain 'GPS data' being circulated by the Permit Applicant during this intervening period (which duly occurred).
- 9 Furthermore to avoid a fifth sitting day it was agreed by all parties that the discussion of the draft permit conditions would occur 'on the papers' rather than face-to-face. This further written information process has been provided and we have taken same into account in making our overall findings.
- 10 The Tribunal carried out an unaccompanied inspection of the subject land and surrounds in between 17 February and 7 March 2016.
- 11 The key issues in this proceeding have been:
 - Whether it is 'mandatory' or 'discretionary' requirement for the noise levels associated with the proposal to comply with the relevant noise limit in the EPA Noise Control Guidelines Publication 1254 October 2008 (**EPA Guidelines**).
 - Route of helicopter in early 2016 noise test.
 - The degree of 'need'.
 - Whether there is strategic planning support for the proposal.

- Will the use of the proposed helicopter landing site produce unacceptable amenity impacts on surrounding areas?
- Are there other matters we should consider?
- Does the proposal raise any unreasonable 'safety' issues/is one preferred flight path adequate?

12 We can summarise our overall findings as follows.

13 For the reasons explained below, the Tribunal accepts that the maximum noise limits set in the EPA Guidelines are ultimately preferred limits which the Tribunal can consider in its discretion, rather than constituting mandatory noise limits.

14 In relation to the 'planning merits' of the proposal, we acknowledge that the proposal has some positive aspects eg it is favourable per se that the subject land is zoned Industrial 1 and there is a modest 'need' aspect to the proposal. However, when viewed holistically, we consider the 'strategic planning context' to play a fairly neutral role in our assessment of the proposal. Rather, we see the key determinative factors as arising from the site-specific physical context – what are the key 'safety' issues and would the proposal cause any unacceptable noise impacts on the closest dwellings? In assessing same, we find there to be fundamental unresolved problems with the proposal - we are unconvinced that this would be an acceptable planning outcome. Hence we have set aside Council's Notice of Decision to Grant a Permit and directed that no permit issue.

15 Our reasons follow.

PRELIMINARY ISSUES

Are the noise limits set by the EPA guidelines discretionary or mandatory?

16 A re-occurring topic during the hearing was the role and weight we should give to the EPA Guidelines. It was common ground that in the situation here, these guidelines prescribe that the maximum helicopter noise level (measured at the nearest residential dwelling – here being the No. 12 Mill Road dwelling) is 82 dB(A).

17 In this regard, the objectors urged us to find that this constitutes a mandatory noise limit and that any failure to satisfy 82dB(A) would be fatal to the proposal. In taking this position, the objectors relied on the expert noise evidence of their witness Mr Unkles, who confirmed in his oral evidence that he understand the '82 dB(A)' noise limit to be mandatory not discretionary.

18 Relying on:

- the expert opinion of Mr Unkles;

- the email dated 21 September 2015 sent to Mr Chalifour by Ashleigh Jones² of the Victorian EPA, in which Ashleigh Jones expresses the view that the three relevant bullet points in section 16 of the EPA Guidelines constitute mandatory requirements; and
- the expert opinion of the other noise expert (Mr Antonopoulos) being that the maximum helicopter noise for the purposes of the EPA Guidelines sits right on the limit of 82 dB(A)

the objectors urged the Tribunal to find that there is (as a whole) compelling evidence that the maximum noise levels generated by the proposed helicopter landing and taking off would exceed 82 dB(A) and that this is a fatal breach of the EPA Guidelines.

19 This was disputed by the Permit Applicant, who argued that the 82 dB(A) noise limit is discretionary and in any case (relying on the evidence of Mr Antonopoulos) can be satisfied by the proposal.

20 The following legal ruling is made by Member Martin as the Presiding Legal Member.

21 The Tribunal finds the noise limits set by the EPA Guidelines to be ultimately discretionary rather than mandatory, for the following reasons.

22 It is telling that the title to the document in question uses the word “*Guidelines*”, rather than say ‘regulations’. If one googles the meaning of ‘guidelines’, the first result that comes up is “*A general rule, principle or piece of advice*”. Whilst I acknowledge the use of the word ‘rule’ here to be more ambiguous, I am satisfied the reference to “principle” and “piece of advice” is consistent with a discretionary situation. Similarly I see a ‘discretionary’ flavour to The Free Dictionary defining “guideline” as “*A statement or other indication of policy or procedure by which to determine a course of action...*”.

