

**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

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**LEGAL SUBMISSIONS FOR LLOYD DAVIS/ MARSHALL & KRISTINE  
STEAD  
SUBMITTER NO. 943/ NO. 943 & NO. 834  
3 MARCH 2021**

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## SUBMISSIONS FOR LLOYD DAVIS/KRISTINE & MARSHALL STEAD

### Introduction

- 1 These submissions are made on behalf of Marshall/Kristine Stead and Lloyd Davis (**the submitters**). The Steads reside at 703b Te Kowhai Road, Te Kowhai 3288. Mr Davis resides at 703A Te Kowhai Road. Both submitters share their southern boundary with Te Kowhai Airfield (**TKA**). Appendix A shows the location of the submitters in relation to TKA.
- 2 The submitters have chosen to present joint legal submissions as their interests in relation certain rules in the Waikato Proposed District Plan (**PDP**) overlap to a large extent.
- 3 Mr Davis made the following submissions on the PDP which relate to activities within the Te Kowhai Airpark Zone (**TKAZ**):
  - (a) Submission #943<sup>1</sup>;
  - (b) Further submissions (#FS1154 & #FS1178); and
  - (c) Submission on Variation 1 (#V17).
- 4 The Steads made the following submissions on the PDP which relate to activities within the TKAZ:
  - (a) Submissions #834 and #943<sup>2</sup>; and
  - (b) Further submissions (#FS1154 & #FS1178).
- 5 The submitters also lodged submissions on rules in Chapter 24 (Village Zone), Chapter 9.2 (Objectives and Policies – Specific Zones – Te Kowhai Airpark), Chapter 13 (Definitions) and Chapter 29 (Appendices – Appendix 9) to the extent that those rules relate to activities within the TKAZ.
- 6 As well as summarising the relief sought by the submitters in relation to the aforementioned rules, these submissions focus on key legal issues which have been identified in the s 42A report, the evidence and expert evidence lodged by other submitters and the rebuttal evidence filed by the s 42A author (**s 42A rebuttal evidence**).

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<sup>1</sup> A collective submission which was made by McCracken Surveys Limited on behalf of the submitters.

<sup>2</sup> See above.

## Submissions

### Appendix 9: Te Kowhai Airfield

- 7 The submitters support the submission point of Greig Metcalfe (#602) (Mr Metcalfe) which opposes the proposed Obstacle Limitation Surface (**OLS**) in the PDP. The Steads' and Mr Davis live adjacent to TKA and will therefore be affected by the proposed OLS restrictions to the greatest extent.
- 8 The proposed OLS is based on Instrument Flight Rules (**IFR**), while the existing OLS in the Waikato Operative District Plan (**ODP**) is based on Visual Flight Rules (**VFR**). The submitters do not see a rationale for TKA operating under IFR conditions and view the imposition of IFR and the proposed OLS as unnecessary restrictions on their ability to develop their land.
- 9 The s 42A report states that no evidence has been presented to justify the implementation of IFR rules and accordingly recommends that the OLS in the ODP should be retained and the proposed OLS should be rejected.<sup>3</sup> This position has not changed in the s 42A rebuttal evidence<sup>4</sup> and the submitters support this recommendation. The implications of the proposed OLS are discussed later in these submissions.

### Te Kowhai Airpark Zone

- 10 The submitters support Mr Metcalfe's submission that "flight training school" and "circuit training", as present in the Activity Status Table at 27.1.1, should both be classified as Non-Complying activities in all the Precincts in the TKAZ. The s 42A report recommends that these activities should be Non-Complying in all precincts and the submitters support this recommendation.<sup>5</sup> This is a proposal by a private company that wants to futureproof the development and use of TKA. In practical terms, that means that NZTE wants to protect its economic development options at the expense of adverse impacts on the submitters' land. Those impacts include adverse noise effects from repetitive circuit training manoeuvres and also adverse effects on development potential.

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<sup>3</sup> Section 42A Report, Section 9.4, [355] at p. 91.

<sup>4</sup> Rebuttal Evidence – Section 42A Report, at [28], p 8.

<sup>5</sup> Section 42A Report, Section 8.3 [152] at p. 48.

