

BEFORE THE HEARINGS COMMISSIONERS FOR WAIKATO DISTRICT COUNCIL

IN THE MATTER OF

The Resource Management Act 1991 (“the Act”)

AND

IN THE MATTER OF

of Hearing Submissions and Further Submissions on the
Proposed Waikato District Plan (Stage 1)

Hearing 25 – Zoning

For Submitter:

Neale Russell Limited (#921)

Opening Submissions of Counsel for Neale Russell Limited

(Mercer Airport)

DATED 12th May 2021

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MAY IT PLEASE THE COMMISSIONERS:

1. These submissions are made on behalf of Neale Russell Limited who is the owner of the property referred to as Mercer Airport. Neale Russell Limited is the legal entity under which this submission should be recorded.

Introduction and Background

2. The airport is located at 590 Koheroa Road, Mercer. In addition to the land owned by Neale Russell Limited, the airport also has a license to occupy Council land between the facilities block and the Kopuera stream and a long-term lease of 40 years over some of the neighbour's land lying to the north and east of the airport runway.
3. Currently, the airport operates under a consent issued in 1996 by the then Franklin District Council. The original consent allowed for the operation of the airstrip as a commercial airport with skydiving, flight training, and a variety of light commercial air work.
4. The original consent also included the establishment and operation of a backpacker's accommodation, café with liquor license, and development of a hanger for the maintenance of light aircraft.
5. The 1996 resource consent was varied in 2013 and three of the conditions in the original consent were amended. This application was notified to neighbouring landowners and a hearing held before the council. A decision was issued on 25 July 2013 which was subsequently appealed to the Environment Court. The appeal was settled by the parties and a Consent Order issued on 3 March 2014. Mercer Airport therefore operates under the original consent from 1996 as amended by the subsequent Environment Court consent order. I have attached a copy of these as **Appendix 1**.
6. When the current owners took over the airport in 2010, it was run-down, neglected and struggling. Since then, they have put a significant amount of time and resource into revitalizing the facility and providing for its future success. Site facilities have been enhanced and the operational capacity of the airport has expanded with three new businesses and three flying clubs now based there. The Mercer Hotel Backpackers and a licensed café also now operate on site.

7. Currently, consented activities at Mercer Airport include the following:
 - Skydiving
 - flight training
 - light commercial air work
 - hangers for the garaging and maintenance of aircraft
 - backpackers with accommodation, café and light meals,
 - engine testing facility for Rocket Lab.

8. However, the airport consents impose the following operational limits:
 - Aircraft activity is not to exceed 100 movements per day averaged over a rolling three month period;
 - Aircraft movements are to be confined between the hours of 7am to 10pm;
 - The runway is not to exceed 1360m in length;
 - The airfield is to operate in such a way that ensures that no aircraft will have to fly over any dwelling at a height of less than 250m;
 - Aircraft noise must not exceed 55dBA L_{DN} contours,
 - Traffic is limited to 60 vehicles per day (60 movements in and 60 movements out).

9. The airport is recognized by the Civil Aviation Authority as a non-certified airdrome and it is significant in the district, if not the region. In the future, the owners see the airport growing as the district expands, with an increased ability to operate chartered and scheduled passenger and freight services. Recently, a flight simulator has been commissioned and in 2020, reconstruction of the World War Two Catalina hangar was completed.

10. The airport and surrounding land is zoned Rural in the Operative Waikato District Plan and this zoning has simply been rolled over in the Proposed District Plan. Thus, at present, the airport has no recognition, or protection in the District Plan. This means that its operation is constrained by its current resource consents and also that there is no “public notice” given to surrounding land owners or future landowners, of the airport’s activities, it’s operational

requirements, and the noise it may be expected to generate. In other words, there is no protection of the airport's reverse sensitivity effects, nor ability for it to expand.

