

## APPENDIX 1

## Our advice

**Prepared for** Kāpiti Coast District Council  
**Prepared by** Matt Conway and Hamish Harwood  
**Date** 15 February 2017

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### Consultation requirements for private plan change requests

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**Background**

A Hearing Panel appointed by the Council is currently holding a hearing on Kapiti Coast Airport Holdings Limited's (**KCAHL**) private plan change request.

The Ngahina Trust has put forward the view that KCAHL had an obligation to consult with it under Schedule 1 of the Resource Management Act 1991 and it did not do so.

KCAHL's position, in reliance on the Environment Court's decision in *Briggs v Kapiti Coast District Council* [2011] NZEnvC 57, is that there is no obligation on the proponent of a private plan change to consult under clause 3 of Schedule 1, and in any event, that the Ngahina Trust is not the relevant iwi authority.

You have asked us for legal advice on three questions arising from this matter.

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**Questions and answers**

- 1. Is the law in relation to consultation with tangata whenua by a private plan change requestor correctly stated in *Briggs v Kapiti Coast District Council*?**

*Briggs* is the leading authority in relation to the question in issue and, in our opinion, it is appropriate for the Council to rely on the interpretation expressed in it in the present circumstances.

- 2. If the law is not correctly stated in *Briggs*, as contended by counsel for the Ngahina Trust, what (if any) implications are there for:**
  - (a) the hearing continuing to hear submissions and evidence; and/or**
  - (b) the Panel's recommendation on PC84 to Council in due course – refer for example to *Waikato Tainui Te Kauhanganui v Hamilton City Council* at [90] "the obligation to consult with the relevant iwi authority is mandatory and unconditional"?**

In light of our answer to question 1, in our view the Hearing Panel is entitled to continue to hear submissions and evidence and make its recommendation on PC84 to the Council.

- 3. Is the law in relation to the obligation to consult with tangata**
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**whenua different in relation to a plan change initiated by the local authority as opposed to a plan change request initiated by a private party?**

Yes. The Environment Court in *Briggs* held that clauses 21 to 29 of Schedule 1 of the RMA do not impose any consultation obligation on promoters of private plan changes. Therefore, unlike local authorities, promoters of private plan changes are not required to consult with iwi authorities when preparing private plan change requests.

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## Our reasons

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1. The presence of competing arguments about consultation requirements in the present hearing reflects a degree of ambiguity in Schedule 1 about whether clause 3 of Schedule 1 applies to private plan change requests.
  2. It is the courts' role to clarify what the law is in situations of ambiguity that are brought before them, and the *Briggs* decision directly addresses the subject of the present ambiguity. The Court reviewed the consultation requirements for private plan changes in clauses 21 to 29 of Schedule 1 and squarely addressed the issue being raised by the Ngahina Trust.
  3. The Court stated its findings in a manner that suggests they are of broad application rather than being limited to the facts of that case. In particular, the Court made the following unequivocal statements:
    - [10] The consultation principles apply to local authorities when preparing a plan change. These principles, which are to be applied in a manner determined to be appropriate by the local authority at its discretion, do not apply to private plan changes which are processed in accordance with Clauses 21-29 of Schedule 1.
    - [11] Clauses 21-29 do not impose any consultation obligation on promoters of private plan changes nor do they impose a consultation obligation on local authorities processing such plan changes. Although Clause 29(1) provides that Part 1 of Schedule 1 (which includes Clause 3) applies to private plan changes, that Part in fact does not apply until the private plan change has been accepted under Clause 25(2)(b), at which time it is ready to proceed to notification.
  4. Aside from the *Briggs* decision, we have not identified any case law addressing the question of whether consultation requirements arise in the context of a private plan change request. Therefore, the Environment Court's decision appears to be the only authority on this issue, and in our opinion it is appropriate for the Council to rely on the interpretation it adopts in the present situation.
  5. We have considered the matters raised in the 13 February 2017 legal submissions of counsel for the Ngahina Trust, and we are not
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persuaded that the arguments presented provide sufficient reasons to disregard the Court's findings in *Briggs* and instead adopt the interpretation preferred by the Trust.