23 That said the EPA guideline values are the only available criteria for acceptable noise levels relevant to these circumstances.

24 The key section of the EPA Guidelines for our purposes is Section 16 at page 10, which expressly deals with helicopter noise. They give criteria for helicopter noise as:

The criteria comprise three separate components, each of which should be satisfied at the nearest affected buildings:

- The measured $L_{Aeq,1}$ (measured over the entire daily operating time of the helipad) shall not exceed 55 dB(A) for a residence.
- The measured maximum noise level L_{Amax} shall not exceed 82 dB(A) at the nearest residential premises (See Note below). (Tribunals emphasis)

² Being a Senior Noise Policy Officer, Policy and Regulation

- Operation outside the hours between 7 am and 10 pm shall not be permitted except for emergency flights.

Note: These levels will generally be met by a separation between the landing site and the residential premises of 150 m for helicopters of less than two tonnes all-up-weight, and 250 m for helicopters of less than 15 tonnes all-up-weight.

- 25 The second bullet point and the note are of particular relevance here.
- 26 I acknowledge that the word “*shall*” is used in the second bullet point of Section 16 ie “*The measured maximum noise level L_{Amax} shall not exceed 82dB(A) at the nearest residential premises*”.
- 27 However on balance the Tribunal sees the more compelling position to be that these section 16 requirements are ultimately discretionary, relying on:
- The use of the word “*should*” in the opening paragraph of section 16, which reads “*The criteria comprise three separate components, each of which should be satisfied at the nearest affected buildings ...*”.
 - The final sentence of the first paragraph under the heading “*Introduction*” at page 1 of the EPA Guidelines stating “*The guidelines are designed, however, to be the basis of assessment and not the last word*”.
 - The very fact that the title to the document uses the term “*Guidelines*” – see our discussion of this point further above.

With respect, we do not see the email opinion of the relevant EPA officer (Ashleigh Jones) on this issue as carrying any major weight – it appears this email was more in the nature of ‘an informal personal view’ and that Ashleigh Jones does not have any legal qualifications as far as the Tribunal is aware.

Route of helicopter in early 2016 noise test

- 28 It is convenient at this point to indicate our finding on one other contentious issue, as follows.
- 29 There was some debate at the hearing whether the on-site noise testing done by Mr Antonopoulos in early 2016 was flawed. This testing involved Mr Antonopoulos carrying out noise testing in several nearby locations whilst a helicopter was taking off from the concrete pad in question, doing two circuits and then landing again. Mr Chalifour showed us certain video footage he took at the time using his phone, and argued that this footage points to the helicopter veering further east, away from its intended path in a north-east direction alongside the railway tracks. Whilst it is still not clear to us how he would have been in a position to obtain the necessary GPS data, during the hearing Mr Chalifour also tabled an aerial photo of the locality, marked up with yellow lines to show the ‘veering off’ being alleged.

- 30 This was contested by the Permit Applicant, who produced its own marked up aerial photo, with red lines showing the helicopter duly flying in and out alongside the railway line. It was the position of Ms Marcus and the expert evidence of Mr Antonopoulos that these red lines were accurately derived from a GPS device sitting inside the helicopter at the time.
- 31 There was a further discussion about this situation at the beginning of the final hearing day. By the end of this discussion, Mr Chalifour conceded that there were real discrepancies between his own 'yellow lines' and the direction which the helicopter was heading as shown on his own video footage. However Mr Chalifour indicated that he still queried whether the situation shown with the 'red lines' was accurate.
- 32 Turning to our findings, we are satisfied that there is sufficient evidence for us to be satisfied that this noise test was done properly and that its results can be relied upon. In particular, we rely upon:
- The key expert noise consultant involved in the testing (Mr Antonopoulos) being a very experienced and reputable noise expert, who is known to the Tribunal.
 - The very fact that we were told the 'red lines' reflect the results of the GPS device inside the helicopter during the key flights. We see no convincing evidence before us suggesting that the GPS device in question was inaccurate or mal-functioning. To the contrary, we would normally expect a GPS device by its very nature to be highly accurate.
- 33 The video footage shown by Mr Chalifour in our view actually reinforces that the flight path of the helicopter is as shown with the red lines (or very close to).