- 11 In respect of *Rule 27.2 Land Use - Effects*, the submitters also support Mr Metcalfe's submission that the emission of noise from the TKA should be controlled by:
- (a) a maximum number of aircraft movements;
  - (b) hours of operation to exclude night flying; and
  - (c) preparation of an Airpark Management Plan through consultation with affected landowners.
- 12 The s 42A report recommends a maximum of 15,000 annual aircraft movements and that flying outside of 0700 hours to 2200 hours should be restricted.<sup>6</sup> The submitters support these recommendations and as a result support inclusion of the new rules below:<sup>7</sup>

**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> <sup>136</sup>
<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> <sup>137</sup>
<u>DI</u>	<u>Any activity that does not comply with Rule 27.2.16 PI and P2.</u> <sup>138</sup>

**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> <sup>139</sup> <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> <sup>140</sup>

- 13 As stated in the s 42 A rebuttal evidence, having an annual maximum of aircraft movements as a permitted activity provides some certainty<sup>8</sup> for the community and it is submitted the same is true in relation to the times at which aircraft operations can occur.

<sup>6</sup> Section 42A Report, Section 11.7, [516] at p. 137.

<sup>7</sup> Section 42A Report, Section 14.5, [764] at p. 192.

<sup>8</sup> Rebuttal Evidence – Section 42A Report, [70] at [12].

- 14 The submitters do not support the recommendation in the section 42A report that an Airpark Management Plan is not required because of the inclusion of noise standards and other restrictions on flying.<sup>9</sup> Further consultation is needed with landowners that will be affected by the increase in operations of TKA and the inclusion of an Airpark Management Plan is appropriate as a result.

### ***Temporary Events***

- 15 NZTE made a submission that *Rule 27.2.14(d) P1 – Temporary Events* as notified should be deleted. The rule states that if a temporary event within the TKAZ has “*direct access from a national route or regional arterial road*”, then it will be a restricted discretionary activity. TKAZ currently only has once access point, that is, via State Highway 39. The submitters oppose NZTE’s submission as this would allow for temporary events to occur within the TKAZ without need for resource consent.
- 16 The section 42A report recommends that the rule remains as notified to maintain consistency with rules for temporary events in other zones. The submitters support this recommendation.<sup>10</sup>

### ***Noise Rules***

- 17 The submitters support the recommended changes in the s 42A report on *Rule 27.2.6 Noise – Other than Taxiways* as below:

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<sup>9</sup> Section 42A Report, Section 14.3, [722] at p. 185.

<sup>10</sup> Section 42A Report, Section 19.3, [898] at p. 212.

P1	Noise generated by emergency sirens. <sup>125</sup>
P1 P2 <sup>126</sup>	<p>(a) <del>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:</del></p> <p><del>(i) 55dB (L<sub>den</sub>) 7am to 10pm every day; and</del></p> <p><del>(ii) 40dB (L<sub>den</sub>) and 70dB (L<sub>max</sub>), 10pm to 7am the following day.</del></p> <p>(a) <u>Noise measured within any site in any zone, other than the Te Kowhai Airpark Zone, must meet the permitted noise levels for that zone.</u></p> <p>(b) <u>Noise levels must be measured in accordance with the requirements of New Zealand Standard NZS 6801:2008 Acoustics - Measurement of Environmental Sound.</u></p> <p>(c) <u>Noise levels must be assessed in accordance with the requirements of New Zealand Standard NZS 6802:2008 Acoustic - Environmental noise.</u></p>
P2 <sup>127</sup>	<p>(a) <del>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:</del></p> <p><del>(i) 50dB (L<sub>den</sub>) 7am to 7pm every day; and</del></p> <p><del>(ii) 45dB (L<sub>den</sub>) 7pm to 10pm every day; and</del></p> <p><del>(iii) 40dB (L<sub>den</sub>) and 65dB (L<sub>max</sub>) all other times.</del></p>
P3 <sup>128</sup>	<p>(a) <del>In ALL PRECINCTS, Rules P1 and P2 do not apply to:</del></p> <p><del>(i) Noise from aircraft movement on the taxiways; or</del></p> <p><del>(ii) Construction noise; or</del></p> <p><del>(iii) Noise from emergency sirens.</del></p>
DI	Any activity that does not comply with Rule 27.2.6 P1, P2 <del>or P3.</del> <sup>129</sup>