6. It is correct that the question before the Court in *Briggs* was whether the Council, rather than the requestor, was obliged to consult on a private plan change request. Therefore, arguably, the Court's comments in relation to consultation requirements for plan change requestors are *obiter*. *Obiter dictum* is an opinion expressed by a Court that is not essential to the decision and therefore is not legally binding, but is still persuasive.
7. We say that these comments are "arguably" *obiter* because in our view it is possible to argue that the Court was required to reach conclusions about consultation on private plan changes generally in the case because the two issues are interrelated. However, even if the Court's comments were *obiter*, they remain persuasive as to whether there is a requirement for consultation on private plan change requests.
8. Ngahina Trust's legal submissions seek to cast doubt on the quality of argument before the Court in *Briggs* and say that because of this lack of "any reasoned argument" the decision carries little weight as a precedent.<sup>1</sup> In our view, the brevity of the *Briggs* decision and the absence of any discussion of the nature and quality of legal argument heard by the Court does not remove the decision's precedent value. The decision remains a clear conclusion expressed by an Environment Judge about the interpretation of the provisions in issue.
9. Ngahina Trust's legal submissions also refer (at paragraph 8) to *Waikato Tainui Te Kauhanganui v Hamilton City Council* [2010] NZRMA 285 in support of the proposition that there is an absolute duty to consult tangata whenua who may be affected. It is important to note that this decision was in the context of a Council-initiated variation, to which the clause 3 consultation requirement applies, rather than a private plan change request.

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**Please contact us  
if you have any  
questions or if we  
can be of further  
assistance**

**Matt Conway / Hamish Harwood**  
Partner / Senior Solicitor

+64 4 924 3536 / +64 4 924 3508

+64 21 455 422

matt.conway@simpsongrierson.com / hamish.harwood@simpsongrierson.com

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<sup>1</sup> At paragraphs 20.5 and 21.

## APPENDIX 2

# Recommended Changes to ODP (Tracked Changes)

The text shown in black ~~strike-through~~ and underlined are the amendments outlined in notified Private Plan Change 84 (i.e. the amendments sought by Kapiti Airport Holdings Limited).

The text shown in ~~red strike-through~~ and underlined are the further amendments recommended by the Hearing Panel.

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## PART C – OBJECTIVES AND POLICIES

### OBJECTIVE 1.0

#### POLICY 2: USES

A complementary range of activities in the "Airport Mixed Use Precinct" will be permitted to support aviation activities and provide for non-aviation, commercial and other employment opportunities, ~~with residential, retail and commercial activities that have the potential to undermine the sustainability of the Paraparaumu Town Centre, or to generate adverse effects, requiring a resource consent.~~

Explanation: The "Airport Mixed Use Precinct" permits aviation activity to grow beyond the "Airport Core Precinct". Non-aviation b

\business and commercial activity and development is permitted to support the sustainability of the Airport Core Precinct activities. Certain specified activities are classified as non-complying (i.e.g. residential activity in some areas, offensive trades, certain retail/commercial activities etc), discretionary (i.e.g. work associated with heritage buildings) or controlled activities (i.e.g. the external design, appearance and siting of buildings and associated development) to enable to the Council to avoid, remedy or mitigate manage potential adverse effects as appropriate, particularly those that would degrade the vitality and vibrancy of the Paraparaumu Town Centre or the functioning and levels of service on the local road network. Supermarkets, Department Stores and more than one small scale retail grocery outlet are prohibited activities. ~~More than one Supermarket in the zone is a non-complying activity, and more than one department store is a prohibited activity.~~

### OBJECTIVE 2

#### POLICY 2A: COMMERCIAL ACTIVITY

In order to avoid significant adverse effects and protect the role, function, vitality and viability of the Paraparaumu Town Centre through the remedy and mitigation of other adverse effects, resource consent is required for the following activities:

- department stores;
- supermarkets; and

- stores of between 151m<sup>2</sup> and 1,500m<sup>2</sup> gross floor area that retail groceries or non-specified food lines.

## **POLICY 5: TRAFFIC EFFECTS**

Development within the Airport Zone shall ensure that: ~~any traffic effects are avoided, remedied and mitigated through restrictions on the timing of development~~

- (a) any traffic effects are avoided, remedied or mitigated through restrictions on the timing of development; and
- (b) in the case of department stores, supermarkets, and stores between 151m<sup>2</sup> and 1,500m<sup>2</sup> gross floor area that retail groceries or non-specified food lines, development is further restricted to ensure that:
  - (i) significant adverse effects on the safety and efficiency of the strategic transport network are avoided; and
  - (ii) the safety and efficiency of the strategic transport network is protected through the remedy or mitigation of other adverse effects.