THE DEGREE OF 'NEED'

- 34 It was put to us by the Permit Applicant that there is a significant 'need' aspect to the proposal. That is, Ms Marcus highlighted the fact that JamCo Constructions Pty Ltd is involved in maintaining the power grid and there can be occasions where there is a time-sensitive priority for a representative of JamCo Construction Pty Ltd (typically its owner Mr du Toit) to urgently attend at more distant power facilities, which can be anywhere in Victoria. Following this line of thinking, the ability for Mr du Toit to rapidly cover large distances by helicopter can be a vital part of fixing the relevant problem with the power network without there being an 'outage' or other substantial power disruption to the region involved.
- 35 In response to our questions, it was clarified that most commonly Mr du Toit would carry little (if any) tools or spare parts with him in the helicopter, as part of such urgent operations. Rather, the imperative is for Mr du Toit himself to be able to attend at the relevant location urgently, and then apply his professional skills and experience to fixing the problem. In

his statement to the Tribunal Mr du Toit stated that he is the construction /Project Manager for all projects involving major terminal station rebuilds.

36 With respect to this 'need' issue, our finding is that we can have some regard to it, but that it carries only modest weight for the following reasons.

37 Whilst it appears some of the helicopter flights would be for urgent jobs in the nature of 'avoiding power outages', it appears other flights would be of a more routine nature. In this second situation, the potential use of a helicopter which can land and take off from the review site itself seems more a matter of 'convenience' than 'need'. In relation to the more urgent jobs, it is not clear how frequently they will arise and what proportion of the overall helicopter usage would be of this nature.

38 While we understand that Mr du Toit lives in Lara and does not intend to use the helicopter for ordinary 'commuting' purposes, we are aware that if the proposal went ahead:

- In the absence of relevant permit conditions, such use of the helicopter for ordinary commuting would be theoretically possible.
- Any permit conditions seeking to prohibit the use of the helicopter for ordinary commuting may be problematic to properly monitor and enforce.

39 This distinction between 'convenience' compared to 'need' is also highlighted by the admission that typically the pilot of the helicopter will be taking few (if any) spare parts and/or tools with them to the site. There was some indication the pilot might sometimes take a brief-case or the like with them. If the expectation is that there will be little (if any) loading of spare parts and/or tools held at the review site into the helicopter, this does 'beg the question' whether a very similar arrangement could operate out of the nearby Avalon Airport (being a dedicated aviation facility) which is less than 10 kilometres away.

STRATEGIC PLANNING SUPPORT FOR THE PROPOSAL

40 We turn now to the issue of the extent of strategic planning support for the proposal. It is self-evident that the Industrial 1 zoning of the subject land involves a lower level of sensitivity and is favourable per se for the proposal. The rider however is that the key purpose of the zone includes the following text which we have highlighted – *"To provide for manufacturing industry, the storage and distribution of goods and associated uses in a manner which does not affect the safety and amenity of local communities"*. It is clear from this highlighted text that even with this Industrial 1 zoning, the relevant proposed activities need to have regard to the amenity of the local communities, rather than it being an 'open slather' situation.

41 In the course of the hearing, we were referred (at least out of completeness) to various State and local policies. For example, Clause 21.07 (Economic

development and employment) includes amongst its policy aims that employment and development be promoted per se in this municipality and under the sub-heading “Industry” it is stated that “*There is a need to provide a diverse range of appropriately located, well serviced industrial land which meets the needs of a range of industrial types and minimises land use conflicts*”. Whilst recognising the argument that this Applicant needs the use of a helicopter on the subject land as part of how it operates day-to-day, again there is the counter-balance that it is stated that there should be a minimising of land use conflicts. Similar provisions and considerations apply in relation to the relevant text at Clause 21.07-2.

