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

LEGAL SUBMISSIONS FOR NZTE OPERATIONS LIMITED
HEARING 17 - TE KOWHAI AIRPARK ZONE

Dated: 3 March 2021

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION

NZTE Operations Limited

1. Counsel appears for NZTE Operations Limited, submitter No. 823, (**NZTE**).

2. NZTE owns and operates the Te Kowhai Aerodrome (**Aerodrome**). The Aerodrome has been provided for in Waikato district plans since 1973. Under the Operative Waikato District Plan (**OWDP**) the Aerodrome is zoned Rural, and its operations are enabled by the Obstacle Limitation Surfaces (**OLS**) and an Airport Noise Outer Control Boundary (**OCB**).

3. The Aerodrome is proposed to be rezoned Te Kowhai Airpark Zone (**Airpark Zone**) under the Proposed Waikato District Plan (**PWDP**). The Airpark Zone is intended to provide for the continued operation of the Aerodrome and enable the development of an Airpark on land adjacent to the runway consisting of a mix of commercial and residential precincts.

Relief Sought - In General

4. NZTE's submission on the Airpark Zone seeks confirmation of the Airpark Zone, subject to the following:

   (a) confirmation of the OLS as varied by Variation 1 to the PWDP;

   (b) replacing the OCB with the revised OCB and Air Noise Boundary (**ANB**);[1] and

   (c) amending the policies, objectives and rules as sought by NZTE.[2]

NZTE's Witnesses

5. NZTE has called evidence from:

   (a) Dan Readman – Landowner

   (b) Jonathan Broekhuysen – Urban Design

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1 EIC of Laurel Smith (Acoustic).

2 EIC of Dave Serjeant (Planning).

(c) Dave Park – Aviation

(d) Laurel Smith – Acoustics

(e) James Armitage – Infrastructure

(f) Dave Serjeant – Planning

AIRPORT LEGISLATION

Evidence

Background

6. The Readman family (now NZTE) have proactively engaged with the Civil Aviation Authority (**CAA**) and Waikato District Council (**Council** or **WDC**) for several years in relation to the Aerodrome's safe operation.

7. Counsel was initially briefed to assist resolve temporary operational issues arising between the CAA and the Council in 2015. WDC's solicitors at the time were Brookfields Lawyers. There was concurrence between the parties that the CAA's regulatory requirements should ultimately be regularised through the PWDP.

8. NZTE have more recently worked collaboratively with the Council on draft provisions for the Airpark Zone, including providing technical input on the operational requirements of the Aerodrome, infrastructure to service development, and the development of a Framework plan for the Airpark.

9. Following the notification of the PWDP, NZTE raised concerns in relation to the notified OLS that led to Variation 1 to the PWDP. NZTE has sought to maintain an open dialogue with the Council but is unable to support several changes proposed under the s.42A report (as discussed below).

The proposed OLS

10. The relevant CAA design standards for the Aerodrome (i.e.,1A+) include the length and width of the runway strip, requirements for flight path protection at runway ends and around an aerodrome, and the shape of the OLS.[3] The

[3] EIC of Dave Park, at [27], [42] and [108].

shape of the OLS is dictated by whether the Aerodrome is operating under Visual Flight Rules (**VFR**) or Instrument Flight Rules (**IFR**).

11. The notified OLS (as set out in Variation 1 to the PWDP) will better enable the safe operation of the Aerodrome. It provides for a greater clearance of obstacles around the Aerodrome approach and take-off pathways and enables the Aerodrome to seek CAA approval for IFR operations.[4]

12. The operative OLS under the OWDP is restricted to aircraft with a wingspan of 12m and would not allow for IFR operations.[5] Mr Park addresses the safety benefits of IFR in his evidence, observing that IFR is the industry best practice for safe operation of Aerodromes.[6]

13. The s.42A recommendation that the operative OLS should be retained would preclude CAA approval being available for IFR operations and compromise the safe operation of the Aerodrome.[7]

Circuit training

14. NZTE has adopted a "circuit pattern" for departures and landings which avoids overflying the Te Kowhai village.[8] Mr Park explains in his evidence that the established circuit pattern is intended to avoid turns at low levels and that it is standard piloting practice world-wide.[9]