11. Looking into the future, it is hoped that the airport's potential will be recognized and that it will expand.

Rationale for the Mercer Airport Special Zone

12. A Special Zone for Mercer Airport is being advanced because the District Plan fails to provide any recognition or protection of the facility even though it is a potentially significant resource to the community, and future landowners should be aware of the noise, and obstacle limitation requirements the airport operates under.
13. In particular the Mercer Airport Zone seeks to include Obstacle Limitation Surfaces ("OLS") in the District Plan, which recognize, and protect the flight vectors under which the Airport operates. The OLS is no different from the current operation requirements the Airport operates under and simply protects the flight paths that aircraft using the airport need to operate safely.
14. A 65dBA Ldn Airnoise Boundary and 55 dBA Ldn Outer Control Boundary are also proposed, recognizing the noise that aircraft using the Airport generate. The noise contours, which require compliance, have been modelled to reflect the average of 100 daily aircraft movements allowed under the current consent. However, to cater for future growth in the Airport, the noise contours:
 - (i) allow for a change in the mix of aircraft as compared to the resource consent, and
 - (ii) allow for up to 5% of those movements (other than the Catalina) to occur at nighttime.
15. Other aspects of the Mercer Airport special zone are that it:
 - (i) does not restrict aircraft movements to between the hours of 7am to 10pm;
 - (ii) allows for up 160 vehicles (or 320 vehicle movements), per day whereas the resource consent allowed a maximum of 60 vehicles per day;
 - (iii) has bulk and location controls for new buildings at Mercer Airport;
 - (iv) provides for a similar range of land use activities as the resource consent;

- (v) allows for up to 40 jet movements (20 flights) per 12 month period between the hours of 7am and 10pm, but excluding ex-military jets;
- (vi) includes the OLS, which reflects current operational requirements.

Legal Framework

16. The legal framework under which you are required to assess this submission has been canvassed thoroughly, in the Opening Submissions of Waikato District Council¹. I agree with those submissions, noting though that some nuance of the assessment is required, where a rezoning, such as this is being proposed.
17. To aid in the assessment, Council has prepared a s42A Framework Report. That report was intended to provide a framework for submitter’s evidence and to inform the preparation of the s42A Report itself in setting out the relevant statutory tests and statutory considerations². The s42A Framework Report sets out a “three lens” approach which has since been clarified by the Hearings Panel³.
18. The starting point for considering a submission requesting a rezoning is to determine whether the resulting land use pattern, and zoning, will assist Council to carry out its functions in achieving the purpose of the Act, and whether the zone is in accordance with Part 2 of the Act. From there, the proposed rezoning must be examined as to whether it is the most appropriate method for achieving the objectives of the District Plan⁴ by:
- Identifying other reasonably practicable options for achieving the objectives; and
 - Assessing the efficiency and effectiveness of the provisions in achieving those objectives by:
 - identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposed provisions, including opportunities for:

¹ Opening Legal Submissions of Waikato District Council, 23 September 2019 at paragraphs 26 to 66, Appendix 1.

² s42A Framework Report, 19 January 2021 at paragraph 17

³ Hearings Panel Minute - 15 March 2021

⁴ s30(1)(b) Resource Management Act 1991

- (i) Economic growth that are anticipated to be provided or reduced⁵; and
 - (ii) employment that is anticipated to be provided or reduced⁶.
- If practicable, quantify the benefits and costs referred to above⁷.
 - Assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods⁸.
19. Efficiency and Effectiveness are key themes in this assessment. Efficiency means⁹:
- Efficiency measures whether the provisions will be likely to achieve the objectives at the lowest total costs to all members of society, or achieves the highest net benefit to all of society. The assessment of efficiency under the RMA involves the inclusion of a broad range of costs and benefits, many intangible and non-monetary.*
20. Effectiveness assesses the contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address¹⁰.
21. There are two preliminary points I would like to make the terms of this assessment, both of which are key premises in the Council’s s42A Report.
22. First, there is no presumption in favor of any particular zoning, or of the status quo remaining. You are required to determine the most appropriate zoning for the land judging between the status quo and the proposed provisions¹¹.
23. This creates a tension in the assessment in considering the proposed re-zoning against the objectives, or intent of the District Plan found in the Rural Zone. This is because by its nature, the airport, is legally established but is not of itself a “rural activity”. This is a point of the s42A

⁵ s32(2)(a)(i) Resource Management Act 1991

⁶ s32(2)(a)(ii) Resource Management Act 1991

⁷ s32(2)(b) Resource Management Act 1991

⁸ s32(2)(c) Resource Management Act 1991

⁹ Ministry for the Environment. 2017.; A guide to section of the Resource Management Act 1991 at 18

¹⁰ Supra note 9 at 19

¹¹ *Infinity Group v Queenstown Lakes DC* (EnvC C010/05) 28 January 2005, at paragraph 53

report to which I will return to later, but note for the time being that this tension, is in my view, appropriately resolved by acknowledging that despite the Rural Zoning (of both the Operative and Proposed District Plans), the airport nevertheless operates legitimately, and is part of the existing environment.

24. Second, District Plan provisions can, and often do, impose restrictions on private property. Even where such controls are objected to by the landowner, those provisions may nevertheless be appropriate¹².