- 42 Although Clause 21.13 provides about one and a half pages of local policy provisions specifically for Lara, they are very general in nature and say nothing about helicopters.
- 43 The residential land to the east of the review site (on the opposite side of the railway line) is zoned Rural Living Zone. During the hearing Mr Chalifour submitted that Lara is expected to grow strongly and that there is an impending situation of this residential land to the east being re-zoned to a more intensive form of residential zone. This was disputed by both Council and the Permit Applicant, who advised that they are unaware of any such strategic intention. Furthermore they both relied on the fact that the Lara Local Structure Plan at the back of Clause 21.13 specifically has the following narration for this area to the east of the review site – “*Retain existing Rural Living Zone*”. We find the position of Council/the Permit Applicant more persuasive on this particular issue.
- 44 In summary, we do not see the ‘strategic planning context’ for the proposal as playing any significant role in our discretion. Rather, we see this strategic context as either being ‘neutral’ or at most tipped mildly in favour of the proposal due to the very fact of the review site being zoned Industrial 1. To the extent this finding departs from the expert planning evidence of Mr McGurn, we find that evidence unpersuasive.

NOISE AND SAFETY ISSUES

The Planning Provision Requirements

- 45 The relevant Clause of the Planning Provision that we are required to consider is Clause 52.15 Heliport and Helicopter Landing Site which has as its purpose:

To ensure the amenity impacts of a heliport and a helicopter landing site on surrounding areas is considered.

- 46 The application guidelines for a permit under Clause 52.15-2 then in summary, and as applicable here, requires a site plan, a location plan with distances to sensitive uses within 500 metres and a written report which:

Demonstrates a suitable separation distance between the landing point of a heliport or helicopter landing site and any building used for a

sensitive use that is not associated with the helicopter operation by either:

- Locating the proposed heliport or helicopter landing site at least 150 metres for helicopters of less than 2 tonnes all-up weight, or 250 metres for helicopters of less than 15 tonnes all-up weight, or
- Providing an acoustic report by a suitably qualified consultant.
- Includes details of the proposed frequency of flight movements.
- Includes the proposed hours of operation.

47 The decision guidelines requires the responsible authority to have regard for EPA's Noise Control Guidelines, as discussed above, and to consider the *effect of the proposal on nearby sensitive uses in terms of the proposed frequency of flight movements and hours of operation*

48 At issue in this matter is noise and its amenity impacts. The EPA Guidelines for Helicopter noise³ state:

The criteria comprise three separate components, each of which should be satisfied at the nearest affected buildings:

- The measured $L_{Aeq, T}$ (measured over the entire daily operating time of the helipad) shall not exceed 55 dB(A) for a residence.
- The measured maximum noise level L_{Amax} shall not exceed 82 dB(A) at the nearest residential premises (See Note below).
- Operation outside the hours between 7 am and 10 pm shall not be permitted except for emergency flights.

Note: These levels will generally be met by a separation between the landing site and the residential premises of 150 m for helicopters of less than two tonnes all-up-weight, and 250 m for helicopters of less than 15 tonnes all-up-weight.

49 In making its application the permit applicant provided the necessary reports and plans including a report by Watson Moss Growcott *Assessment of Helicopter Noise*, 15 February 2015 which assessed flights from the north east landing site.

50 We will confine our consideration to the second criteria of the EPA Guidelines being the 82 dB(A) noise limit as the first and third criteria will be met and were not contested. Based on the proposed use of a Robinson R44 helicopter which is less than two tonnes all-up-weight the nearest sensitive use is less than 150 metres from the HLS and this was not at issue.

51 Notwithstanding that the nearest sensitive use is approximately 110 metres from the HLS, based on the acoustic measurements by Watson Moss Growcott, which had regard to the EPA Guidelines, the responsible

³ Environment Protection Authority, Noise Control Guidelines, p10, Publication 1254, October 2008.

authority supported the granting of a permit for the use of a HLS on the north east side of 85 Mill Road.

- 52 The key issue the objectors raised in this matter is the amenity impacts from noise from the use of 85 Mill Road for a HLS.

What does the acoustic evidence indicate?

- 53 The objectors relied on the expert evidence of Mr Unkles who was instructed to review the assessment undertaken by Watson Moss Growcott⁴. The permit applicant relied on the expert evidence of Mr Antonopoulos. We will turn to Mr Antonopoulos's noise assessment shortly but firstly it is useful to provide an overview of the earlier noise testing undertaken by Watson Moss Growcott Acoustics Pty Ltd.