15. All pilots are required under the CAA Rules to comply with an Aerodrome's established circuit.[10] Pilots in training will practice take-offs and landings following the circuit pattern.[11] Mr Park notes that this training exercise is called "circuits". As set out in Mr Park's evidence, circuit training is an everyday activity at aerodromes, an essential part of all pilots training, and a requirement under the CAA Rules.[12]

16. Mr Park states that the s.42A report's recommendation to make "circuit training" a non-complying activity is contrary to the safe operation of the

4 EIC of Dave Park at [43], [119], [139] and [148].
5 EIC of Dave Park, at [47].
6 EIC of Dave Park, at [138] – [139].
7 EIC of Dave Park, at [47] and [138].
8 EIC of Dave Park, at [15] and Figure 2.
9 EIC of Dave Park, at [17].
10 EIC of Dave Park, at [19].
11 EIC of Dave Park, at [18].
12 EIC of Dave Park, at [134].

Aerodrome and will compromise pilot's ability to comply with the CAA Rules.[13]

Flight training school

17. Mr Park explains the necessity to make provision for pilots to practice emergency procedure in the event of an engine failure are take-off (**EFATO**).[14] While this training exercise can cause a "startle effect" for people beneath the aircraft's flight path, it is an essential flight training manoeuvre that is common at aerodromes throughout New Zealand.[15]

Relevant Law

Legislation

18. The Civil Aviation Rules (**CAA Rules**) under the Civil Aviation Act 1990 and the Health and Safety Work Act 2014 (**HSWA**) apply to the operation of the Aerodrome.

19. NZTE manages the Aerodrome, and Mr Readman is the Aerodrome Operator, under the CAA Rules.[16]

20. NZTE is a "person conducting a business or undertaking" (**PCBU**) under the HSWA. Mr Readman is the Aerodrome's PCBU officer. He is required to observe statutory health and safety obligations under the Act.[17]

Civil Aviation Rules

21. The CAA is the government body responsible for establishing the rules and standards for the operation of aerodromes and aircraft. The CAA Rules are based on international standards set by the International Civil Aviation Organisation.[18] These rules are supplemented by Advisory Circulars which provide information on how to comply with the CAA Rules.

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13 EIC of Dave Park, at [126] [127] and [128].
14 EIC of Dave Park, at [20].
15 EIC of Dave Park, at [21].
16 EIC of Dan Readman (Landowner), at [29].
17 HSWA, ss 17 and 18.
18 EIC of Dave Park (Aviation), at [24].

22. The Aerodrome Operator of a Non-Certificated Aerodrome has an obligation to establish procedures to ensure safe aircraft movements.[19] This obligation extends to ensuring that all protrusions through the OLS are notified to pilots.

Health and Safety Work Act 2014

23. Under the HSWA, NZTE and Mr Readman have a duty to – so far as is reasonably practicable – eliminate risks to health and safety.[20]

24. This duty of care applies to both employees of NZTE working at the Aerodrome and other persons who may be at risk from activities carried out at the Aerodrome.[21] If it is not reasonably practicable to eliminate risks to health and safety, there is an obligation to minimise those risks as so far as is reasonably practicable.[22]

Submissions

25. The obligations under the CAA Rules and the HSWA are relevant to the provisions that NZTE seeks to have included in the PWDP.

26. The s.42A report recommends:

    (a) Reverting to the operative OLS under the OWDP;[23]

    (b) Inserting a new definition for "circuit training", and an activity specific rule as a non-complying activity;[24] and

    (c) Inserting a new definition for "flight training school", and an activity specific rule as a non-complying activity.[25]

27. These recommendations would jeopardise the NZTE's ability to comply with legislation governing the safe and efficient operation of the Aerodrome. They should, therefore, be disregarded in favour of the relief sought by NZTE's proposed relief. In particular:

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19 CAA Rules, Subpart I Rule 139.503 (1 December 2020).
20 HSWA, s 30.
21 HSWA, ss 36(1) and (2).
22 HSWA, s 30(1)(b).
23 Section 42A report, [287] and [349].
24 Section 42A report, [159] – [160], [169] – [170].
25 Section 42A report, [150] – [158], [168].