Council's s42A Report

25. Unsurprisingly, Mercer Airport is very disappointed with the conclusions reached in the s42A Report prepared by Ms Legarth. My clients feel that the importance of the Airport, its future potential within the District, and its legitimate operational requirements have been ignored, in favour of the objectives of the "Rural Zone".
26. That report concludes:

292. *I have not further considered the submitter's policies or methods of implementation. As the policies and methods of implementation follow the objectives, I have concluded that the special zone sought for the Mercer Airport is inconsistent with the strategic direction for the surrounding rural zone. The land use is for an airfield of a relatively small scale, and current activities are provided for by way of a resource consent in the rural zone. In my opinion, the scale and significance of the activity does not suggest that a specific zone to recognise the land use is appropriate. The rural zone objectives and policies appropriately describe the outcomes sought for rural character and amenity, and productive land use, and can manage the potential effects on the community, as the environment court decision demonstrates. The change of zone as sought in the submission would increase the scale and nature of effects allowed through the district plan, and impose a higher level of regulation on the neighbouring properties.*

293. *The special zone and methods of implementation apply to the land use on the site, which is not rural in character. I understand that these are intended to include an increase in the activities associated with maintenance of light aircraft,*

¹² *Hastings v Auckland City Council* (EnvC A068/01)

flight training, and refuelling, as well as housing the Catalina aircraft with some interpretation/promotional material.

.....

304. *The 'public good' aspect of planning regulations should be considered. Based on the evidence provided, I am not satisfied that the degree of regulation over neighbouring properties is justified, in order to address a significant resource management issue and achieve the sustainable management purpose of the RMA. The costs and benefits fall unevenly on the community. The costs to the neighbouring land owners do not appear to outweigh the benefits provided to that community.*

.....

307. *I have concluded that, even if it can be demonstrated that the OLS and noise insulation measures are appropriate and the costs to the community can be justified, it does not follow that a Special zone: Mercer Airport should be added to the plan to assist the Council to carry out its functions in order to achieve the purpose of this Act. The airfield is located in a rural zone, and it is evident that a resource consent can consider and manage the adverse effects, and can be obtained to provide for aircraft-related activities. I consider that retaining the rural zone in the plan will ensure that the activities in that zone are rural in character, in the event that the private airfield relocates elsewhere.*

(my emphasis added)

27. Key themes emerge from Ms Legarth's report and conclusions:
- (a) She is concerned at the additional regulation perceived on adjoining landowners;
 - (b) She is concerned that there may be other views held in the community that are not represented in the submissions; and
 - (c) That the existing resource consent is sufficient to enable the Airport to operate, and continue in the Rural Zone.
28. However, in my view these conclusions, are, with respect, based on several false premises, and, in some respects, an erroneous understanding of the legal framework within which she was required to make her assessment. At times, irrelevant matters are considered, at the expense of proper consideration of relevant matters. I address key matters as follows.

Correspondence received from Kopuera Land Company Limited, Balle Bros Group and surrounding landowners.

29. Apparently, Council received correspondence from Kopuera Land Company and from landowners and residents near Mercer Airport on 31 March 2021. Surprisingly, the Council did not provide this correspondence to my client and the first we have seen of it, was in the s42A Report.

30. Regarding that correspondence, Ms Legarth says that:

268. The ability for the neighbouring landowners and the community to express their views on the 'Special zone: Mercer Airport' and provisions sought in submissions [921.1, 921.2, 367.15 and 367.30] was limited to the opportunity to make a further submission. Other than a further submission made by Submitter 921, there were no further submissions received. In my opinion, the lack of further submissions is not an indication of support or opposition of the community.

269. Based on the regulatory history of the airport, there are indications that land owners and potentially the wider community may have a view on the activities, scale and operation of the Mercer airport and relevant planning controls needed to manage adverse effects. I consider that the concerns raised through the notified consent process and the level of regulation arising from the Environment Court consent order can inform the regulatory approach needed to manage effects on the community in the proposed plan.

270. After the submissions on the proposed plan had closed and evidence was received from the submitters, the Council received letters from landowners and residents on Koheroa Road and surrounds in the districts of Mercer and Mangatawhiri; and from the Kopuera Land Company Limited ("KLCL") that raise the concerns about the potential effects from an increase in activities at the airfield.