- 54 In July 2014 Watson Moss Growcott⁵ made an initial noise assessment to evaluate the potential noise impacts on nearby sensitive uses of a possible helicopter landing site (HLS) at the south west, or otherwise at the north-east side, of the subject land. The sensitive uses where noise was measured were 12 Mill Road and 33 Hicks Street. The assessment at these locations was based on the helicopter flying on two different flight paths: one that arrived from the north east of the HLS and, on departing, traveling south west; and, the other arriving from the north east, landing on the south west HLS and, on departing, traveling south west. The noise measured at 12 Mill St showed that of maximum noise levels for the six flight paths tested were between 80 and 86 dBA with only one below 82 dBA. At 33 Hicks St no maximum noise levels exceeded 82 dBA.

- 55 Watson Moss Growcott made another noise assessment in February 2015⁶ and it was this that the responsible authority based its decision on. This time the flight paths all traverse the railway line and arrive or depart in a north east direction to and from the JamCo Construction site. The helicopter used both the south west and the north east landing site to arrive and depart from 85 Mill Road and the points of descent were specified. This time noise was measured at 12 Mill Road, 33 Hicks Street and 41-45 Clover Street. The maximum noise levels measured at 12 Mill Road were 81 dBA. The noise levels at the other sites were below 80 dBA.

- 56 Based on the February 2015 test flights Watson Moss Growcott concluded that as long as the flight paths using a Robinson R44 helicopter were

⁴ Mr Unkles based his assessment the two noise assessments made by WMG of July 2014 and March 2015 both of which were provided to the Tribunal. His 28 November 2015 expert witness statement predated the expert witness 29 January 2016 statement containing the noise assessment made by Mr Antonopoulos. Mr Unkles had however read the statement made by Mr Antonopoulos.

⁵ Watson Moss Growcott, *Proposed Helicopter Landing pad, 85 Mill Road, Lara: assessment of Helicopter Noise, a report prepared on behalf of JamCo Constructions Pty Ltd*, July 2014

⁶ Watson Moss Growcott, *Proposed Helicopter Landing pad, 85 Mill Road, Lara: assessment of Helicopter Noise, a report prepared on behalf of JamCo Constructions Pty Ltd*, March 2015

adhered to the noise levels do not exceed the EPA guidelines for helicopters.

57 The February 2015 Watson Moss Growcott report were review by Marshall Day Acoustics. Marshall Day⁷ commented that:

Given the variability of noise level measurements in practice and the measurements being only 1 dB below the 82 dB L_{max} threshold, there may be occasions when the maximum noise levels from the proposed helicopter operations exceed the maximum noise level threshold at the nearest sensitive receivers.

58 Marshall Day however concluded that

In our opinion however, based on the measured noise levels contained in the report and the proposed limited number of movements ... the report finding are acceptable for this development

59 Turning now to the expert evidence of Mr Antonopoulos⁸, Mr Antonopoulos was instructed to review the previous noise testing undertaken by Watson Moss Growcott and to undertake his own investigations which included noise assessments of of the helicopter idling at the HLS and then in flight.

60 Mr Antonopoulos used the EPA guidelines to make his assessment as he noted this is the only guidance available on helicopter noise.

61 Mr Antonopoulos and his colleague measured the noise at three residential locations being:

- 12 Mill Road;
- Hicks St, at 120 metres south east of the proposed HLS;
- 33 Hicks St, 230 metres south of the proposed HLS.

62 JamCo's Robinson R44 helicopter flew two test sequences over the proposed flight path, which Mr Antonopoulos understood to be the optimised flight path determined during the testing performed by WMG. Meteorological conditions during the test flights were recorded as generally calm and the temperature mild.

63 The results showed the maximum measured noise levels at the three locations to be 82 dBA at 12 Mill Road during the take off stage and 79 dBA and 80 dBA during the two landing events. Maximum levels were between 61 - 75dBA during take offs and landings at the other two locations.