(a) The notified OLS will allow NZTE and Mr Readman to take steps to minimise the risks of an aircraft incident under the HSWA and the CAA Rules. The notified OLS will enable a shift to IFR operations, which are inherently safer than VFR operations in inclement weather or poor light conditions;

(b) The effects of training exercises, such as circuits and EFATO training, should be managed by the Aerodrome Operator imposing restrictions on the conduct of training exercises; and

(c) The definition of "flight training school" as a non-complying activity status is unreasonable where here such training exercises are a standard part of aerodrome operations.

OBSTACLE LIMITATION SURFACES

Evidence

28. The Airpark Zone is part of the notified PWDP. It is supported by a s.32 evaluation undertaken by the Council. Variation 1 was initiated to correct an inconsistency in how the OLS was described and shown in text and maps under the original notified PWDP.[26]

29. Mr Serjeant's evidence summarises the two principal differences between the OWDP's operative OLS and that shown under the PWDP (Variation 1):[27]

(a) The OLS has been lowered from a 1:20 slope to a 1:40 slope, and extended from 1200m to 2500m from each end of the runway, with associated transitional side surfaces (extending out to 80m from the runway centreline); and

(b) An inner horizontal surface has been introduced, which lies at a height of 45m above the runway, and extends outwards 2,500m from the runway centreline and strip ends.

30. Mr Park confirms that the purpose of OLS is to provide a means of controlling obstacles (e.g., tall buildings, structures, or vegetation) around

[26] EIC of Dave Serjeant, at [18].

[27] EIC of Dave Serjeant, at [15].

the Aerodrome which could affect the safe operation of aircraft.[28] The OLS height level does not determine the height of the aircraft flight paths. Rather, as stated by Mr Park, the OLS does not *"attract aircraft or alter an aircraft's flight path"*.[29]

31. The Council's s.32 evaluation supports the adoption of the OLS on the basis that it will "future proof" the Aerodrome by providing for future IFR operations. It concluded that the OLS implements Objective 9.2.2 by promoting safer, obstacle free, airspace. The safety benefits of the notified OLS were considered to outweigh the costs.[30]

32. Mr Park concludes that the assertions in the s.42A report that the notified OLS would allow aircraft to fly 6-10m above ground level in some places,[31] and result in damage to fences and farm animals,[32] proceeds from a basic misunderstanding.

33. The s.42A report concludes[33] that nine properties in the Rural Zone and two properties in the Village Zone will not be able to be developed to the maximum permitted building height without a non-complying consent, and the potential for consent being granted is uncertain due to safety effects on the Aerodrome operations.

34. Submitters also raised the effect of the OLS – and the requirement to have the control noted on the property LIM – on the value of their properties.

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28 EIC Dave Park, at [117].

29 EIC Dave Parks, at [118].

30 Section 32 report-Part 2, Te Kowhai Airpark Zone July 2018, page 57.

31 Section 42A report, at [309].

32 Section 42A report, at [355].

33 Section 42A report, at [299].

Relevant law

Existing use rights

35. It is accepted, as a matter of law, that trees and buildings that were in existence as at the date the OSL was notified have existing use rights.[34]

36. On that basis, any trees or buildings that are inside the expanded OLS have the benefit of existing use rights, but only to the height they were at the date of notification of the PWDP (or Variation 1, whichever applies). Subsequent growth of the existing trees, new trees or new buildings will not be protected by existing use rights.[35]

Property values

37. The Supreme Court has confirmed that New Zealand law provides no general statutory protection for property rights equivalent to the United States "eminent domain" doctrine which compensates a property owner for restrictions on property rights.[36] Section 85 of the RMA provides for the Environment Court to consider any claim of unreasonable regulation. However, this section has not been raised in submissions.

