

11th October 2023

Our Ref: ADM.LPC1288

Mr H Bowley, Senior Planning Officer
Cotswold District Council
Trinity Road
Cirencester
GL7 1PZ

Dear Mr Bowley,

Town and Country Planning Act 1990
Application by Rendcomb Aerodrome Ltd under Section 106A in respect of
Rendcomb Airfield, The Whiteway, Rendcomb

Further to our exchanges of emails subsequent to the submission of a similar application in March 2021 (Ref: 21/00911/DMPO), which was withdrawn at your suggestion following a revision to the application, I have pleasure in attaching a new application seeking to modify two of the Obligations of the Legal Agreement.

The revision to the previous application stemmed from the meeting of Chedworth Parish Council on 10th July 2023 and which a representative of the applicant company spoke and proposed a significant reduction to the number of days on which commercial wingwalking flights take place, with the number of flights and the timing which they would occur on those days restricted. It also proposed that there would be no commercial wingwalking flights on Sundays. You stated in response to this vision of the application, that legal advice stated that this approach should not be followed, hence the submission of this revised application.

This application, like its predecessor, seeks to vary two of the Obligations of the Section 106 Agreement dated 29th November 1990, as it relates to commercial purposes at the airfield and access by the public, for which limitations will be suggested.

There is no provision with the Planning Application Fees Regulations for the payment of an application fee, so no fee is payable for the submission of this application. Neither is it possible to lodge this application via the Planning Portal.

Background

By planning application reference CT.6725, permission was granted for the change of use from agricultural land to grass airfield on 12th December 1990, after a legal agreement had been entered into and signed by the retrospective parties. The permission was subject to four conditions relating to the time period within which development should commence and requiring details of building or engineering works; parking areas for aircraft and motor vehicles; and the submission / implementation of a comprehensive landscaping scheme.

Following the grant of planning permission, the land was acquired by the current owners who duly implemented the permission.

The Section 106 Agreement was subject to 11 Obligations, mainly for operational reasons, such as restricting flying of aircraft to a maximum of 180 days per years and on those, no more than 35 take offs could take place with no more than 2 aircraft taking off before 0800. This means that the total number of take-offs per year that can lawfully take place is 6,300. Where such aircraft fly after take-off is not restricted. Obligations 1-5, 7-10 and 12 are not at issue, with the 11th being the main subject of this application. It states:

‘Not to use the Land or allow or permit the use of the Land for commercial purposes with the exception that aircraft used elsewhere for commercial purposes may be kept or stationed upon the Land.’

From discussing this matter with the applicant, who was involved with the 1990 planning application, it should be noted that the reason why the above covenant was imposed was the concern that a flying school could operate from the airfield, which could be a source of disturbance and inconvenience to local residents and those living in nearby villages by the constant circling of low flying aircraft around the area. It was not imposed to prevent wingwalking flights taking place over the airfield, rather than over residential properties for safety reasons. As has been set out within correspondence to your Council in 2019, wingwalking flights had taken place for 28 years and the aeroplanes involved had been sponsored by internationally renowned companies such as Cadburys (Crunchie); St Ivel (Utterley Butterley); Guinot ‘Institut Paris’ (Team Guinot) and Breitling ‘Swiss Chronographs’. With the aeroplanes carrying the names or products of such companies and them being kept at the airfield, which involved payment, this represented a commercial purpose which, technically, ran counter to the terms of the Obligation. However, without such sponsorship, the aeroplanes could not be maintained or flown.

The applicant has openly operated wingwalking from the airfield since 1992, a period of 28 years to the time that these investigations commenced, apparently following a complaint. Such a length of time would be sufficient to be immune from enforcement action, be lawful and sufficient to obtain a Certificate of Lawful Existing Use or Development (CLEUD). The use has not been denied or kept secret but has been operated safely and successfully without incident or objection since the airfield was opened in 1992, until the time prior to the previous application. The wingwalking experience has featured on national and regional television programmes as well as on the radio and in the press, having also been used by individuals and companies wishing to raise funds for charity. In fact, even in 2020, a year where the flying was severely affected by the Covid-19 pandemic, over £100,000 was raised towards charitable causes because of wingwalking experiences at Rendcomb Airfield. This amount has risen significantly with over £600,000 having been raised for various charities in the period July 2022 – July 2023.

