

**BEFORE THE HEARINGS COMMISSIONERS
AT WAIKATO DISTRICT COUNCIL**

UNDER the Resource Management Act 1991

IN THE MATTER of hearing submissions and further submissions on the
Proposed Waikato District Plan - Te Kowhai Airpark Zone

**LEGAL SUBMISSIONS FOR GREIG METCALFE
SUBMITTER NO.602
3 March 2021**

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SUBMISSIONS FOR GREIG METCALFE

Introduction

- 1 These submissions are made on behalf of Greig Metcalfe (**Mr Metcalfe**) and concern:
 - (a) Submission #602 on Chapter 27 (Te Kowhai Airpark Zone) of the Proposed Waikato District Plan (**PDP**):
 - (b) Submission #V16 on Variation 1 to the PDP; and
 - (c) Further submission #VFS4001 on Variation 1 to the PDP.
- 2 Mr Metcalfe has an ownership interest in the property (Lot 2 DP 456538) at 702 Horotiu Road, Te Kowhai (**Metcalfe Property**). The Metcalfe Property will be zoned Village under the PDP.
- 3 These submissions concern rules which relate to the Te Kowhai Airpark Zone and its impacts on other activities in Te Kowhai. We have endeavoured to avoid repeating at length the information included in the planning evidence submitted on behalf of Mr Metcalfe¹, the s 42A report (and s 42A rebuttal evidence), or in the evidence or expert evidence of other submitters.

Submissions

Appendix 9: Te Kowhai Airfield

- 4 Appendix 9 in Chapter 29 of the PDP includes important information in relation to Te Kowhai Airfield (**TKA**), including information on the proposed Obstacle Limitation Surface (**OLS**). Mr Metcalfe opposes the proposed OLS in the PDP and seeks to retain the existing OLS in the Waikato Operative District Plan (**ODP**). This is because a number of his trees protrude into the proposed OLS and there is uncertainty as to whether these trees will benefit from existing use rights and a corresponding uncertainty about whether they will need to be trimmed and/or regularly maintained.

¹ Statement of Evidence of Bevan Ronald Houlbrooke, February 2020.

- 5 The s 42A report on TKAZ does not account Mr Metcalfe's submission on Appendix 9² and counsel suggests that this might have been an oversight. Notwithstanding this, the s 42A report elsewhere states that the OLS should revert back to the OLS in the ODP and Mr Metcalfe supports this recommendation.³

Te Kowhai Airpark Zone

Circuit Training and Flight Training School

- 6 Mr Metcalfe submitted that the Activity Status Table, as notified in Rule 27.1.1, should be amended to include *flight training school* and *circuit training* as Non-Complying activities in all precincts of the TKAZ.
- 7 The section 42A report recommended that this be accepted and has recommended new definitions for flight training school and circuit training.⁴ Mr Metcalfe supports these recommendations, to be implemented in Chapter 13 (Definitions section)⁵, as well as the proposed consequential amendments to Policy 9.2.2.1.⁶
- 8 Mr Metcalfe is strongly opposed to the NZTE position in respect of circuit training. This is not an appropriate activity for an Airfield that operates within an existing village community and certainly not where the PDP specifically contemplates expansion of the village with larger areas rezoned for residential development.
- 9 The s 42A rebuttal evidence recognises that the notified PDP did not contain any rule about circuit training associated with TKA.⁷ The s 42A report recommendation to provide for circuit training as non-complying activity in all precincts was as a result of the adverse noise effects that circuit training would have on residents in the vicinity of TKA. We support the WDC rebuttal evidence recommending that circuit training and flight schools should be a non-complying activity.^{8,9}

² Section 42A Report, Section 6.2, [103] at p. 33.

³ Section 42A Report, Section 9.4, [355] at p. 91.

⁴ Section 42A Report, Section 8.3, [152] at p. 48.

⁵ Section 42A Report, Section 8.3, [151] at p. 48.

