BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE WAIKATO DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (**RMA**)
AND	
IN THE MATTER	of the Proposed Waikato District Plan
BETWEEN	**NZTE OPERATIONS LIMITED**
	Submitter [No. 823]
AND	**WAIKATO DISTRICT COUNCIL**
	Local Authority

SYNOPSIS OF ORAL SUBMISSIONS FOR NZTE OPERATIONS LIMITED

Dated: 8 April 2021

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INTRODUCTION

1. I will address the following issues which appear to remain in contention:

   (a) Age of aerodrome and operation;

   (b) Public and private ownership;

   (c) OLS and existing use rights for trees;

   (d) OLS and s.32aa evaluation; and

   (e) Legal submissions for Metcalfe.

2. Mr Serjeant will identify the outstanding evidential issues, including those raised during the first day of hearing on 8 March 2021.

AGE OF AERODROME AND OPERATION

3. The Reporting Planner's opening statement suggests at para. [5] that the aerodrome has been operating for 20 years. The Reporting Planner orally corrected this to 40 years during her opening.

4. Mr Readman's evidence-in-chief (**EIC**) at para. [3] states the aerodrome has existed since 1960 and officially commenced operation in 1968 (i.e., 53 years).

5. Mr Serjeant (EIC at para. [10]) states that the aerodrome has been recognised under the district plan since 1973 (i.e., 48 years).

PUBLIC AND PRIVATE OWNERSHIP

6. Mr Serjeant (EIC at para. [69]) states that it is not useful to assess physical resources based on their private or public ownership.

7. Part 2 of the Resource Management Act 1991 (**RMA**) does not distinguish between physical resources in public or private ownership.

8. Mr Serjeant (EIC at para. [67]) states that private ownership of aerodromes is commonplace. Moreover, the Te Kowhai Aerodrome (**Aerodrome**) provides public benefits in much the same way as golf clubs or marinas which are open for public use.

9. The Council promulgated the Te Kowhai Airpark Zone (**Airpark Zone** or **TKAZ**) to protect and provide for the Aerodrome an existing resource (Objective 9.2.1 and Policy 9.2.1.1). Mr Serjeant (EIC at para. [68]) states that the Waikato 2070 recognises the Airpark Zone as a *"special activity precinct"* that will contribute to the district's economic wellbeing.

10. The correct approach to considering competing environmental values between different resources is to undertake a s.32AA Evaluation.[1] In the present case the competing values to be considered include the Aerodrome's infrastructural value and operational safety as against the amenity of neighbouring rural properties.

OLS AND EXISTING USE RIGHTS FOR TREES

11. I agree in principle with the Tompkins Wake opinion dated 1 March 2021 (see Appendix 3 to s.42A rebuttal).

12. I note a correction to para. [35] of my written submissions, dated 3 March 2021 (**written submissions**). I agree with Tompkins Wake that existing use rights crystallise from the date of the notification of the decision on the Proposed Waikato District Plan (**pWDP**). It is from the point that Council's decision is made operative, and the Obstacle Limitation Surface (**OLS**) rule would take legal effect.[2]

13. I am instructed that NZTE offers (through these submissions) the following advice note to address the costs associated with maintaining existing tree height below the proposed OSL:

> The Operator of Te Kowhai Aerodrome will undertake an updated survey of "existing trees" as at the date that the OLS rule becomes operative.

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1 *Shepherd v Rodney District Council* (EC A24/2009, 2 March 2009) at para. [19]. The Environment Court undertook a similar assessment between the competing values of safe airport operations and rural amenity between paras. [29] and [42].

2 RMA, s 86B; refer Tompkins Wake advice (1 March 2021), at paras. [20] to [22].

> Where the owner consents, trimming of existing trees required to comply with the OLS will be undertaken at the instruction of and paid for by the Operator of Te Kowhai Aerodrome.
>
> For the avoidance of doubt, the term "existing trees" means any tree that existed within the OSL on 9 April 2021.

14. Further, Mr Park's evidence discusses the flexibility that can be taken towards existing and possible future protrusions of existing trees into the inner horizontal surface of the OLS (at para. [15] of his summary statement dated 3 March 2021). Mr Park has confirmed at para. [20] of his EIR that this flexible approach would apply to the Kahikatea forest fragment (Yapp submission).

15. NZTE accepts that the existing use right of trees is a relevant matter in the s.32AA evaluation. But it is only one matter to be evaluated.

OLS AND S32AA EVALUATION

16. At para. [41] of my written submissions, I refer to the requirement to take the s.32AA evaluation into account in making a decision on submissions (see clauses 10(2)(ab) and 10(4) of the First Schedule of the RMA).

17. In relation to the s.32AA evaluation, I agree in principle with paras. [49] and [50] of the Tompkins Wake opinion (see Appendix 3 to s.42A rebuttal) that:

    (a) Airport safety and the cost of compliance with the OLS are both relevant factors to consider;

    (b) In deciding upon the most appropriate OLS rule the Hearing Panel must have regard to the actual or potential effect on the environment of activities provided for in the pWDP;

    (c) There is a 'tension' between the adverse effects of trees hindering a safe flight path for aircraft and the adverse effects on the landowner of complying (cost and amenity);

    (d) The OLS rule must be prepared in accordance with Part 2 – which includes s.7(b) and potentially gives rise to s.6(c) issues (for some trees); and

(e) The Hearing Panel will need to determine which of the two OLS alternatives best satisfies a s.32AA evaluation.

18. NZTE relies on *Shepherd v Rodney District Council* (EC A24/2009, 2 March 2009) and *Barrett v Thames-Coromandel District Council* [2017] NZEnvC 126 in setting out the matters relevant to the s.32AA evaluation of the two OLS alternatives.