(my emphasis added)

31. However, these folk did not lodge a further submission, though they had the opportunity to do so. In my submission, Ms Legarth has relied on the correspondence received from surrounding residents to a degree not provided by the Law. Furthermore, she has used it to speculate on the views that may or may not be held by the wider community, and then to

interpolate circumstances from the previous, and unrelated, Environment Court appeal of 2013. With respect, these are serious, and fundamental flaws, in her report, that must be wholly disregarded by you. I come to that view for the following reasons.

32. It is common ground that although some of the surrounding residents have written to Council, they are not submitters. They do not have that legal status.
33. Whilst it is tempting to say that this correspondence, should have been ignored in its entirety and not featured at all in the s42A Report, I do accept that you are obliged to consider the effects of this proposal on the “environment”.¹³ These will include any environmental effects that may arise on those surrounding properties. However, caution must be exercised because that is not the same as taking into account the interests or concerns of individual landowners, or for that matter, what their views may or may not be. It is not a subjective assessment, but an objective one.
34. For example, one of the issues expressed is that any extension to consented hours will affect sleep¹⁴. Whilst that may be a concern to a particular individual, for specific reasons perhaps; you are required to consider whether the noise impacts, on the environment generally, are appropriate.
35. Similarly, another of the concerns expressed is that the OLS proposed will have a negative economic impact and constrain further development “we” may wish to undertake¹⁵. You are not entitled to consider economic impact, if any, on a particular property, nor for that matter constraints to development opportunity on a particular property. However, an evaluation of costs and benefits of the OLS that weights such matters as the operational necessity of the Airport on one hand, with the implications of such a planning control over properties on the other.
36. Duck shooting¹⁶, use of drones, how the OLS affects individual properties and loss in value of properties, adverse effects for the neighbours, amenity of individual properties, outside noise, use of the right of way, cumulative effects on individual properties and comments on the provisions being sought; are all examples of matters that are not effects on the environment, but that are issues that individuals have sought to raise.

¹³ Legal Submissions on Behalf of Waikato District Council Arising From Hearing 20: Maaori Sites and Areas of Significance Heard 3 August 2020; 19 August 2020 at paragraphs 12-16

¹⁴ s42A Report, 271(e)

¹⁵ s42A Report, 271(a)

¹⁶ s42A Report, 271

37. In my view, the s42A Report should have set out how this correspondence was going to be addressed, if at all. It should have provided reasoning for what, if any of the matters raised were considered relevant to her assessment. It did not.
38. As it stands though, Ms Legarth seems troubled that there may be views held in the community, not contained in submissions. In particular, Ms Legarth:
- (a) Speculates that there are indications that land owners and potentially the wider community may have a view on the activities, scale and operation of the Mercer Airport¹⁷;
 - (b) Attaches the correspondence in full and listing all of the matters raised in this correspondence, without commenting on which, of those matters are relevant to her evaluation and which are not¹⁸;
 - (c) Observes that consultation with the rural community and a cost benefits analysis is a matter that needs to be addressed by Mercer Airport¹⁹.
39. Similar comments are made throughout the s42A Report, but Ms Legarth's rebuttal evidence repeats, and emphasises these concerns. She says²⁰:

38. *The issue I raise in respect of an OLS and noise controls is that the costs of that planning constraint fall unevenly on the adjacent land owners, **and that their views have not been represented in this process.***

.....

41. *In my opinion, the reason why the **consent order can inform the regulatory approach in the plan is that it was the subject of evidence, and provided information about what conditions were considered necessary to manage potential effects of the operation of the airport.** The rural zone objectives, policies and rules of the operative plan were applied to the consideration of the consent application. The conditions imposed on the consent provide context for management of potential effects that may arise as a result of the airport operation.*

¹⁷ s42A Report at paragraph 269

¹⁸ s42A Report at paragraph 270 onwards

¹⁹ s42A Report at paragraph 317

²⁰ Rebuttal Evidence at 38

42. *In addition to the consent order, the correspondence received by the community does suggest that there are options that would properly form part of an RMA section32A evaluation of the options. I have not undertaken a full s32AA evaluation of the special zone, but I have considered some of the requirements in my s42A report. I do not agree with Mr Dawson's RMA s32AA evaluation attached to his rebuttal that there are no regulatory costs, no environmental costs above those associated with development, no social costs, and no economic costs. There are also 'orphan' rules permitting non-aviation-related activities, and requiring resource consent where conditions are not met that have no objective or policy support.*

(my emphasis)