⁶ Section 42A Report, Section 8.3, [160] at p. 50.

⁷ Rebuttal Evidence, Section 42A Report [84], at p 13.

⁸ Rebuttal Evidence, Section 42A Report [86]. at p 13.

⁹ Rebuttal Evidence, Section 42A Report [91], at p 14.

Maximum number of aircraft movements

- 10 The s 42A report recommends a maximum of 15,000 annual aircraft movements for TKA and that night flying should be restricted outside of 0700 hours to 2200 hours.¹⁰ Mr Metcalfe supports these recommendations and the consequential recommendation to include new rule 27.2.16 and 27.2.17 as below:¹¹

Rule 27.2.16 – Hours of Operation for Aircraft Operations

<u>PI</u>	(b) <u>In ALL PRECINCTS, Aircraft Operations including take-offs and landings, must be carried out between 0700 hours to 2200 hours.</u> ¹³⁶
<u>P2</u>	(a) <u>In ALL PRECINCTS, Rule PI does not apply to the following:</u> (i) <u>Aircraft landing or taking off in an emergency; or</u> (ii) <u>Emergency flights required to rescue persons from life threatening situations; or</u> (iii) <u>Emergency flights to transport patients, human vital organs or medical personnel in a medical emergency; or</u> (iv) <u>Flights required to meet the needs to a national or civil defence emergency declared under the Civil Defence Emergency Management Act 2002; or</u> (v) <u>Aircraft using the airfield due to unforeseen circumstances as an essential alternative to landing at a scheduled airport elsewhere; or</u> (vi) <u>Aircraft being used in the course of firefighting duties; or</u> (vii) <u>Aircraft being used in the course of police duties.</u> ¹³⁷
<u>DI</u>	<u>Any activity that does not comply with Rule 27.2.16 PI and P2.</u> ¹³⁸

Rule 27.2.17 - Aircraft Movements

<u>PI</u>	(a) <u>In Precinct A, the maximum number of aircraft movements per calendar year shall be 15,000.</u> ¹³⁹ <u>One aircraft landing is one aircraft movement and one aircraft take-off is one aircraft movement.</u>
<u>DI</u>	<u>Any activity that does not comply with Rule 27.2.17 PI.</u> ¹⁴⁰

- 11 Despite the inclusion of these rules, Mr Metcalfe maintains that the inclusion of an Airpark Management Plan is appropriate in the circumstances in order to sufficiently mitigate adverse noise effects created by the operations of TKA.

Noise

- 12 Mr Metcalfe made an original submission on *Rule 27.2.7 P1 a) ii) Noise – Taxiways* in the PDP as notified:

¹⁰ S 42A Report, Section 11.7, [516], at 137.

¹¹ S 42A Report, Section 14.5, [764], at 192.

27.2.7 Noise – Taxiways

PI	<p>(a) In ALL PRECINCTS, noise from aircraft movements on the taxiways must not exceed the following noise limits:</p> <p>(i) When measured at the <u>notional boundary</u> of 202, 212 and 214 Limmer Road:</p> <p style="margin-left: 40px;">A. 50dB (L_{Aeq}), 7am to 10pm every day; and</p> <p style="margin-left: 40px;">B. 40dB (L_{Aeq}), and 65dB (L_{Afmax}) at all other times; or</p> <p>(ii) When measured at the <u>notional boundary</u> of any other <u>site</u> in the Rural Zone:</p> <p style="margin-left: 40px;">A. 50dB (L_{Aeq}), 7am to 7pm every day; and</p> <p style="margin-left: 40px;">B. 45dB (L_{Aeq}), 7pm to 10pm every day; and</p> <p style="margin-left: 40px;">C. 40dB (L_{Aeq}), and 65dB (L_{Afmax}) at all other times</p> <p>(b) Rule 27.2 (PI)(a)(ii) does not apply to 98A and 98B Limmer Road</p>
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13 Mr Metcalfe’s submission stated that the rule should include reference to the Village Zone as well as the Rural Zone because the Village Zone is located near TKA and should be included in the noise rule accordingly.