- 18 The submitters support this recommendation as it provides clarity on noise restrictions in the TKAZ in relation to the Village Zone (as well as other zones).
- 19 The s 42A report recommends that *Rule 27.2.7 Noise - Taxiways* is replaced by a new *Rule 27.2.7A Noise – Aircraft Operations*. This change is recommended on the basis of a submission made by NZTE. The new Rule 27.2.7A in the section 42A report states 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.*”<sup>11</sup>
- 20 The submitters do not support this recommendation. The respective Air Noise Control Boundaries (ANCBs) referred to in the s 42A report were not notified in the PDP. In fact, the Airport Air Noise Boundary in the notified PDP as per Appendix 1 – Acoustic Insulation, Section 3 Figure 2 is the same ANCB that is included in the ODP. The submitters were initially under the impression that TKA was only going to operate on this basis.
- 21 The ANCBs in the Marshall Day Acoustics Report (**Marshall Day Report**) were not notified in the PDP, but rather were depicted in an appendix to

<sup>11</sup> Section 42A Report, Section 13.1.5, [663] at p. 173.

the submission of NZTE. The Tonkin & Taylor Acoustic Report (**T & T Report**) was only introduced in the s 42A report. As a result, the submitters consider that there has been a lack of consultation about the proposed ANCBs and the s 42A report and the s 42A rebuttal evidence does identify this as a prevalent theme with rules that are now being considered appropriate for the TKAZ.<sup>12</sup> If the Panel does decide that ANCBs of some form are appropriate, then the submitters' position is that the ANCBs in the T & T Report should be included as this has less of an adverse impact on their land and reflects the noise anticipated with a maximum of 15,000 movements per year.

### *Village Zone*

- 22 The submitters both reside at properties which are located within the Village Zone as notified in the PDP. The submitters made an original submission on *Rule 24.3.3.2 D1 Height – Buildings, structures or vegetation within an airport obstacle limitation surface*. This rule will require landowners within the Village Zone to obtain a resource consent for a discretionary activity if a building, structure or vegetation protrudes through the proposed OLS.
- 23 The proposed OLS would have direct consequences on landowners surrounding TKA. The issues surrounding the proposed OLS in the Village Zone include:
- (a) Potential requirement for trees to be trimmed or removed if they breach the proposed OLS;
  - (b) Uncertainty on where the cost burden lies for removal of obstacles which protrude into the OLS;
  - (c) A restriction on the development that can occur on the properties of affected parties given that buildings which protrude into the OLS will require a discretionary resource consent.
- 24 The submitters remain opposed to Rule *24.3.3.2 D1 Height – Buildings, structures or vegetation within an airport obstacle limitation surface*. They are also opposed to NZTE's submission that the rule should be amended so that *trees* are also restricted from protruding into the proposed OLS.

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<sup>12</sup> See for example, [84] of Rebuttal evidence – Section 42A Report.

The s 42A report recommends NZTE's submission point regarding the inclusion of trees should be accepted.<sup>13</sup>

- 25 There has been no meaningful consultation with the landowners over the potential for trees to be trimmed or removed if the proposed OLS is implemented. On this basis and the relevant case law which suggests that trees within the Village Zone have existing use rights<sup>14</sup>, the submitters seek that *Rule 24.3.3.2 D1* is deleted. The legal submissions lodged on behalf of Greig Metcalfe should be referred to for a full summary of the legal argument in respect of existing use rights for trees when an OLS is proposed.

#### *Existing Use Rights for Trees*

- 26 The legislative provision for existing use rights is contained in s 10 of the Resource Management Act 1991 (**RMA**), which states that 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 the proposed plan was notified; and
- (b) the effects of the use are the same or similar in character, intensity and scale.

- 27 For the purposes of these legal submissions, the case law for existing use rights for trees in relation to OLSs' is summarised as follows:

- (a) The Environment Court has held that trees have existing use rights in relation to existing lawful intrusions into a proposed OLS;<sup>15</sup> and
- (b) Any further growth of trees above an OLS does constitute a change in intensity, character and scale making that growth exempt from existing use rights.<sup>16</sup>

- 28 We agree with the analysis in the Tompkins Wake legal opinion<sup>17</sup> that the relevant date for establishing existing use rights under section 10 of the RMA will be the date decisions on the OLS rules are publicly notified. Any

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<sup>13</sup> Section 42 A Report, Section 10.3, [391] at p. 113.

<sup>14</sup> *Rotorua Regional Airport Limited v Fischer EnvC A113/09*.

<sup>15</sup> At [102].

<sup>16</sup> At [66], [74] and [75].

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



trees which protrude into the OLS at the time decisions are notified will be protected by existing use rights because they will have been lawfully established at that date and there were no controls on their height previously.