40. Given these various comments, I only conclude that this correspondence, has influenced Ms Legarth's assessment. Whether or not there may or may not be other views in the community as to activities, scale and operation of the Mercer Airport that have not been expressed by submissions is speculative and completely irrelevant here.
41. My client is entitled to rely on their submission and there can be no question at all that what they seek is squarely within the scope of their submission, the relief they have sought, and the publicly notified process.²¹ Indeed, it is not uncommon for submissions to seek, and to achieve rezoning successfully and without difficulty. As such, their submission must be assessed as it stands.
42. Regarding the previous Environment Court appeal and Ms Legarth's references to it. That appeal was resolved by agreement of the parties, rather than by the exchange of evidence, hearing and decision of the Court. Speculation as to how that appeal evolved, or the resolution that was achieved is unhelpful and irrelevant. The only relevance of the Consent Order is that it legitimises Mercer Airport as part of the existing environment.

RMA definition and National Planning Standards

43. The National Planning Standards came into effect on 5 April 2019 and therefore they do not apply to Stage 1 of the Proposed District Plan because it was notified beforehand²².

²¹ *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (PT) W053/93; 4 August 1993 (affirmed on appeal)

²² Opening Legal Submissions of Waikato District Council, 23 September 2019 at 68

44. However, Ms Legarth comments on the National Planning Standards for special zones, and the Special Purpose Zone: Airport Zone provided therein²³. She concludes that:

252.....I consider that the Special Purpose Zone: Airport Zone in the Standards is more appropriate for airports servicing commercial aircraft that are large-scale and have a 'port' function that provides transport for freight and passengers. In my opinion, the special zone is not suitable for all areas used by aircraft, given the differences in the type of aircraft, and nature and scale of runways in rural environments that may be used for landing and take-off by aircraft.

.....

254. In my opinion it would be useful to add a definition to distinguish between an airport and a smaller airfield, or landing strip, and only apply a Special Purpose zone: Airport zone to those airports that have satisfied certain certification and regulatory requirements of the CAA; or that serve a 'transport' function and are a complex of runways and buildings for the take-off, landing, and maintenance of civil aircraft, with facilities for passengers. There is no scope in the submissions to add a definition that differentiates between airports based on their public and commercial services, use for transit of people and goods, or scale.

45. It is difficult to ascertain from her comments, whether her concern that Mercer Airport does not, in her view, “fit” within the Airport Special Zone provided by the National Planning Standards also means, that any “special zone”, such as that here being sought, is not also appropriate. I apologise if that was not the intended inference, but simply make the observation that:

- (a) The degree of “fit” with the National Planning Standards is not relevant;
- (b) You are entitled to determine that a “special zone”, bespoke to Mercer Airport is appropriate, irrespective of the special purpose zones that are provided in the National Planning Standards.

²³ S42A Report at paragraphs 248 - 254

Strategic Direction

46. Part of your assessment, requires you to examine whether the proposed rezoning is the most appropriate method for achieving the objectives of the District Plan²⁴, by assessing the efficiency and effectiveness of the provisions.

47. Ms Legarth remarks that:

284. There are no strategic direction objectives and policies that specifically deal with airports or the special zones. The land uses associated with the airfield include aircraft maintenance and re-fuelling, which I consider to be industrial in nature. The airfield is not located in an area identified for industrial activities.

48. Given both are fairly unique, it is probably not surprising that the Proposed District Plan does not contain any objectives and policies (strategic direction), dealing with airports or special zones.

49. However, whilst the s42A Report emphasises that Mercer Airport is in a rural area it is important to recognise that Mercer Airport is part of the existing environment, and it has been for some time. As such, its existing effects must inform the expectations of amenity and character in the surrounding environment, rather than solely the Rural Zone objectives and policies.

50. Furthermore, you are required to consider the objectives of the District Plan as a whole, as opposed to that of the existing Rural Zone in isolation. Conversely, the s42A Report tends to focus on certain aspects of Chapter 5 – Rural Environment in concluding that:

286. The strategic outcomes sought for the rural environment are to protect high class soils, support productive rural activities, and avoid urban subdivision use and development". Rural character and amenity are to be maintained. The list of consented activities at the airport do not directly support rural productive activities. The plan provisions sought in the submissions facilitate a potential increase in the nature and scale of effects, and seek a higher level of regulation over neighbouring rural properties to facilitate a non-rural use of the land.