There are also spin-off benefits to local bed and breakfast premises, hotels, cafes and public houses as a result of the participants using such facilities and 12 people are employed in running the business when it is fully operational during the summer months. This use, therefore, makes an important contribution to the rural economy.

The Legal Position

Section 106A of the Town and Country Planning Act concerns the modification and discharge of Planning Obligations. The 'relevant period' for the agreement's discharge has expired and the case made reflects Section 106A (6) (b), as the Obligation is believed to no longer serve a useful purpose and should be discharged. Overall, there has been a sufficient change in circumstances since the legal agreement was signed in 1990 to indicate that it fails to now serve a useful purpose.

The test under Section 106A (6) (b) is whether the Obligation 'no longer serves a useful purpose' this has been held to be a 'useful planning purpose.' Thus, if the Obligation's only purpose is to meet some non-planning purpose, it will generally be reasonable to discharge it. In this case, the restrictions prevent the use of the land for commercial purposes, aimed at the time that it was imposed to preclude a flying school from operating at the airfield.

The modification and discharge of Planning Obligations is governed by Section 106A of the Act and this gives rise to the following key questions:

1. When can a developer apply to modify or discharge a Planning Obligation?
2. What is the procedure to be followed?
3. What principles should be applied in considering whether a Planning Obligation 'no longer serves a useful purpose' or 'continues to serve a useful purpose but would serve that purpose equally well if it had effect subject to the modifications specified in the application?'

In response to the above questions, I can comment as follows:

1. Timing

An application to discharge or modify a Planning Obligation under Section 106A may only be made after the 'relevant period' (S.106A (3)). The 'relevant period' is defined by S.106A (4) as either;

- (i) such period as may be described in regulations, or
- (ii) in the absence of such regulations, five years beginning with the date on which the Obligation was entered into.

No regulations have been passed to provide for a period other than the default of five years. Accordingly, as the Obligation was made more than five years ago, the right to invoke the S.106A procedure applies in this instance.

2. Procedure

The relevant key elements of this procedure are:

1. The application must be submitted on a form provided by the Local Planning Authority requiring the information specified by the Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992, including a statement of the applicant's reasons for applying for the modification or discharge. The application must be accompanied by a plan identifying the land to which the Obligation relates.
2. The applicant is required to give notice of the application to any other person against whom, on the day 21 days before the date of the application, the Planning Obligation in question is enforceable.
3. The application must be determined within 8 weeks from the date on which the application is received.

For the avoidance of doubt, I wish to make it clear that the accompanying application seeks to modify the Obligation and not to remove it. Application Forms have been completed and the related plan are enclosed, together with a copy of the relevant Obligation. It is assumed that by considering the lack of justification for the restriction and how the use took place openly for a period in excess of 28 years without complaint and in the full knowledge of Cotswold District Council that this accompanying letter and documentation provides sufficient information to justify the modification of the Obligation, especially the noise evidence submitted.

3. The Principles to be Applied

The test under S.106A (6) (b) is whether the Obligation 'no longer serves a useful purpose'. This has been held as to be a 'useful planning purpose'. Thus, if the Obligation's only purpose is to meet some non-planning purpose, it will generally be reasonable to discharge it or modify it, as in this case.