64 Mr Antonopoulos evidence was that at 12 Mill Road the noise levels marginally complied with EPA's Guideline level at the nearest residential premises and that the levels at the two other Hicks Street premises clearly

⁷ Marshall Day Acoustics *Peer Review of Watson Moss Growcott Acoustic Report, Letter to Joshua Trowell, City of Greater Geelong, from Alex Morabito consultant, 23 April 2015*

⁸ SLR global environment solutions, *85 Mill Road Lara, Proposed Landing Site, VCAT reference P154/2015, Expert Witness Statement – Acoustics, 29 January 2016.*

comply with the EPA guideline. Additionally due to the low number of intended flights he expected EPA's daily LAeq, maximum of 55 dB(A) would easily be complied with.

- 65 Mr Antonopoulos concluded that based on his assessment of noise at the proposed HLS at 85 Mill Road Lara that his testing results were generally in line with the test result previously recorded by Watson Moss Growcott in March 2015 and that the use of a helicopter at the site "*would not provide unreasonable noise amenity impacts to nearby residences.*"

Will the use of the proposed helicopter landing site produce appropriate amenity impacts on surrounding areas?

- 66 Based on the maximum level of noise likely to be generated by the proposed use of a helicopter landing site as given in evidence we have concluded that the use of helicopter landing site by a helicopter less than two tonnes all up weight is likely to produce an unacceptable amenity impact on the surrounding areas.
- 67 We base our findings on the following.
- 68 The maximum acceptable noise level was recorded at the nearest residential at 82 dBA by Mr Antonopoulos. Having regard to the EPA Guidelines, which has a maximum acceptable noise level for helicopters of 82 dBA at the nearest residential, the noise from the helicopter is, in our view, at the margin of acceptability (a point sensibly conceded by Mr Antonopoulos in the course of presenting his verbal evidence).
- 69 As acknowledged by Mr Antonopoulos there could be a margin of error of between 1 or 2 dBA in the noise measurements which, if applied to the maximum measured level, would exceed 82dBA.
- 70 The flight path used when Mr Antonopoulos made his measurements was described as the optimised flight path determined through the previous work by Watson Moss Growcott. This flight path was mapped and GPS data of the flight path was provided to us. It was similar to the July 2014 flight paths assessed by Watson Moss Growcott when the helicopter travelled across the railway and then to the north. Watson Moss Growcott recorded maximum noise levels of 84dBA and 86 dBA at 12 Mill Road. However the rate of ascent and descent of the helicopter may have differed between the two assessments. This indicates to us that any deviation from the optimised flight path could result in maximum noise levels above 82 dBA.
- 71 We acknowledge that the land is zoned industrial and it would be expected that there could be a number of sources of noise in the immediate surrounds, including those from industry and from the trains, and these would impact on the residential amenity. However when we visited 85 Mill Road the area seemed relatively quiet, the most discernible noise being from the few cars going along Mill Road. This traffic noise was recorded by Mr Antonopoulos at around 81dBA, or less, at 12 Mill Road. We also

observed several V/Line trains passing through but these were not particularly perceptible. We did not have the benefit of observing a helicopter using the HLS or a freight train passing through although Watson Moss Growcott did record a noise level of around 84 dBA at 12 Mill Road when a passing train blew its horn. While there are noises in the surrounding environment of a similar measurement level the most frequent being trains both Mr Unkles and Mr Antonopoulos agreed that trains and helicopters have different noise characteristic: the noise from trains is impulsive whereas a helicopter's noise is tonal which is more attention grabbing.

- 72 Taking into consideration the noise assessments, the evidence of Mr Antonopoulos and Mr Unkles and the various noise assessments and reviews we consider that a helicopter using a landing site at 85 Mill Road would be an unreasonably and disturbing dominant noise at nearby residential premises. Furthermore we are not confident that the optimised flight path would always be adhered to and the noise levels maintained at less than 82 dBA.

Are there other matters we should consider?