38. The diminution of property values will, in general, be found to be a measure of adverse effects on amenity values.[37]

39. The Environment Court observed in *Hudson v New Plymouth District Council* that people concerned with diminishing property values were inclined to approach the matter from a subjective viewpoint. The Court held:[38]

> *By way of observation those who are concerned with the fact that their property values might drop are often viewing the matter from a subjective viewpoint. In other words, they are used to a certain*

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34 *Rotorua Regional Airport v Fischer* [2010] NZRMA 105 where it was it was held owners of trees had existing use rights to any lawful intrusion by the trees into airspace as at the date of the notification of the designation. In this instance, Rotorua Regional Airport was seeking enforcement orders against a neighbour (located 1km away) with trees that entered the OLS.

35 *Fischer* above, at [77].

36 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, at [45], [47].

37 *Foot v Wellington City Council* (W73/98); *Bunnik v Waikato District Council* (A42/96).

38 *Hudson v New Plymouth District Council* (W138/95), at page 6.

> *environment and perceive a change to that environment at inevitably resulting in a drop in property values. That however, is subjective to that person. He or she is used to what is there and resent change. They fear that people who may in the future wish to purchase a property will perceive that change…. It is our experience that in many cases the potential purchaser is not greatly influenced by matters which may be of great moment to the present occupier of a property…. However we do not base our decision on that surmise. We simply have no evidence to support future drop in property values.*

Section 32 evaluation

40. The s.42A report purports to shift the onus to NZTE to provide the evaluation to support the notified OLS.[39] It is a well-established principle that there is no formal onus of proof on a submitter.[40]

41. The Schedule 1 process permits the Commissioners' to make a decision – based on a further evaluation of the proposed plan under s.32AA – altering the notified provisions of the PWDP to address matters arising from the submissions.[41]

Submissions

Errors of fact

42. The s.42A report recommendation to revert to the operative OLS is based on fundamental errors. Mr Park's expert evidence as to the purpose and intent of the OLS should be preferred.

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39 Section 42A report, [292] and [350].

40 *Leith v Auckland City Council* [1995] NZRMA 400, at 408; *Hibbit v Auckland City Council* [1996] NZRMA 529, at 533.

41 RMA, Schedule 1, clause 10.t.

Existing use rights

43. In my submission, existing use rights – and the related effects on biodiversity raised in the s.42A report[42] – is not a reason to revert to the operative OLS.

44. NZTE will need to have regard to existing use rights in establishing whether there are areas of the OLS where obstacles can remain, and work with the landowners to achieve the safety outcomes required for CAA approval. Mr Readman has addressed in his evidence how this works in practice.[43]

Development potential and valuation effects

45. Mr Broekhuysen has undertaken an in-depth analysis on the potential impact on development of the five properties in proximity to the runway and concluded that the OLS does not unreasonably inhibit the potential development options for these properties. Mr Broekhuysen's expert assessment of the effects on the development potential of properties beneath the notified OLS should be preferred.

46. The effect of a proposed district rule on a property's value is not a relevant consideration – except to the extent that this arises for consideration under s.85 of the RMA.

47. The Environment Court's observation in *Hudson* is applicable. The submissions as to the effects of the notified OLS on property values are based on purely subjective assessments. There is no independent evidence to support the contention that there will be a drop in property values.

Section 32 evaluation

48. It is not NZTE's obligation to provide an evaluation to support the notified OLS. The OLS is part of the Council promoted proposed plan; and the obligation to undertake the s.32AA evaluation rests with the Council.

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42 Section 42 report, at [355].

43 EIC Dan Readman, at [40] – [41].

49. The decision to amend the PWDP to address matters raised in submissions must be supported by reasons. In the present case, those reasons must be founded in expert evidence.

50. NZTE is the only submitter to present expert evidence supporting the notified OLS. None of the submitters opposing the notified OLS – and seeking to revert to the operative OLS – have provided expert evidence in support of their submissions. The s.42A report recommendations run directly counter to the s.32 evaluation and are not supported by an expert report.

ANB / OCB (NOISE BOUNDARIES)

Evidence

Noise boundaries

51. The provisions sought by NZTE include appropriate land use and airport noise controls associated with the revised OCB and Air Noise Boundary (**ANB**), which have been developed in accordance with NZS 6805. Ms Smith recommends:[44]

(a) a revised OCB, and an alternative ANB developed in accordance with NZS 6805, to replace the notified OCB; and

(b) amendments to the land use and airport noise control rules associated with the revised boundaries.