14 The s 42A report states that Rule 27.2.7 as notified is confusing and that the rule should be replaced by a new Rule 27.2.7A to manage noise associated with “aircraft operations”.¹² The s 42A report suggests “aircraft operations” is defined as follows:¹³

Aircraft Operations²⁶

Includes:

- the landing and take-off of any aircraft at an aerodrome;
- the taxiing of aircraft associated with landing and take-off and other surface movements of aircraft for the purpose of taking an aircraft from one part of the aerodrome to another.

15 Mr Metcalfe supports the inclusion of aircraft operations in place of the terms “general aviation” and “recreational flying”.

16 The s 42A report suggests that the new Rule 27.2.7A Noise – Aircraft Operations should state that “*Noise from aircraft operations in ALL PRECINCTS, including aircraft movements on taxiways, shall not exceed 65dB Ldn outside the Air Noise Boundary and 55db Ldn outside the Outer Control Boundary as shown in the planning maps.*”¹⁴ Mr Metcalfe supports this recommendation in part. Mr Metcalfe supports the implementation of acoustic limits in relation to noise from the TKAZ and the clarification around the definition of “aircraft operations”. Mr Metcalfe is however,

¹² Section 42A Report, Section 13.1.3, [626] – [627] at p. 167.

¹³ Section 42A Report, Section 8.3, [180] at p. 52.

¹⁴ Section 42A Report, Section 13.1.5, [663] at p.173.

uncertain as to whether the Air Noise Control Boundaries as referred to in the s 42A report are appropriate to control and manage adverse effects on neighbouring properties. Mr Metcalfe understands that other submitters to the TKA will be opposing the Air Noise Boundary and Outer Control Boundary which the s 42A report suggests should be adopted in the PDP and it will be for the Panel to decide whether such measures are appropriate.

- 17 Mr Metcalfe also made a submission that *Rule 27.2.6 Noise – Other than Taxiways* should be amended to include reference to the Village Zone. The s 42 A report recommends that the following amendments are made to Rule 27.2.6:¹⁵

P1	Noise generated by emergency sirens. ¹²⁵
P1 P2 ¹²⁶	<p>(a) Noise from any activity in PRECINCT B must not exceed the following noise limits when measured at the notional boundary of a site within the Rural Zone:</p> <p>(i) 55dB_{L_{Aeq}} 7am to 10pm every day; and</p> <p>(ii) 40dB_{L_{Aeq}} and 70dB_{L_{Amax}} 10pm to 7am the following day.</p> <p>(a) Noise measured within any site in any zone, other than the Te Kowhai Airpark Zone, must meet the permitted noise levels for that zone.</p> <p>(b) Noise levels must be measured in accordance with the requirements of New Zealand Standard NZS 6801:2008 Acoustics - Measurement of Environmental Sound.</p> <p>(c) Noise levels must be assessed in accordance with the requirements of New Zealand Standard NZS 6802:2008 Acoustic - Environmental noise.</p>
P2 ¹²⁷	<p>(a) Noise from any activity in PRECINCT C OR D must not exceed the following noise limits when measured at the notional boundary of any site in the Rural Zone outside of the Te Kowhai Airpark Zone:</p> <p>(i) 50dB_{L_{Aeq}} 7am to 7pm every day; and</p> <p>(ii) 45dB_{L_{Aeq}} 7pm to 10pm every day; and</p> <p>(iii) 40dB_{L_{Aeq}} and 65dB_{L_{Amax}} all other times.</p>
P3 ¹²⁸	<p>(a) In ALL PRECINCTS, Rules P1 and P2 do not apply to:</p> <p>(i) Noise from aircraft movement on the taxiways; or</p> <p>(ii) Construction noise; or</p> <p>(iii) Noise from emergency sirens.</p>
D1	Any activity that does not comply with Rule 27.2.6 P1, P2 or P3. ¹²⁹

- 18 Mr Metcalfe supports this recommendation as it provides for clarity on noise restrictions in the TKAZ in relation to the Village Zone.