19. The s.42A Reporting Planner's opening statement lists (at para. [18]) the 4 issues that the planner had in mind in recommending that the Variation OLS be removed. All these issues relate to alleged effects of complying with the OLS. There is no reference to the safety issues – and the 'tension' between the adverse effects of trees on safe flight paths and adverse effects on landowners – which is address in the Tompkins Wake opinion (see Appendix 3 to s.42A rebuttal).

20. The Hearing Panel is required when making its decision to:

(a) Include *"the reasons for accepting or rejecting the submissions"* and *"a further evaluation undertaken in accordance with s.32AA"* (see clause 10(2)(a), Schedule 1, RMA); and

(b) *"… have particular regard to the further evaluation"* (see clause 10(4), Schedule 1, RMA).

21. This obligation was addressed by the High Court in *KI Commercial Ltd v Christchurch City Council* [2016] NZHC 1218 at [15]:

> Under s 32AA of the RMA, the Panel was required to complete a further evaluation of any changes that were made since the initial s 32 evaluation report was completed, including the changes it made in its decision to r 15.7.2.1. This further evaluation must examine the benefits and costs anticipated from implementing the changes, along with the other matters referred to in s 32(1) to (4) of the RMA. The further evaluation must be referred to in the decision in sufficient detail to demonstrate that the evaluation was undertaken in accordance with statutory requirements.

22. The s.42A report includes a s.32AA evaluation of the proposal to replace the Variation OLS with the Operative OLS. However, this evaluation does not:

(a) Consider the benefits and costs of the two alternative OLS provisions including such things as the:

i. Value of the Aerodrome as an existing physical resource within the district (see Dave Serjeant EIC at paras. [14], [68], and [99]); and

ii. Cost of the Aerodrome being unable to accommodate Instrument Flight Rule navigation.

(b) Evaluate which of the alternatives best achieves the objectives of the Airpark Zone (refer Objective 9.2.1 and Policy 9.2.1.6 – safety; and Objective 9.2.3 and Policy 9.2.3.1 – reverse sensitivity).

23. There is no s.32AA evaluation (i.e., in the s.42A report, s.42A rebuttal, or opening statement) of benefits and costs of complying with the OLS with regard to the existing use rights of the surrounding rural activities – or, for that matter, the Aerodrome as an existing physical resource.

24. In *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 1A ELRNZ 454, (1993) 2 NZRMA 497 the Planning Tribunal held that the reasons for the decision on submissions should incorporate the considerations and conclusions on the matters mentioned in s.32(1) to (4). Since the 2013 amendment, this includes a further evaluation under s.32AA. The s.32 evaluation matters form part of the reasoning process leading to the Hearing Panel's decision.

25. The s.42A report does not refer to the s.32 evaluation of the OLS (either the notified version or the Variation version). It therefore fails to consider whether the Variation OLS was a more appropriate method of achieving the plan objectives than the Operative OLS.

26. The High Court in *Nga Puawaitanga (Meremere) Ltd v Waikato District Council* (1998) 4 ELRNZ 480; [1998] NZRMA 529 held that a Hearing Panel has a discretion as to whether to accept any recommendation in a s.42A report. The report is simply one piece of evidence which is before the Hearing Panel.

27. I respectfully submit that, where the s.42A report fails to undertake the required s.32AA evaluation of the recommended changes, the Hearing Panel

can cure that error by completing a s.32AA evaluation having regard to all the evidence. This was what the Court did in *Barrett* (see paras. [29] – [30]).

28. NZTE acknowledges the existing use rights of trees in existence at the time the decision of this Hearing Panel is notified – and accepts that this is a relevant matter in the s.32AA evaluation. But it is only one matter to be evaluated.

LEGAL SUBMISSIONS FOR METCALFE

29. I agree in principle with the summary of existing use rights in the written legal submissions for Metcalfe (dated 3 March 2021) at [30] to [33]. However:

    (a) The *Fischer* decision is distinguishable on the compensation / cost issue (as the Court was considering a designation which provides for compensation through Public Works Act 1981); and

    (b) Metcalfe's submissions overlook *Barrett* and *Shepherd* decisions which specifically addressed district plan OLS rules.

30. I note that counsel for Metcalf appeared to suggest during oral submissions that the potential residential value of her clients' rural land is somehow of higher than the resource value of the existing Aerodrome.

31. The *Shepherd* and *Barrett* decisions indicate the Court tend to evaluate air safety as being of higher value than existing residential amenity under s.32AA. It cannot be the case that the potential for residential amenity is of higher value than an existing Aerodrome or the associated requirement for air safety.

32. In any event, counsel's proposition turns the principle of reverse sensitivity on its head. The proposed residential development is coming to the nuisance because Aerodrome already exists. Land uses that encroaching on existing activities should bear the costs of that encroachment. It is noted that NZTE has offered to do so in respect of existing trees that will protrude through the OLS and existing trees that may do so in the future.

33. Existing use rights (e.g., trees and buildings) and rights afforded under the rural provisions of the operative district plan are reasonable considerations when evaluating the resource values of the Aerodrome against rural amenity. The potential for future residential zoning is not a valid consideration.

34. The written legal submissions for Metcalfe appear at para. [35] to seek *"compensation"* for landowners from NZTE for trees that would need to be removed or trimmed. There is no general statutory provision in New Zealand which compensates a property owner for district plan controls that place restrictions on property rights (see para. [37] of my written submissions). Any compensation to landowners should be limited to the cost of complying with the OLS (i.e., trimming trees).

Dated this 8th day of April 2021

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Dr R A Makgill / B C Parkinson

Counsel for NZTE Operations Limited