Noise and land use controls

52. The s.42A report recommends several amendments to the PWDP airport related noise and land use controls.

53. The recommended amendments include:

(a) A rule limiting operations to 15,000 flights per annum;

(b) A rule defining the operational hours of the Aerodrome to be 7am to 10pm;

[44] EIC of Laurel Smith, at [27].

(c) A rule excluding engine testing between 10pm and 7am; and

(d) Non-complying status of circuit training and a flight school.

54. Ms Smith states that she is unaware of any airport with an annual cap on movements and concludes that there is no noise effects basis for limiting the number of aircraft movements.[45]

55. Ms Smith has provided specific analysis which discounts the benefits to the local community from managing noise effects associated with circuits being flown by trainee pilots and others. Her evidence is that noise from flying in circuits is part the aviation activity, and after accounting for circuits in her noise modelling the 55dB Ldn noise contour was barely affected.[46]

56. Ms Smith has recognised that there is the potential for "unreasonable sleep disturbance effects" from night flying and has recommended limiting the number of night-time departures to 40 over a 3-month period.[47]

Reverse sensitivity

57. NZTE's submission sought a new objective and policy addressing reverse sensitivity effects on the existing Aerodrome.[48] The s.42A report supported that submission and recommends inserting:

(a) New objective 9.2.3 *"The operational needs of Te Kowhai Airpark are not compromised by noise-sensitive activities with the potential for reverse sensitivity conflict"*; and

(b) New policy 9.2.3.1 *"Manage reverse sensitivity risk by: (a) ensuring that noise-sensitive activities within the Te Kowhai Airpark Noise Control Boundaries are acoustically insulated to appropriate standards"*.

58. NZTE submissions seek a non-complying activity rule for noise sensitive activities within the Rural and Village Zones, responding to the new objective and policy.[49]

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45 EIC of Laurel Smith, at [83].

46 EIC of Laurel Smith, at [95].

47 EIC of Laurel Smith, at [55] and [119].

48 EIC of Dave Serjeant, at [34].

Relevant law

Aircraft noise controls

59. The RMA provides the main source of control over aircraft noise, although there are limitations on the application of the RMA to aircraft.[50] The High Court in *Dome Valley District Residents Society* held that overflying aircraft is outside the ambit of the RMA.[51]

60. Case law has recognised that noise from aircraft, particularly when approaching, departing, or operating at airports, can be a source of annoyance and nuisance.[52] Aircraft noise is an adverse effect on amenity, and can be addressed through district rules.[53]

NZS 6805

61. NZS 6805 provides guidance on how airport noise should be managed and how land use planning carried out in the vicinity of airports. To control the long-term emission of noise from airport operations the Standard has developed controls based on an ANB.

62. The Standard, and particularly its application to district plans under the RMA, has been the subject of judicial comment.[54] While these cases primarily concern the three international airports, the Standard has also been applied in cases involving a skydiving operator and a heliport.[55]

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49 EIC of Dave Serjeant, at [37].

50 RMA, s9(5) limits the application of the restriction on the use of land in respect of overflying by aircraft *"only to the extent to which noise emission controls for airports have been prescribed in a national standard or set by the territorial authority".*

51 *Dome Valley District Residents Society Inc v Rodney District Council* (2008) 14 ELRNZ 237.

52 Studies on the effects of aircraft noise on people, in terms of potential health effects and general annoyance, have been discussed in cases including *Gargiulo v Christchurch City Council* [2001] NZEnvC 291; *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 6, at [97] – [102]; and *Robinsons Bay Trust v Christchurch City Council* [2004] NZEnvC 163.

53 RMA, s76.

54 *Wellington International Airport Ltd v Wellington City Council* [1997] NZEnvC 355; *Housing New Zealand Corporation v Manukau City Council* [2001] NZEnvC 440; *Robinsons*, above note 55.