The case in favour of discharge or modification of Obligation 11

The Section 106 Agreement applies to the land edged red on the plan incorporated within it but does not apply to the airspace more than 500ft above it or the airspace surrounding it. Accordingly, there is nothing to prevent AeroSuperBatics taking off from another location, such as Cotswold Airport (formerly Kemble Airfield) for example, with a wingwalker and then carry out a display over Rendcomb Airfield and surrounding residential properties, provided the aircraft is no lower than 200 feet above ground level. Such a course of action, although convoluted, would not be in breach of the Planning Obligation or Civil Aviation Authority Regulations and the aircraft could then land with the wingwalker on board, if desired. Such an arrangement is clearly a nonsense but would not result in anything different taking place - it would just mean that the operation will be less sustainable.

I would also point out that there have been significant changes in planning legislation and guidance since the legal agreement was entered into. In particular, the National Planning Policy Framework says that planning policies and decisions should enable the sustainable growth and expansion of all types of business in rural areas as well as sustainable rural tourism and leisure developments which respect the character of the countryside. Part of the character of this area since the First World War when RFC Rendcomb was formed has been an airfield in this location, albeit that it was closed for many years until it reopened in 1992. There are now 12 people employed by AeroSuperBatics during its busiest period and this business makes an important contribution to the rural economy of the Cotswold District, which would be prejudiced if the non-specific Obligation is retained. Accordingly, it is suggested that the best course of action would be the one promoted in my letter to your colleague dated 10th December 2019 that the Obligation be varied and that a mutually acceptable conclusion is achieved.

With regard to the occasions on which the commercial flying activities have taken place during a period on one year, evidence was presented to you as part of the PCN information that wing walking took place on 84 days of the 180 set out in the S.106 Agreement, with an average of 7.3 flights per day, compared to the 35 take-offs per day contained in the S.106. Together with the non-commercial flights that have taken place, the airfield has been operating at 11.44% of its maximum capacity (6300 take-offs). Furthermore, with flights lasting approximately 8 minutes, the busiest day of the year resulted in a maximum of 136 minutes of flying, again much less than could take place within the Obligations.

As has previously been relayed to your colleague and set out earlier in this letter, the commercial flights in a one year period have resulted in over £100,000 during covid and £600,000 more recently being raised for charitable causes. This has been generated by either individuals paying for a wing-walking experience and then getting individual sponsorship to raise funds for a particular charity or else a charity has organised a number of flights and arranged with donors for them to organise sponsorship towards the charity for their wing-walk. Payment is made to AeroSuperBatics to cover the costs of flying and administration in the same way as an entry fee has to be paid to enter the London Marathon, for example. Accordingly, the commercial use represents a benefit to the wider community as it generates income for charities as well as pleasure to individuals. I am sure that charities who have benefitted from the wing-walking experiences will support this application.

Your colleague asked in our discussions for more information about the reason for the Obligation restricting commercial operations at the airfield. This was due to the concern from local Parish Councils that the airfield would be used as a base for a flying school and that flying lessons could take place in circuits at relatively low level over villages such as North Cerney, Rendcomb, Calmsden and Chedworth, which would be a potential source of disturbance to the residents of those settlements. Discussions took place with the officer dealing with the planning application and it was agreed that the way forward was to incorporate an Obligation in the agreement to preclude such a possibility. Accordingly, the non-commercial purposes clause was incorporated and agreed.

Suggested Modified Undertaking

Your colleague asked if a modified Obligation could be suggested to replace the one at issue. As the purpose of its inclusion concerned the prevention of flying school(s) operating from the airfield, I would suggest that the Obligation should be amended to state:

‘No flying school shall operate from the Land’

The objections that have been received are understood to concern the wingwalking activities that take place at the airfield, where members of the public, businesses and charities pay for the flights either to fulfil a personal desire or to raise funds for charity. This use is fundamental to the business and if this is not allowed, the business would have to close, resulting in the loss of jobs. There are limitations within the S106 Agreement restricting the number of days on which flights can take place to 180 in any calendar year [Obligation 1] with not more than 35 take-offs in any one day [No 2], which will not be affected but the change that the applicants are seeking is a new undertaking that will permit commercial wingwalking experiences on a maximum of 100 days per year. As you are aware, this is dictated by the weather conditions and predominantly takes place in the period from April to October.