- 29 As the trees will continue to grow beyond this date, the increased growth could be considered a change in character, intensity or scale and we agree with the Tompkins Wake opinion that this will depend on the particular facts of each case<sup>18</sup> as there is limited case law in relation to the circumstances surrounding TKA.
- 30 As a result, if the OLS in the PDP is adopted, the continued growth of trees could constitute a breach of existing use rights and those trees may be required to be trimmed at their height as of when a decision in favour of the PDP OLS is notified.
- 31 The case that the above legal principles are derived from concerned the impact on property rights in the context of a Notice of Requirement (**NOR**) where compensation was payable pursuant to the Public Works Act 1981 (**PWA**). In this case, TKA is a private airfield where there is no legal mechanism to compel NZTE to compensate adjoining landowners for the potential trimming/felling of their trees on private land.
- 32 The WDC rebuttal evidence recognises that there is uncertainty around the issue of existing use rights and that if trees did need to be trimmed or felled then the cost would lie with the landowners. We would suggest that this would be an unfair and unequitable outcome.
- 33 On the basis of the reasons above and in line with the recommendation that the ODP OLS should be retained, the submitters seek deletion of Rule 24.3.3.2 D1 or any consequential relief.

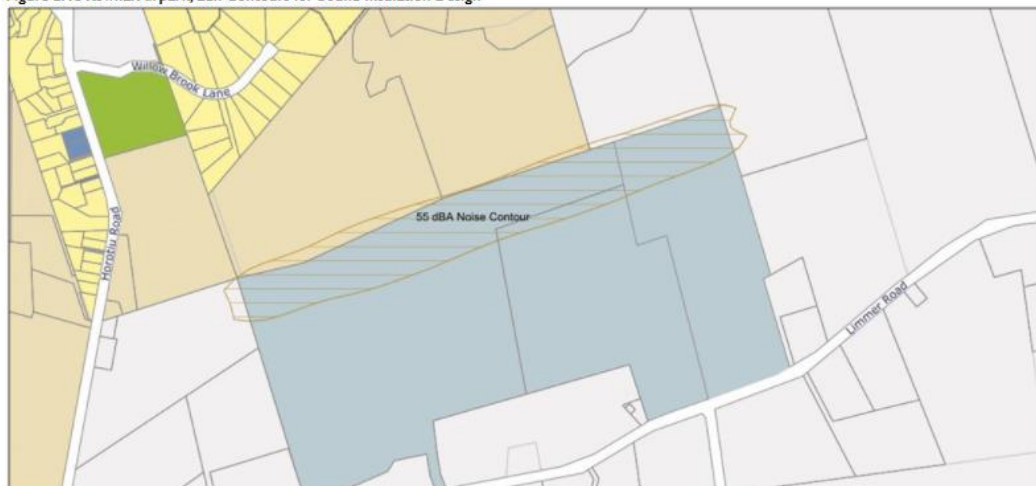
#### *Airport Noise Control Boundaries*

- 34 The PDP as notified contains rules relating to noise at TKA including acoustic insulation requirements within the Rural Zone and Village Zone which apply to dwellings in the mapped Airport Noise Outer Control Boundary as notified at Appendix 1 – Acoustic Insulation, Section 3 Figure 2 as below:

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<sup>18</sup> At [9].