- 73 During the course of the hearing the objectors raised a number of concerns regarding the noise assessment which for completeness we will briefly address:

- There were a number of shipping containers along the Mill Road border which we observed were used to store equipment. The objectors were concerned that they would baffle the noise and their placement perhaps deliberate to moderate the helicopter noise during assessment. Both Mr Unkles and Mr Antonopoulos provided an opinion on the impact these containers would have on the noise levels measured at 12 Mill Road. Essentially they agreed that the shipping containers may moderate the noise when the helicopter was taking off, according to Mr Antonopoulos, by up to 5 dBA if the containers formed a solid barrier. However once the helicopter was in the air the shipping containers would not have any effect especially on the maximum noise levels that were measured during the various assessments. We therefore do not consider the presence of the shipping containers made any substantive difference to the overall noise assessment outcome.
- The objectors also queried a number of aspects of testing in particular the position of the microphone measuring the noise levels at 12 Mill Road which was in a vertical position rather than pointing towards the flight path. Mr Antonopoulos explained that the angle of the microphone is only relevant when recording high frequency noise and as a helicopter emits low frequency noise the angle of the microphone is not required to be tilted towards the noise source. We are satisfied that Mr Antonopoulos's testing followed the correct procedures.

- The meteorological conditions during testing were noted as calm and other meteorological metrics recorded. Various questions were asked Mr Antonopoulos about the effect meteorology may have on measured noise levels. In Mr Antonopoulos's view, and one we accept, temperature and humidity may have a miniscule affect. Wind he submitted is likely to have the most effect although Mr Antonopoulos considered it would only have a small or no effect at the receiver locations such as dwellings due to the effect of wind shear.

DOES THE PROPOSAL RAISE ANY UNREASONABLE 'SAFETY' ISSUES/IS ONE PREFERRED FLIGHT PATH ADEQUATE?

74 As indicated above it is the proposed that the helicopter flight path would traverse the railway line and using a 50 metre wide flight path travel north along the railway reserve that lies immediately east of 85 Mill Road. JamCo Constructions Pty Ltd agreed to this flight path being a permit condition. A map provided to us showed that in addition to the railway line there are a number of power lines and poles on both sides of Mill Road and to the north east of the subject land.

75 It was put to us by Mrs Marcus that amenity is the only reason the actual flight path is relevant as once a helicopter is in the air it is beyond planning control. That may generally be the case however one of the objectives of the Planning and Environment Act 1987 is to provide a safe environment of all Victorians and visitors to Victoria. Due to the number of land based hazards that could impede a helicopter in flight along the designated flight path we consider that safety is a relevant matter for our consideration.

Precedent on safety and helicopters

76 There have only been a limited number of VCAT decisions that have been made in relation to helicopter land sites and very few that have dealt in any way with safety issues. In *Williams v Manningham City Council*⁹ objectors to the granting of a permit for a HLS raised concerns about the safety of a helicopter taking off and landing generally and also safety related to the distraction helicopters may pose to drivers on local roads. In that matter Member Whitney commented that she was not presented with any substantiating evidence on safety and considered safety to be outside the outside the scope of planning generally. Member Whitney did not regard the presence of a helicopter flying overhead to be so unusual in a modern society to distract drivers using the roads and did not consider the safety issues would warrant refusal of the permit.

⁹ Williams v Manningham CC [2015] VCAT 1367

- 77 Safety was also briefly mentioned in *Bos v Manningham City Council*¹⁰ however Member Baird did not consider it to be of an undue concern in that matter.

What are the safety issues?

- 78 Safety concerns were raised by VicTrack, CASA and Mr Clarke.
- 79 VicTrack, as the owner of a neighbouring property, was notified about the permit application. While not a party to the appeal VicTrack objected to the issue of a permit and expressed concern about the helicopter height as it crosses the railway tracks especially when trains are travelling at speeds of up to 160kph. It also expressed concern about the use of the railway reserve as the flight path because of the potential for helicopter engine failure.
- 80 VicTrack in its letter of 10 April 2015 invited further dialogue about its concerns.
- 81 The Civil Aviation and Safety Authority (CASA), due to possible obstacles or safety issues were also notified by the responsible authority of the permit application. CASA's response was not to object to the issuing of a permit for a HLS as it is not its role to do so. CASA, in email correspondence, did however comment that the close proximity of residential housing and alignment of the approach and departure paths with the railway line as possible hazards to flight and ground safety that need to be considered. CASA suggested a risk assessment be undertaken.
- 82 Mr Clarke, chief pilot for JamCo Aviation provided expert evidence including about safety issues of the proposed use and development of the HLS at 85 Mill Road Lara. Mr Clarke who joined JamCo Aviation, which like JamCo Constructions Pty Ltd is part of the JamCo Group, as its chief pilot in May 2015. He is a well credentialed commercial helicopter pilot and flight instructor. While Mr Clarke considered that the Robinson R44 helicopters had sufficient power to safely clear the surrounding area – with its power lines and poles and other obstacles - Mr Clarke raised his concern about only having one flight path and considered that for safety reasons there should be more than one flight path. He suggested that an additional path that could be used would be from the north or south and in the event of strong westerly winds possibly one over the ovals to the south west of the HLS.