Explanation: Development within the Zone will need to comply with the site access and the roading standards of the Plan. Such development will generate traffic on the external road network and contribute to the need for improvements. To ensure that development within the Zone does not outstrip the capacity of the road network, certain “floorspace thresholds” controls have been set. These controls specify certain roading improvements to be undertaken in parallel with increasing areas of gross floor area. The proposed rules allow some control flexibility, provided that a traffic assessment of the effects on the local road network and broader State Highway network within the District is undertaken. In recognition of the primary purpose of the Zone, i.e. aviation related activities, the threshold controls do not apply to activities within the Airport Core Precinct. This is because the threshold controls applying to the Airport Mixed Use Precinct assume that the Airport Core Precinct will be fully developed almost immediately upon these rules coming into effect.

If the situation should arise where approved development in the Airport Mixed Use Precinct proceeds in advance of the completion of the Western Link Road (WLR), any potential adverse traffic effects will be addressed by traffic management measures (egg traffic signal timings) implemented by the roading authority to ensure that any effects are not necessarily imposed upon existing road users along Kapiti Road and the wider road network.

In relation to Policy 5(b)(ii) the strategic transport network includes:

- Kapiti Road;
- Roads that connect to Kapiti Road (including unconstructed but designated routes);
- the Mackays to Peka Peka expressway, including its interchanges; and
- State Highway 1 (or the route that follows the State Highway 1 alignment if it is revoked to become a local road).

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## PART D – RULES AND STANDARDS

### D.9.1 Airport Zone Rules

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#### D.9.1.4 Discretionary Activities

The following are discretionary activities:

- (i) The alteration or modification, which is not a minor work as defined in Part Q of this Plan, and the demolition or removal of any heritage feature or building recorded in the Heritage Register. In relation to historic buildings, "modification" includes any subdivision of land containing the historic building and its curtilage.
- (ii) Activities within the "Aviation Heritage Precinct" not provided for as permitted activities and not defined as non-complying or prohibited.
- (iii) The alteration or modification which is not a minor work as defined in Part Q of this Plan and the demolition or removal of the control tower, as a historic building. In relation to historic buildings, "modification" includes any subdivision of land containing the historic building and its curtilage (except where specified in this Plan to be a non-complying activity or prohibited activity).
- (iv) Activities which do not comply with any restricted discretionary activity standards are discretionary activities.
- ~~(v) Noise sensitive activities outside the Air Noise Boundary not specifically provided for as a permitted activity.~~
- ~~(vi) One only supermarket within the zone.~~
- ~~(vii) More than one store of between 151m<sup>2</sup> and 1,500m<sup>2</sup> GFA that retails groceries or non-specified food lines.~~
- ~~(v) Noise sensitive activities between the Outer Noise Boundary and the Airport Noise Effects Advisory Overlay not specifically provided for as a permitted activity.~~

#### D.9.1.5 Non-Complying Activities

The following are non-complying activities:

- (i) Offensive trades.
- (ii) The keeping of free flight birds.



- (iii) Retail and commercial service activities, not being a prohibited activity, that are not listed as permitted activities in rule D.9.1.1 or do not comply with the permitted activity retail/commercial activity floorspace threshold standards in D.9.2.1.
- (iv) Aircraft operations occurring between 10.30pm and 6am that are not exempt by the "Noise from Aircraft Operations" permitted activity noise standard.
- (v) Any other activity not being a permitted, controlled, discretionary (restricted), discretionary or prohibited activity.
- (vi) Any development in the Airport Zone, not being a prohibited activity, which results in the development in the Airport Zone exceeding 339,400m<sup>2</sup> GFA.
- (vii) Any above ground development, within the area defined on the Precinct Plan as Runway 12/30, which is inconsistent with the use of that area for imperative landings and other limited uses.
- ~~(viii) One only Department Store within the zone.~~
- ~~(ix) Supermarkets other than as provided for in rule D.9.1.4.~~
- ~~(x) More than one store of between 151m<sup>2</sup> and 1,500m<sup>2</sup> GFA that retails groceries or non-specified food lines.~~
- ~~(xi) Noise sensitive activities outside the Air Noise Boundary but inside the Outer Noise Boundary not specifically provided for as a permitted activity.~~

#### **D.9.1.6 Prohibited Activities**

The following are prohibited activities:

- ~~(i) Noise sensitive activities within the Airport Noise Boundary not specifically provided for as a permitted activity.~~
- ~~(ii) Department Stores other than as provided for in rule D.9.1.5.~~
- ~~(iii) Supermarkets.~~
- ~~(iv) More than one store of between 151m<sup>2</sup> and 1,500m<sup>2</sup> gross floor area that retails groceries or non-specified food lines.~~

#### **PART Q: DEFINITIONS**

***Supermarket*** means an activity of more than 1,500m<sup>2</sup> gross floor area within a single building mainly engaged in retailing groceries or non-specific food lines, whether or not the selling is organised on a self-service basis, except that in the Airport Zone the minimum gross floor area shall be 1000m<sup>2</sup>.