Figure 2: Te Kowhai Airpark, Ldn Contours for Sound Insulation Design

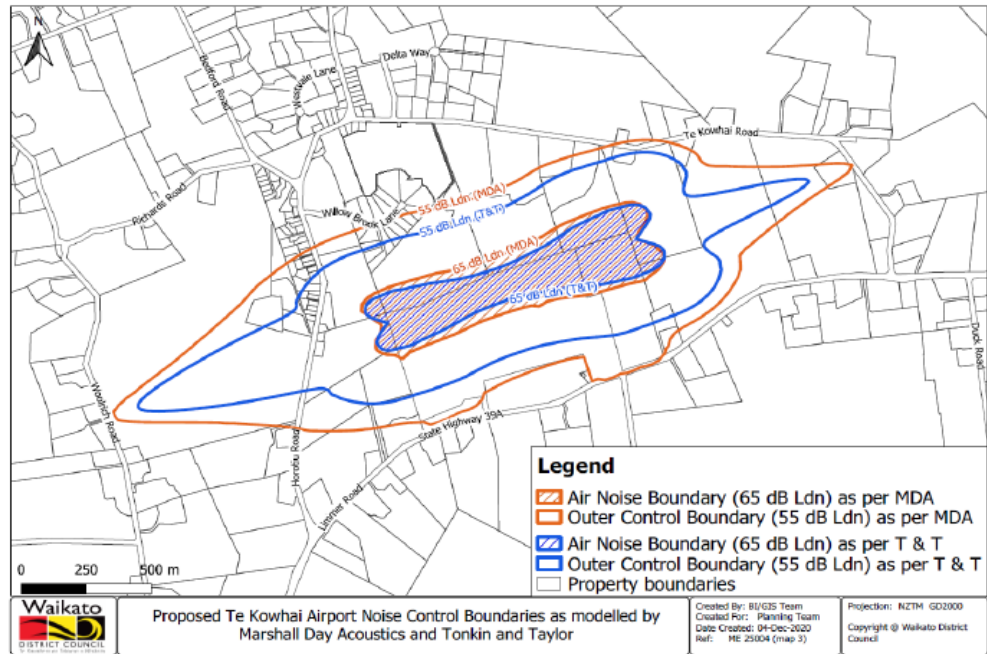


- 35 As referenced earlier in these submissions, NZTE made a submission to amend the Planning Maps to show the proposed Air Noise Control Boundaries (**ANCB**) in Figure 3 of the Marshall Day Report. Areas of the respective properties owned by the Steads and Mr Davis are located within the (inner) Air Noise Boundary (**ANB**) in Figure 3 of the Marshall Day Report.
- 36 The s 42A report states that ANCBs are appropriate for TKA in some form.<sup>19</sup> The s 42A report relies on the T & T Report which shows an ANB which is only fractionally smaller than that in the Marshall Day Report.<sup>20</sup> The ANB in the T & T Report still affects the properties of the Steads and Mr Davis. The ANCBs in the Marshall Day Report and the T & T Report are depicted below:<sup>21</sup>

<sup>19</sup> Section 42A Report, Section 11.4, [466] at p. 127.

<sup>20</sup> Section 42 A Report, Section 11.7, [510] – [528], at p. 135 – p.140.

<sup>21</sup> Section 42 A Report, Section 11.7, Image 14: Te Kowhai Airpark Airport Noise Control Boundaries (as modelled by Marshall Day Acoustics and Tonkin and Taylor), at p. 138.



37 The s 42A report recommends that the ANB in the T & T Report should be implemented into the PDP, rather than the ANB in the Marshall Day Report.<sup>22</sup> The submitters do not support this recommendation, largely in part because of the implications of being located within the ANB and the corresponding rules proposed in the s 42A report which relate to the ANB which will severely affect the submitters’ ability to develop on their land.

38 The s 42A report recommends that noise-sensitive activities which are to be located within the Village Zone and are located within the T & T ANB should be a non-complying activity.<sup>23</sup>

**Rule 24.1.3 Non-Complying Activities**

<b>NCI</b>	<b>Noise-sensitive activities to be located within the Te Kowhai aerodrome Airport Air Noise Boundary.<sup>74</sup></b>
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39 This rule will make it very difficult for the submitters to establish a residential activity within the ANB and is likely to have a significant negative effect on the value of their respective properties due to reduced opportunities for development. As a result, the submitters are opposed to this rule.

40 There also seems to be a tension in the s 42A report between the recommended changes to Rule 24.1.3 and the recommendation in

<sup>22</sup> Section 42 A Report, Section 11.7, [523], at p. 139 – 140.

<sup>23</sup> Section 42 A Report, Section 11.9, at p. 142.

respect of Rule 24.3.7<sup>24</sup>. The s 42A report recommends the following changes to Rule 24.3.7:

Village Zone

Rule 24.3.7 Building – Airport Noise Outer Control Boundary Noise-Sensitive Activities<sup>93</sup>

P1	<p>(a) Construction of, or addition, or alteration to, a building containing a noise-sensitive activity must <del>comply</del> <u>be insulated in compliance</u> with Appendix I (Acoustic Insulation) within:</p> <p style="padding-left: 40px;">(i) <del>The Airport Noise Outer Control Boundary</del> <u>An airport noise boundary or outer control boundary<sup>94</sup>;</u>  <del>must achieve the internal design sound levels specified in Appendix I – Acoustic Insulation, Section 3 Table 6</del> <u>comply with Appendix I – Acoustic Insulation, Section 3.</u></p>
RDI	<p>(a) Construction <del>of, or</del> addition, <del>to</del> or alteration to, a <u>dwelling building<sup>95</sup></u> that does not comply with a condition in Rule 24.3.7 P1.</p> <p>(b) Council's discretion is restricted to the following matters:</p> <p style="padding-left: 40px;">(i) On-site amenity values;</p> <p style="padding-left: 40px;">(ii) Noise levels received at the notional boundary of the <u>building dwelling<sup>96</sup></u>;</p> <p style="padding-left: 40px;">(iii) Timing and duration of noise received at the notional boundary of the <u>dwelling building; and<sup>97</sup></u></p> <p style="padding-left: 40px;">(iv) Potential for reverse sensitivity effects.</p>