Responses to Safety Concerns

- 83 We understand there are currently more than 120 passenger trains either stop or pass through the Lara station each week day plus there are weekend passenger train services and freight and interstate trains using the track. There are plans to increase passenger services on this line.

¹⁰ *Bos v Manningham City Council* [2005] VCAT 1048

- 84 To minimise possible inference with trains Mr du Toit advised that when approaching the HLS he could visually check the track for trains and if necessary hover some distance away from the landing site until a train had safely passed through Lara. When taking off Mr du Toit proposed to contact VicTrack controllers to make sure the rail track was clear of trains so he could lift off and then traverse the track. We were not given any indication as to VicTrack's opinion of this arrangement or whether VicTrack was even aware of this proposed arrangement.
- 85 Mr Trowell submitted that the Notice of Decision had been formed on the basis of satisfying VicTrack's safety concerns. He was of the understanding that some agreements may have been reached between the permit applicant and VicTrack and that Council's Notice of Decision, as part of the Noise and Amenity Plan/ Management Plan condition, made a requirement that *measures to communicate with train operators about flight movements be prepared in consultation with VicTrack.*
- 86 We were informed by Ms Marcus that further discussion with VicTrack had not occurred and therefore VicTrack's objection stands.
- 87 In response to CASA's suggestion a risk assessment was undertaken. We were provided with a copy of the JamCo risk assessment for the HLS at Mill Road which is dated 2 February 2104. Mr Clarke who joined the JamCo Group after the risk assessment was undertaken reviewed it and considered it *adequate.*

Have safety issues been adequately addressed?

- 88 There are various safety issues related to the railway line that we do not consider have been adequately addressed or resolved by the permit applicant.
- 89 We reviewed the Jam Co risk assessment and noted that the risk assessment follows a fairly standard but basic risk assessment approach. We note that the assessment was undertaken by JamCo Construction personnel, that all nominated risks were initially rated as high but through the implementation of proposed measures were re rated by JamCo personnel as having a low residual risk and that the assessment does not specifically address risks associated with traversing and following the railway line. While not familiar with the standard methodology for risk assessments of this type we question the objectivity and credibility of an assessment undertaken by JamCo personnel who are not independent assessors and as far as we are aware are not risk assessment experts. We therefore give the risk assessment little weight and consider that not specifically addressing the risks associated with the railway reserve flight path is a major flaw in the assessment.
- 90 Constrained by the amenity issue of noise to the one flight path albeit along the railway reserve for only a limited number of flights Mr du Toit presented an approach to restrict flights to times when there are no trains on

the track by contacting VicTrack control to ensure that the rail track was clear prior to take off. As there has not been any discussion with VicTrack to assess the feasibility of this approach we do not know if VicTrack is amenable to taking on this responsibility; however to our mind the VicTrack control's priority is to efficiently manage trains as they travel on its tracks. It is unlikely that VicTrack would want to effectively take on the role of flight controller for a helicopter, and importantly any associated liability in the event of an accident. We were not presented with any other possible options to overcome this very serious failure in the plan to use 85 Mill Road for a HLS.

- 91 Although we recognise that it may well be that there is a low likelihood of the helicopter crashing onto a train or causing some other disruptions to train services there is the potential for such an event and it could have dire consequences. This failure to provide an agreed solution to VicTrack's concerns about the helicopter in flight close to the rail track warrants a refusal for a permit based on safety grounds alone.

CONCLUSION

- 90 For the reasons set out above, we have set aside Council's Notice of Decision to Grant a Permit and directed that no permit issue. In this situation, it is unnecessary for us to resolve the draft permit conditions. For the removal of any doubt, we do not see even an well-drafted set of permit conditions as overcoming our fundamental concerns set out above.

Philip Martin
Presiding Member

Catherine Wilson
Member