Village Zone

- 19 In his original submission, Mr Metcalfe sought amendments to Rule 24.3.3.2 Height – Building, structures or vegetation within an airport obstacle limitation surface. The rule as notified purports to require vegetation or trees which protrude through the proposed OLS to be

¹⁵ Section 42A Report, Section 13.2.5, [697] at p. 180- 181.

trimmed to comply with the proposed OLS in order to be a permitted activity.

20 The Metcalfe property contains many large trees and there are around 40 trees which already breach the proposed OLS. It is submitted that the trees on the Metcalfe property which breach the proposed OLS benefit from existing use rights.

21 Under s 10 of the RMA, land may be used in a manner that contravenes a rule in a district plan or proposed district plan if both:

(a) the use was lawfully established before the rule became operative or a proposed plan was notified;¹⁶ and

(b) the effects of the use are the same or similar in character, intensity and scale before the relevant notification or coming into operation of a rule.¹⁷

Rotorua Regional Airport Limited v Fischer EnvC A113/09

22 In *Fischer*, the Environment Court had to consider the issue of existing use rights of trees in the context of an airport which was looking to lower the surrounding OLS. In this case the Rotorua Regional Airport Limited (**the Applicant**) sought enforcement orders against the Respondent to trim trees on his property which breached the proposed OLS.

23 The Applicant publicly notified a Proposed Plan Change 32 (**PC32**) and two Notices of Requirement (**NOR**) in December 2005. The second NOR contained a Section providing for a lower OLS. There had been a pre-existing OLS which was inserted in 1997. The proposed OLS was to be effective as of April 2008.

24 The Respondent's property contained a number of trees which intruded into the proposed OLS. There was no dispute that the trees were planted long before PC32. As a result, the Respondent argued that the trees on his property enjoyed existing use rights under s 10 of the Act.¹⁸

25 The Environment Court concluded that:¹⁹

¹⁶ *Rotorua Regional Airport Limited v Fischer EnvC A 113/09* at [53].

¹⁷ At [53].

¹⁸ At [35].

¹⁹ At [66].

- (a) When the proposed OLS was notified in 2005, the trees on the Respondent's property largely complied with the existing (1997) OLS; and
- (b) Any further growth of trees above the height was a change in intensity, character and scale justifying the Applicant requiring the trees to be trimmed.

26 Despite the above, the Court did find that the Respondent's trees had existing use rights to any existing lawful intrusion into the NOR as at its notification.²⁰

27 Orders for height reduction of the trees to the NOR levels were declined.²¹ Enforcement orders were made by the Environment Court to reduce the height of two trees which breached the 1997 OLS and had no existing use rights at the time that the 1997 OLS was inserted (that is, the trees grew past the 1997 OLS after it was inserted).²²

28 The decision in *Fischer* also considered whether the act of allowing the trees to continue growing amounted to "changing the character, intensity, or scale of the use of the land" for the purposes of s 176(1)(b)(iii) of the RMA which relates to the effect of a designation. The Court held that an existing use does not of itself infringe ss 176 and 178 RMA which collectively prevent actions that could hinder a public work. Regarding the effects on property rights, the Court noted:

*"Furthermore, this court would have expected **extremely clear statutory wording for legislation which allowed people's ownership of homes and properties (or other property rights) to be removed before any issues of compensation were addressed.***²³ **[emphasis added].**

Accordingly, we have always understood that the effect of a designation was that although it affected property rights, it did not affect the continuation of the status quo until such time as the position had ben regularised, either by agreement or acquisition.

²⁰ At [102] Note: We understand that the relevant date for establishing existing use rights under section 10 of the RMA in this instance will be the date decision on the OLS rules are publicly notified.

²¹ At [156].

²² At [157].

²³ At [63].