51. Mr Dawson's evidence, on a more balanced consideration though is, that:

²⁴ s32(1)(b) Resource Management Act 1991

- (a) The PDP sets a strong policy direction that part of maintaining rural character and amenity is to recognise and protect lawfully established rural activities from reverse sensitivity²⁵;
 - (b) The district plan policy provides a clear direction that a number of statutory tools can and should be used to ensure that activities in the rural zone are as compatible as possible with their surrounding environment. These tools include recognising that not all effects can be internalised but where they cannot, specific mitigation is required²⁶.
52. Both these considerations have been omitted from the s42A Report, although they are in my view, material. Indeed, the existence of the Airport, and its reverse sensitivity impacts are the very reason why the special zone, including the OLS and the noise contours, are now being sought.

Community Benefit

53. The benefit of the Airport to the community, and its ability to continue under the protection proposed by the Mercer Airport special zone, and to expand in future, is a relevant consider. Disappointingly, Ms Legarth dismisses these benefits, as being of benefit to the airfield operators²⁷.
54. However, the evidence of Dee Bond sets out a variety of commercial, recreational and community groups who use, and benefit from the Mercer Airfield. It is hoped that in the future that will expand.
55. Again, a key premise of the Mercer Airport special zone is that it is protected from reverse sensitivity, and complaint, as development inevitably occurs around it. This seems to have been completely ignored in the s42A Report.

²⁵ Chris Dawson, Further Evidence at 3.16

²⁶ Chris Dawson, Further Evidence at 3.18

²⁷ S42A Report, at 299

The District Plan and the Existing Resource Consent

56. One of the conclusions reached by Ms Legarth is that the existing rural zone and current resource consent are sufficient to enable the Airport to operate. However, at the same time she says that should an OLS be needed, or noise insulation required to mitigate effects, then these can be incorporated in the District Plan by other means. Specifically she says:

307. *I have concluded that, even if it can be demonstrated that the OLS and noise insulation measures are appropriate and the costs to the community can be justified, it does not follow that a Special zone: Mercer Airport should be added to the plan to assist the Council to carry out its functions in order to achieve the purpose of this Act. The airfield is located in a rural zone, and it is evident that a resource consent can consider and manage the adverse effects, and can be obtained to provide for aircraft-related activities. I consider that retaining the rural zone in the plan will ensure that the activities in that zone are rural in character, in the event that the private airfield relocates elsewhere.*

317. *A Specific Zone: Mercer Airfield imposes costs and a higher degree of regulation on neighbouring rural properties. Consultation with the rural community and a cost benefits analysis needs to be addressed by the submitter. Good planning practice would usually result in a consistent approach between the objectives and policies that apply in the Special Zone: Te Kowhai Airfield, if the same outcomes are intended. A Specific Zone is not necessarily the most efficient way of enabling or controlling the effects of land use. In the event that safety concerns associated with the operation of the airfield need height controls through an OLS, and insulation requirements to manage noise effects, these can be included in the plan without a zone change from rural to a specific zone.*

.....

320. *I have concluded that the operation of the airfield should be the subject of a detailed consent and assessment by a decision-maker through the consent process, and should not be enabled by a Specific Zone: Mercer Airfield. More detail is needed to justify the level of regulation over neighbouring, properties as proposed by the submitter.*

57. The only means by which an OLS and noise contours can be secured is within the District Plan. The OLS is a clear and necessary operational requirement, which exists at present. The noise

contours allow for limited expansion, but largely reflect the existing consented aircraft movements. They too already exist.

58. I'm afraid I do not understand how these could be incorporated in the District Plan now, or in the future, by any means other than a special zone. If they were to be included in isolation, as Ms Legarth appears to be suggesting, then they would be lacking the context and objectives and policies required of them under the Act.
59. I am intrigued, and concerned by the logic that "*retaining the rural zone in the plan will ensure that the activities in that zone are rural in character, in the event that the private airfield relocates elsewhere*"²⁸. There is no suggestion that Mercer Airport might relocate, but much less is that of any relevance. Moreover, the compatibility of Mercer Airport with the surrounding environment, is largely a foregone conclusion and irrelevant, because save for the limited opportunity for expansion the special zone affords, the bulk of its effects already exist.

Significant Effects

60. Ms Legarth concludes that there are potentially significant adverse effects on the environment from several non-aviation related activities proposed in the Mercer Airport Special Zone. She says:

290. *The planning evidence provided on behalf of the submitter sets out a permitted activity rule, which includes a number of non-aviation related activities. The controlled activities in that table include activities such as fuel storage, accommodation and water, stormwater and wastewater management. Controlled activities cannot be declined, and conditions may not be imposed that have the effect of declining an activity. Water supply, wastewater and stormwater discharges are matters for the regional plan, unless there are connections to Council reticulated services. In my opinion, these activities have the potential for adverse effects on the environment that are potentially significant and should be controlled by a restricted discretionary or discretionary activity. There is no clear link between the non-aviation and temporary activities in the rules, and the objectives and policies that they must*

²⁸ S42A Report, at 307

implement. There is little guidance in the policies or objectives to assist decision-makers to manage the potential effects of non-aviation activities.