55 *Re Skydive Queenstown Ltd* [2014 NZEnvC 108; *Dome Valley District Residents Society Inc v Rodney District Council* (2008) 14 ELRNZ 237.

Part 2 matters

63. Controls on airport noise – and airport operations to manage noise – need to be balanced with the recognition of airports as public transportation services and important physical resources. Consistent with s.5 of the RMA, such physical resources should be managed in a sustainable manner to provide for social and economic wellbeing, and for the needs of the community in general.

Reverse sensitivity

64. A long line of case law has established the relevance of reverse sensitivity as an effect on the environment under the RMA.[56] The potential effect of reverse sensitivity, from a proposed new use on an existing use, is an effect on the environment in terms of ss.31 and 32 (in relation to plans) and Part 2 of the RMA generally.

65. Cases related to airport zoning have established that it may be desirable to limit the right to construct dwellings as a permitted activity on properties in the vicinity of airports, and to require any new buildings to have appropriate sound insulation to mitigate aircraft noise nuisance.[57]

66. In certain, limited, situations the problems of reserve sensitivity may justify the description of an activity as a prohibited activity having regard to any significant environmental effects or the need to take a precautionary approach.[58]

Submissions

Aircraft noise controls

67. There are currently no mandatory regulations or standards placing controls on the noise effects of aircraft flight paths on communities below. The ANB is limited to noise produced during take-off and landing. There is no

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56 *Wilson v Selwyn District Council* [2005] NZRMA 76; *Independent News Auckland*, above note 55; *Lendich Construction Ltd v Waitakere City Council* (A77/99).

57 *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145; *Independent News Auckland*, above note 55.

58 *Coromandel Watchdog of Hauraki Ltd v Ministry of Economic Development* [2008] 1 NZLR 562 (CA).

jurisdiction to separately control circuit training, which is an activity involving overflying aircraft.

68. NZTE's evidence has shown that there is no effects-based reason to control circuit training, or to limit the number of aircraft movements per year. Ms Smith's recommendations – being consistent with NZS 6805 – should be preferred to the rules recommended in the s.42A report.

Part 2 matters

69. The Aerodrome is an important local resource for the local community, aviators, and aviation related services.[59] The Aerodrome is a physical resource to be sustainably managed.

70. Establishing a small, local, aerodrome like Te Kowhai now would be very difficult.[60] The Aerodrome is part of the existing environment and has been provided for in the district plan for over 50 years. The PWDP provisions should avoid reserve sensitivity effects on the Aerodrome, and balance the protection of amenity with the continued safe operation of the Aerodrome.

71. The recommended amendments to the noise and land use controls contained in the s.42A report are not imposed for an RMA purpose and will not enable the sustainable management of this important physical resource.

Reverse sensitivity

72. The rules package, and amended noise control boundaries, sought by NZTE, appropriately manage the reverse sensitivity effects of adjoining residential activities on the existing operations of the Aerodrome. The expanded ANB, coupled with the rule requiring new noise sensitive activities to install acoustic insulation (including dwellings within the Airpark itself) will mitigate adverse noise effects from the Aerodrome operations.

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59 EIC of Dave Serjeant, at [99].

60 EIC of Dan Readman, at [31].

STRATEGIC GROWTH

73. NZTE made further submissions in relation to submissions[61] by other parties on the alignment of the proposed Airpark Zone with the policies of the Waikato Regional Policy Statement and the Future Proof settlement pattern.

74. These submissions are not addressed in the current hearing and it is understood that they will be addressed in Hearing 25 in relation to Zoning Extents.

75. Mr Serjeant's EIC demonstrates the consistency of the proposed Airpark Zone with higher level policy documents, including Waikato 2070.

76. Nevertheless, NZTE will assess the evidence provided by the other parties, and the s.42A report which specifically addresses Te Kowhai, including the Airpark Zone, when these are available with a view to providing further evidence on strategic growth matters.

Dated 3rd day of March 2021

Dr R A Makgill

Counsel for NZTE Operations Limited

61 Submissions 81.226 and 81.227 by Waikato Regional Council and 606.13 by Future Proof Implementation Committee.