## **APPENDIX 3**

Sub No.	Submitter	Topic	Decision Sought	Panel's Recommendation	Panel's Reasons/Comments	Recommended Amendments to PPC84
PPC84-1	Coastlands Shoppingtown Ltd (Coastlands)	Entire Plan Change	Decline PPC 84 in its entirety	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
	Further Submitters: Nghina Developments Ltd (FS 2) Alpha Corporation Ltd (FS 3) Sheffield Properties Ltd (FS 4) Richard Mansell (FS 5)		Support [in part] Support Support [in part] Support	Accept in part Accept in part Accept in part Accept in part		
PPC84-2	Nghina Developments Ltd	Entire Plan Change	Decline PPC 84 in its entirety	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
	Further Submitters Coastlands Shoppingtown Ltd (FS 1) Alpha Corporation Ltd (FS 3) Sheffield Properties Ltd (FS 4) Richard Mansell (FS 5)		Support [in part] Support Support [in part] Support	Accept in part Accept in part Accept in part Accept in part		
PPC84-3	Alpha Corporation Ltd	Entire Plan Change	Decline PPC 84 in its entirety	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
	Further Submitters Coastlands Shoppingtown Ltd (FS 1)		Support [in part] Support	Accept in part		

Sub No.	Submitter	Topic	Decision Sought	Panel's Recommendation	Panel's Reasons/Comments	Recommended Amendments to PPC84
	Ngahina Developments Ltd (FS 2) Sheffield Properties Ltd (FS 4) Richard Mansell (FS 5)		Support [in part] Support [in part] Support	Accept in part Accept in part Accept in part		Changes to policy framework as outlined in Appendix 2.
PPC84-4	Sheffield Properties Ltd	Entire Plan Change	Decline PPC 84 in its entirety	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
	Further Submitters Coastlands Shoppingtown Ltd (FS 1) Ngahina Developments Ltd (FS 2) Alpha Corporation Ltd (FS 3) Richard Mansell (FS 5)		Support [in part] Support [in part] Support Support	Accept in part Accept in part Accept in part Accept in part		Changes to policy framework as outlined in Appendix 2.
PPC84-5	Richard Paul Mansell	Entire Plan Change	Decline PPC 84 in its entirety	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
	Further Submitters Coastlands Shoppingtown Ltd (FS 1) Ngahina Developments Ltd (FS 2) Sheffield Properties Ltd (FS 4) Alpha Corporation Ltd (FS 3)		Support [in part] Support [in part] Support [in part] Support	Accept in part Accept in part Accept in part Accept in part		Changes to policy framework as outlined in Appendix 2.
PPC84-6	Ngahina Trust	Entire Plan Change	Decline PPC 84 in its entirety		As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
	Further Submitters Coastlands Shoppingtown Ltd (FS 1) Ngahina Developments Ltd (FS 2)		Support [in part] Support [in part]	Accept in part Accept in part		Changes to policy framework as outlined in Appendix 2.

Sub No.	Submitter	Topic	Decision Sought	Panel's Recommendation	Panel's Reasons/Comments	Recommended Amendments to PPC84
	Alpha Corporation Ltd (FS 3) Sheffield Properties Ltd (FS 4) Richard Mansell (FS 5)		Support Support [in part] Support	Accept in part Accept in part Accept in part		Appendix 2.
PPC84-7	<b>NZ Transport Agency</b>	Entire Plan Change	<b>Decline</b> PPC 84 in its entirety unless consequential changes to the ODP made in regard to the requirements for information on transport modelling information that should be required to be submitted with any resource consent applications that would be enabled by the Plan Change.	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2  Changes to policy framework as outlined in Appendix 2.
	<i>Further Submitters</i> Coastlands Shoppingtown Ltd (FS 1) Ngahina Developments Ltd (FS 2) Alpha Corporation Ltd (FS 3) Sheffield Properties Ltd (FS 4) Richard Mansell (FS 5)		Support [for declining PPC84] Support [for declining PPC84] Support [for declining PPC84] Support [for declining PPC84] Support [for declining PPC84]	Accept in part Accept in part Accept in part Accept in part Accept in part		