- 41 This rule would allow for construction of a building containing a noise-sensitive activity as a permitted activity, inside either the ANB or the Outer Noise Control Boundary (**OCB**) if the required acoustic insulation is installed in that building. There would need to be compliance with Appendix 1 - Acoustic Insulation.
- 42 It would seem a bit odd to include a rule in the PDP to allow for a noise-sensitive activity as a permitted activity within the Village Zone if it falls within the ANCBs (Rule 24.4.3.7) and then also include a rule which automatically makes a noise sensitive activity a non-complying activity if it falls within the ANCBs (Rule 24.1.3 NC1). You could have a situation where it was permitted to build a dwelling in this area but occupation of that dwelling as a residence would be a non-complying activity.
- 43 With respect, we suggest that this might be an oversight in the s 42A report. The submitters oppose the recommendation in the S42A report to include a new Rule 24.1.3 NC1. The submitters support Rule 24.3.7 P1 as notified to the extent that a building containing a noise-sensitive activity which is constructed in the Village Zone must comply with Appendix 1 – Acoustic Insulation, Section 3 Table 6.

<sup>24</sup> Section 42 A Report, Section 12.5, at p. 161.

- 44 We also note the evidence of Ms Smith for NZTE<sup>25</sup> where she contemplates that residential activity within the ANB could be acceptable within the NZTE site because of the proposed construction and expectations of landowners. In our submission exactly the same criteria could apply to dwellings on other land adjoining TKA and those expectations could be articulated by way of consent notices at the time of subdivision. We note further that there are examples of residential activity adjoining small air fields within the Waikato Region already (for example Pauanui) and it would seem that noise adverse effects can be anticipated and provided for.
- 45 The submitters also do not see why NZTE could not move the airstrip at TKA southwards so that the ANB does not cover their property. This seems like a pragmatic solution which would allow for NZTE to progress with development of the Airfield without unfairly imposing restrictions on what surrounding landowners can do with their land.

### Conclusion

- 46 In conclusion the submitters seek, 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) *Appendix 1 – Acoustic Insulation, Section 3* – Retention of these rules as notified, including Figure 2;
  - (c) *Rule 24.1.3 NC 1* – the non-inclusion of this proposed rule<sup>26</sup>;
  - (d) *Rule 24.3.3.2 D1* – deletion of this rule on the basis that the OLS in the ODP should be retained;
  - (e) *Rule 24.3.7* – the retention of this rule as notified;
  - (f) *Rule 27.1.1* – for “flight training school” and “circuit training” to be Non-complying activities in all precincts of the TKAZ;
  - (g) *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

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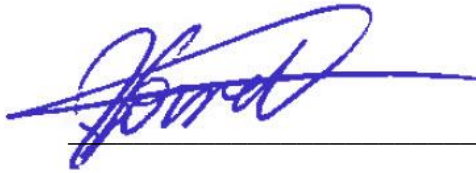
<sup>25</sup> Smith, Evidence- In-Chief (NZTE – Acoustics), [101] at p 33.

<sup>26</sup> As per the Section 42 A report, Section 11.9. at p. 142.

purpose) and a reference to an Airpark Management Plan to ensure appropriate mitigation of adverse effects from TKA);

- (h) *Rule 27.2.6 Noise other than taxiways* – the inclusion of the amended Rule 27.2.6 as recommended in the s 42A report.
- (i) *Rule 27.2.7 Noise – Taxiways* – retention of this rule as notified in the PDP;
- (j) *Rule 27.2.14 Temporary Events P1 (d)* – Retention of this rule as notified in the PDP;
- (k) Any additional or consequential changes required to give effect to the relief sought in this appeal.

Dated: 3 March 2021



J B Forret

Counsel for Marshall/Kristine Stead and Lloyd Davis

Appendix A – Location of submitters' properties in relation to proposed Obstacle Limitation Surface