61. I do not entirely understand the comment here, though gather it relates to the provision of water, stormwater and wastewater infrastructure as a controlled activity. In that respect:
- (a) These are matters regulated by the Regional Council;
 - (b) There is no evidence to suggest that significant adverse effects, a particular threshold required under the Act, might arise;
 - (c) Even as a controlled activity, Council is entitled to impose conditions on the consent dealing with effects.

Reverse Sensitivity Controls - The Obstacle Limitation Surface & Outer Control Boundaries

62. Ms Legarth concludes that the increased level of regulation over neighbouring rural properties is not justified and that it is unreasonable and unnecessary.
63. However, by its nature, an airport is unable to internalise all of its adverse effects. Aircraft come and go. They generate noise and they have operational safety requirements that cannot be overlooked.
64. Whilst adverse effects should be internalised where possible such restrictions should be reasonable. In the event of adverse effects escaping from the site after the imposition of reasonable controls, then restrictions constraining adjacent landowners can and should be implemented. The imposition of buffer controls and noise contours, is not therefore unusual.
65. In *Winstone Aggregates v Papakura District Council*²⁹, the Environment Court was faced with this very issue in considering the proposed district plan. Winstones sought a “buffer zone” for the quarry, which would impact the activities and consentability of neighbouring properties. The Court said this³⁰:

That the district plan should contain objectives, policies and methods to control the effects of quarrying, is not in dispute. It is whether those objectives, policies and methods should be directed at internalising all of the adverse effects, or whether a

²⁹ EnvC A096/98; 14 August 1998

³⁰ Supra note 26 at 101

combination of those restrictions should be combined with restrictions constraining the use of land owned by adjacent landowners. We have already held that we are of the view that adverse effects should be internalised where possible, but that such restrictions should be reasonable. In the event of adverse effects escaping from the site after the imposition of reasonable controls, then restrictions constraining adjacent landowners can and should be implemented. It is only when reasonable controls for the containing of effects at the boundary of the quarry site have been implemented can it be properly and adequately assessed that the perimeter of effects extends beyond the quarry zone thus making it necessary to impose restrictions on adjacent landowners.

66. In the present instance, it is proposed that any building, structure, tree or other vegetation must not protrude through the OLS³¹. Any existing buildings are protected by existing use rights.
67. Mr Park has plotted the OLS in his rebuttal evidence and considered its impact on existing trees and buildings. He concludes that there are no existing houses or buildings not owned by Mercer Airport affected by the west take-off/approach OLS³², by the east take-off/approach OLS³³ or by the north OLS³⁴. There are clearances above all existing buildings and structures, and in most instances, these are significant heights.
68. Whilst there are some trees identified within the OLS, the infringements are not significant and Mercer Airport expects that should trimming be necessary in future, they will come to some arrangement with the landowners.
69. Ms Legarth remains concerned though that the OLS will unreasonably impact on future buildings and structures. Acknowledging that new buildings greater than 10m in height would require a resource consent anyway, it is difficult to see how Ms Legarth's concern has any practical application.
70. In any event, Mr Park's analysis demonstrates that the OLS quickly rises to a height of 10m at a distance of 220m to 250m into the neighbouring properties for the east/west approaches

³¹ Proposed Rule 29.3.1

³² Rebuttal Evidence of David Park at 5.3.5

³³ Supra note 29 at 5.4.5

³⁴ Supra note 29 at 5.56

and 40m into the neighbouring property on the south side. On the north side, the 10m height is reached within Mercer Airport's boundaries.

71. Regarding the Outer Control Boundary, the issue for Mercer Airport is that the construction of new houses on the surrounding properties could curtail its ability to operate under the current resource consent because such noise was considered "unreasonable" and contrary to s16 of the Act.
72. The 65dBA contour within which a new residential dwelling would require a restricted discretionary consent is relatively small, and located close to the Airport boundary. For any new dwellings between the 55dBA and 65dBA contours, the proposal is that the façade of those dwellings be constructed to control the internal noise levels. Mr Hegley says that for new buildings, the cost of this additional requirement is not significant.
73. There is one existing dwelling just inside the 55dB Outer Control Boundary. Attenuation of that dwelling would be required only as the Airport approaches the modelled contour of 100 movements, but even then the exceedance above 55dB would be unnoticeable. However, Mr Hegley has proposed a rule that would require Mercer Airport to provide acoustic insulation to that property, should the Airport exceed 70 flight movements per day averaged over a 3 month period³⁵. This rule has been added to the proposed Mercer Airport Zone provisions included as Attachment 1 to Mr Dawson's summary statement as Rule 29.2.4A P1 (d).
74. Thus, based on Mr Hegley's expert and careful assessment, the actual impact of this additional regulation is minimal and falls only to a slight additional cost for any new dwellings. The impact of this above that of the existing consent, and the actual impact, does not appear to have been considered by Ms Legarth.