The applicants are also prepared to limit the number of commercial wingwalking flights that can take place on any one day. Accordingly, it is suggested that Obligation 11 be deleted and replaced with the following:

On the days when flying from the Land is permitted, not to use the Land or allow or permit the use of the Land on more than 100 days for commercial wing walking where members of the public, businesses or charities pay for their flights under the Civil Aviation Authority approved operations at Rendcomb Airfield.

A further Obligation related to the above is suggested to limit the number of flights that take place in any one day. As stated in previous correspondence and as referred to earlier in this letter, the maximum number of wingwalking flights that took place on one day was 17, which lasted for a total of 136 minutes. The applicants suggest a maximum number of 20 flights in any one day, these lasting a total of 160 minutes, this representing some 22% of the daylight period after 8.00am when flying is permitted. Following discussions with Chedworth Parish Council, the time period when flying takes place has been consolidated to take place between 10.00 and 16.00 and not on Sundays. Accordingly, the following additional Obligation is suggested.

On the days when commercial wingwalking takes place, no more than 20 commercial wingwalking take-offs shall take place and these shall only be between 10.00 and 16.00 and not take place on Sundays. Commercial wingwalking shall not take place on more than 5 days per week.

A consequential revision to another Obligation is also requested as part of this application, this being to Obligation 6, which precludes the general public having access to the Land. As stated in the response to the Planning Contravention Notice, there is a bridleway within the Land, at its southern boundary, and so the legality of this Obligation is questionable. This could easily be rectified but the applicant requests that the wording be amended to allow upto 30 members of the general public to access the Land to observe the wingwalking in a safe and controlled environment. Accordingly, it is suggested that Obligation 6 be amended as follows:

Not to allow or permit the general public to have access to the Land except on 'open days', which shall not be held without the previous written consent of the Council, use the bridleway or attend an organised commercial wingwalking day, in which case not more than 30 members of the public shall attend at any one time.

Noise

During the course of the previous application a noise report was prepared by Matrix Acoustic Consultants. This was subject to a peer review on behalf of the Council. A response and further information was submitted to this review and further questions have been raised by the Council's consultants. These reports are submitted as part of this application, as is a response to the latest request.

Whilst the technical nature of these reports are of interest to your Council's Consultants, there are a number of matters that have to be borne in mind when this application is determined.

- The S106 Agreement allows a maximum of 35 take-offs per day on 180 days per year, a total of 6,300 take-offs. These include non-commercial wingwalking flights and so a question of enforceability arises.
- The maximum number of commercial wingwalking flights would be 2,000 of this total (31.7%).
- The flying operations that take place do not breach any rules or laws of the air and in a rural area such as this, an aeroplane can fly within 500 feet of any dwelling, measured vertically to horizontally.
- The variation of the Obligation will not lead to an increase in the number of flights as the land will still operate within the parameters established by the S.106 Agreement.

Support for the Commercial Activity

The previous application generated significant support for the use of the airfield for commercial wingwalking and, rather than all the supporters being contacted by your Council, the applicant company attach these comments and requests that they be taken into account when considering this application.

Conclusions

The activities that have taken place at Rendcomb Airfield did not cause any problems, issues nor have they been the subject of any investigations by your Council for a period of about 28 years since they first took place. The land has been used as the base for the wingwalking activities continuously since then, without any objection being made known to the applicant until the current investigations commenced, This was in the full knowledge of Cotswold District Council, which confirms that the use of land for this commercial purpose has not caused any planning issues.

In such circumstances, I would be grateful if you would recommend that the Obligation be discharged or varied to ones that relate to the current circumstances as the fact that objections may have recently been raised on the grounds that the Land has been used for commercial purposes would not be a sufficient reason to oppose this application.

Should you need to explore any matters raised within this application and letter in any more detail, please do not hesitate to contact me.

Yours sincerely

Andrew Miles