The concept that a person is able to be made homeless, without being compensated before that happens, is of considerable concern to this court and does not follow from our understanding or interpretation of the designation provisions of the Act.”²⁴

29 The Court did find, for the purposes of the *Fischer* hearing, that:

“the natural accretion in the size of a tree can be a change in character, intensity and scale, both in terms of Section 10 of the Act, and in terms of Section 176.”²⁵

“However, we do so for the purposes of this hearing only and reserve that question for proper argument in another case.”²⁶

Application of Fischer to TKAZ OLS

30 It is submitted that the trees on the Metcalfe property and any other affected property which already exceed the threshold of the proposed OLS would have existing use rights in accordance with the observations of the Environment Court outlined in *Fischer*. In accordance with the legal opinion provided by Tompkins Wake, the date for assessment of the existing use rights would be the date decisions on the OLS rules are publicly notified.²⁷

31 Notwithstanding this, the continued growth of the trees could constitute a breach of those existing use rights and they could be required to be trimmed at their height as of and if and when a decision on the OLS rules are notified. This could be sought by way of an enforcement order.

32 *Fischer* can, however, be distinguished from the circumstances surrounding the TKAZ. In *Fischer* there was an existing OLS which restricted the height of vegetation and trees. The ODP does not restrict intrusion of trees and vegetation into the current OLS (see Rule 25.49.1 in the ODP).

33 On this basis and as it stands, it is submitted that the trees on the Metcalfe property, in their entirety, have existing use rights, even if the trees

²⁴ At [64].

²⁵ At [77].

²⁶ At [78].

²⁷ Bridget Parham, Tompkins Wake Legal Opinion - Proposed Waikato District Plan – Hearing 17: Te Kowhai Airpark Zone – Existing Use Rights, at [8].

protrude into the **current** OLS in the ODP. Taking this to its logical conclusion, Waikato District Council (**WDC**) could not require landowners to trim trees which grew past the current ODP OLS after it became operative. This position would change if the proposed OLS is implemented. However if the proposed OLS (and consequently Rule 24.3.3.2 is not introduced) then the trees would not infringe any rule in a district plan and would have existing use rights.

Compensation

- 34 It is relevant that the *Fischer* decision considered the impacts on property rights in the context of a NOR where compensation was payable pursuant to the Public Works Act 1981 (**PWA**).
- 35 The Court was careful to restrict its comments to the purposes of that hearing and the situation in Te Kowhai is different. This is a private company wishing to expand a private airfield for its own commercial purposes. There has been no discussion with affected landowners regarding the compensation payable for trees that would need to be felled or for ongoing arborist care. Mr Serjeant's planning evidence for NZTE contemplates that the existing use rights of trees will be an issue to solve in the future²⁸ and Mr Readman's evidence talks about "individual land owner agreements and an ongoing maintenance programme to control these obstacles"²⁹ which is an entirely unsatisfactory and uncertain issue for the submitters. NZTE is not a requiring authority and thus the PWA and its compensation provisions do not apply. Given the inherent unfairness of a situation where private landowners could have to meet the costs of trimming trees on their land to facilitate the increased operations of TKA, it is submitted that it would be appropriate for NZTE to fairly compensate landowners (or arrive at some other workable solution) before any rule to regulate the height of trees, including existing trees, is introduced into the existing ODP OLS provisions.
- 36 In summary, the s 42A report (section 9.2) has recommended that the OLS from the ODP is adopted (with some amendments), which is based on **Visual Flight Rules (VFR)** rather than Instrument Flight Rules (**IFR**).³⁰

²⁸ Serjeant EIC para 72, p 24

²⁹ Readman EIC para 41 page 10

³⁰ Section 42A Report, Section 9.4, [355] at p. 91.

Mr Metcalfe supports this, however concerns remain over the issue of maintaining the intruding trees into the current OLS and where that burden falls if the current OLS and corresponding rules are deemed to apply to vegetation and trees. Mr Metcalfe also questions the ability of NZTE to obtain approval from the Civil Aviation Authority and implement IFR given the extent of the issue around existing use rights for trees.