Council's Rebuttal Evidence

75. One further matter arises in Ms Legarth's rebuttal evidence – traffic and safety. Her evidence states:

14. The access to the Mercer Airport is along a rural road, and a private driveway. No evidence has been provided about the potential effects on the rural road or the transport network. I agree with the submitter that the actual and cumulative effects

³⁵ Statement of Evidence of Rhys Hegley, 17 February 2021 at 26

on the transport network need to be assessed and managed, and I consider that this can occur through a consent application should the airport expand beyond the scale authorised by the existing resource consent, rather than a special zone that provides for airport expansion, higher vehicle movements and temporary events.

76. This issue was not previously raised in the s42A Report and it is disappointing to see it raised at this late stage. However, it is incorrect to say that the submitter has not provided any evidence on traffic effects. Mercer Airport had a Transport Assessment (**report**)³⁶ prepared as part of a package of further information provided to the Council on 21 August 2020. This report assessed the existing access to Mercer Airport from the Koheroa Road intersection down to the Mercer Airport facilities. The report concluded that with the implementation of a number of minor upgrades³⁷ the access would be sufficient to enable 160 vehicles (320 vehicle movements per day) to safely access the site. I also note that Mercer Airport has recently sealed the entire length of the access at entirely its own cost.

Conclusion

77. A key theme in your evaluation is the efficiency and effectiveness of the Mercer Airport Special Zone being requested. The Airport exists and it has done for some 35 years. Over that time, its fortunes have changed, but currently, it accommodates a range of commercial, service and community activities related to aviation. It is hoped that Mercer Airport will be home to a very rare and special Catalina aircraft and the current owners are passionate about the future. They want to see the airport succeed.
78. However, to do that, Mercer Airport needs to be recognised and also protected in the District Plan. Largely, the special zoning sought recognises its existing operational constraints, especially in terms of noise and the OLS. However, there is some ability to expand; principally in accommodating a different mix of aircraft and allowing for some night-time movements.
79. The expert evidence presented by my clients, sets out with some care how the Airport should be protected from reverse sensitivity, and what its impacts in terms of operational requirements, noise and traffic generation will be. Whilst the existing resource consent enables the Airport, it does not, protect it from reverse sensitivity, secure the OLS or noise

³⁶ Transport report dated 14 August 2020 prepared by BBO as **Attachment 3** to Mr Dawson's summary statement.

³⁷ Install 6 small passing bays along the private right of way, construct two speed humps and install additional 30 km/hr speed limit signs along the right of way.

control boundaries, or allow sufficient flexibility for the future. Only the District Plan can do that.

80. It seems to me, and with respect, that these considerations have not been given sufficient emphasis in the Council's s42A Report. It is not logical to conclude that the OLS and noise attenuation of adjoining properties may be required, and could be included in the District Plan, but that the proposed Mercer Airport Zone is not justified. Neither do I see how the existing resource consent provides sufficient protection, when it cannot.
81. Whilst I appreciate that the Mercer Airport Special Zone seeks to introduce an OLS and noise contours that will impose some restriction on adjoining properties; the reality is that in the existing environment, those restrictions are little different from the status quo. The Courts have held that where effects cannot be reasonably internalised, then such buffer controls, can and should be imposed. That is the case here.
82. Repeatedly, the underlying concern in Ms Legarth's evaluation seems to be that there may be wider community views that have not been heard. That to me, is speculation, but in any event, the Courts have made it plain that where a submission seeks to rezone land, as is the case here, then without any further recourse to the public, that zoning is appropriate if it achieves the purpose of the Act. It is disappointing to see this issue has been given such emphasis in the Council's reporting.
83. In all, my client's expert evidence supports the conclusion that the Mercer Airport Special Zone is appropriate and that it achieves the purpose of the Act. It is both efficient and effective in recognising and protecting Mercer Airport.