- 37 Without the provisions of the PWA to guide the assessment of compensation and disturbance arising from the tree maintenance and control, the landowners will have little opportunity to negotiate fair terms for a land owner agreement (as proposed by Mr Readman) in circumstances where the trees could be assumed to lose their existing use rights for any further growth from the time the amended rule(s) takes effect. That concern applies especially to trees within the OLS sought by NZTE but also to trees as they continue to grow through the ODP OLS provisions recommended in the s 42A report.

Airport Noise Control Boundaries (ANCBs)

- 38 The s 42A report has recommended several changes relating to the management of noise associated with the Airpark. This includes modification to the extent of both the Outer Control Boundary (55dB Ldn) (**OCB**) and the Airport Air Noise Boundary (65dB Ldn) (**ANB**) as proposed in the Marshall Day Acoustic Report (**Marshall Day Report**), as well as amended policies and new rules. The s 42A report proposes that the OCB and the ANB contained in a Tonkin & Taylor Report (**T & T Report**) should be more appropriate. If the Panel does accept that ANCBs of some form are appropriate, then Mr Metcalfe submits that the ANCBs in the T & T Report should be implemented as these have less of an adverse effect on the Metcalfe property.
- 39 The Metcalfe property is located within the OCB and Mr Metcalfe does support measures to set acoustic limits within which TKA can operate. However Mr Metcalfe does not support the recommendations in the s 42 A report to Rule 24.1.3 that “*noise-sensitive activities located within the Te Kowhai aerodrome Airport Air Noise Boundary*” should be a non-

complying activity.³¹ Mr Metcalfe understands that other submitters will oppose this rule in its entirety.

- 40 If the Panel does accept this recommendation, Mr Metcalfe seeks that Rule 24.1.3 refer only to the ANB, not the OCB within which the Metcalfe property is located. The s 42A rebuttal evidence states that, in order to provide additional clarity, the Non-Complying Activity rule in 24.1.3 should be amended to refer to the 65dB Ldn OCB. Mr Metcalfe supports this recommendation, but does not make comment on the appropriateness of the ANCBs themselves.

Conclusion

- 41 In conclusion Mr Metcalfe seeks, in relation to:
- (a) *Appendix 9 – Te Kowhai Airfield*, retention of the OLS in the ODP and deletion of the OLS as notified in the PDP;
 - (b) *Rule 27.1.1* – for “flight training school” and “circuit training” to be Non-complying activities in all precincts of the TKAZ and consequential amendments to be made to Chapter 9.2 (Objectives and Policies – Specific Zones – Te Kowhai Airpark);
 - (c) *Rule 27.2 Land Use Effects* – for rules to be implemented to restrict a maximum of 15,000 annual aircraft movements and restrict night flying outside of 0700 hours to 2200 hours (rules 27.2.16 and 27.2.17 as recommended in the s 42A report are appropriate for this purpose) and a reference to an Airpark Management Plan to ensure appropriate mitigation of adverse effects from TKA.
 - (d) *Rule 27.2.7* – the inclusion of reference to the Village Zone in *Rule 27.2.7 P1 a) ii*);
 - (e) *Rule 27.2.6* – the inclusion of the amended rule 27.2.6 recommended in the s 42A report;
 - (f) *Rule 24.3.3.2* – clarity on the implications that the proposed OLS will have on mature trees, including potential existing use rights and the responsibility for making trees comply (initially and ongoing).

³¹ Section 42A Report, Section 11.9, [532] at p. 142.

- (g) *Rule 24.1.3* – if the proposed Rule 24.1.3 in the s 42A report is accepted by the Panel, that it be amended to only refer to activities within the ANB; and
- (h) Any additional or consequential changes required to give effect to the relief sought in this appeal.

Dated: 3 March 2021



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