

**Mayor and Councillors
COUNCIL**

19 OCTOBER 2017

Meeting Status: **Public**

Purpose of Report: For Decision

**COUNCIL DECISION ON PRIVATE PLAN CHANGE 84 TO THE
OPERATIVE KAPITI COAST DISTRICT PLAN**

PURPOSE OF REPORT

- 1 This report seeks that the Council adopt the report and recommendations of the Independent Hearing Panel (the Panel) on Private Plan Change 84 to the Operative District Plan by Kāpiti Coast Airport Holdings Ltd.

DELEGATION

- 2 Only Council has the authority to consider this matter.

BACKGROUND

- 3 The hearing on Private Plan Change 84 (PPC84) commenced on 13 February 2017 with additional hearing days on 15 February 2017 and 20 March 2017. The Panel has now prepared a recommendation report to Council which is attached to this report as Attachment 1.
- 4 The Panel Chair, Alistair Aburn, will attend the Council meeting on 19 October 2017 and will be available to answer questions with regard to the Hearing Panel Report and Recommendations.
- 5 PPC84 was requested by Kāpiti Coast Airport Holdings Limited (KCAHL) on 23 July 2015 and was accepted by Council to proceed to a notification on 24 February 2016.
- 6 The purpose of the Private Plan Change Request is:

*to remove prohibited activity status from certain activities so as to enable KCAHL to undertake master planning of the land currently owned in the Airport Zone, and so that resource consents can ultimately be sought in the future.*¹

- 5 The Plan Change Request explained that:

At present, there are four prohibited activities within the Airport Zone. These are:

- (a) noise sensitive activities not specifically provided for as a permitted activity (whether or not within the Air Noise Boundary, Outer Control Boundary, or outside any of the noise contours);*

¹ Private Plan Change Request to Kapiti Coast District Plan - Airport Zone: Prohibited Activities, para 2.6, p3.

(b) department stores;

(c) supermarkets; and

(d) more than one store of between 151m² and 1,500m² gross floor area that retails groceries or non-specified food lines.

- 6 The details of the requested amendments to the District Plan proposed by PPC84 (as described in the public notice) are:

The plan change seeks to remove prohibited activity status of some specified land use activities so that resource consent can be sought. The plan change would enable resource consent to be sought for:

- *noise sensitive activities (e.g. residential activities) in the Airport Zone but outside of the Air Noise Boundary as a discretionary activity; and*
- *the following retail activities:*
 - *one department store as a non-complying activity;*
 - *one supermarket as a discretionary activity, and more than one supermarket as a non-complying activity; and*
 - *More than one retail store between 150m² and 1,500m² in floor area that retails groceries or non-specified food items as a discretionary activity.²*

- 7 Seven submissions were received to PPC84 from the following parties:

- Coastlands Shoppingtown Ltd;
- Ngahina Developments Ltd;
- Alpha Corporation Ltd;
- Sheffield Properties Ltd;
- Richard Mansell;
- Ngahina Trust; and
- New Zealand Transport Agency (NZTA).

- 8 Following the close of submissions KCAHL applied to the Environment Court under Section 311 of the Resource Management Act 1991 (RMA) for declarations regarding the status of each of the submitters under the trade competition provisions of the RMA. The Environment Court decision found that Coastlands Shoppingtown Ltd, Sheffield Properties Ltd and Ngahina Development Ltd were trade competitors of KCAHL. However it declined to go so far as to state their submissions sought to gain an advantage in trade competition terms. Instead the Court left that to Council to consider.

- 9 The Council received five further submissions, all from original submitters:

- Coastland Shoppingtown Ltd;
- Ngahina Developments Ltd;

² Public Notice, Plan Change 84 to the Operative District Plan - Airport Zone, 24 February 2016.

- Alpha Corporation Ltd;
 - Sheffield Properties Ltd; and
 - Richard Mansell
- 10 Kāpiti Coast Airport (formerly known as Paraparaumu Airport) is located between the Paraparaumu Town Centre and Paraparaumu Beach, bordering with Kāpiti Road to the east.
 - 11 The Airport is largely surrounded by residential activities, although the Kāpiti Road/Te Roto Drive vicinity located to the east contains a range of retail, commercial, and industrial activities.
 - 12 The area of land within PPC84 is zoned Airport in the Operative District Plan, as shown on the Planning Map included as Attachment 2.
 - 13 The Airport is divided into several precincts which are shown in the Operative District Plan Planning Map included as Attachment 3.
 - a) "Airport Core Precinct" (light blue notation) containing the runways and aviation activities;
 - b) "Airport Mixed Use Precinct" (beige notation) containing aviation and 'non-aviation' activities, including commercial use and development;
 - c) "Airport Buffer Precinct" (green notation) which is provided between the surrounding residential, aviation and businesses activities; and
 - d) "Aviation Heritage Precinct" (black cross-hatched notation) to protect the historic control tower and museum.
 - 14 The airport and its vicinity are also subject to a number of other Operative District Plan controls, particularly acoustic standards and building requirements, which are also shown in Attachment 3. In particular, the red dashed line is the [Inner] Air Noise Boundary (ANB), the orange dashed line is the Outer Control [Noise] Boundary (OCB), and the green dashed line is the Airport Noise Notification boundary.
 - 15 The recommendations of the Panel are attached to this report (refer Attachment 1) which also includes the recommended changes to the Operative District Plan.
 - 16 If the Council agrees to adopt the Recommendation on PPC84 to the Operative Kapiti Coast District Plan the recommendation will be issued as "Council's decision" on PPC84 and all submitters and further submitters will be notified of the Council's decision. The availability of Council's decision will also be publicly notified in line with the requirements of the Resource Management Act 1991. An appeal period of 30 working days will begin from the date of the public notification of decisions for any person/s that made either a submission or a further submission.
 - 17 Council will be aware that the Independent Hearings Panel's recommendation reports on the Proposed District Plan will be presented to Council in November 2017 and while the decision on PPC84 is a separate issue from the Proposed District Plan it is anticipated that if any appeals are received in relation to the Council decision on PPC84 the timeframe of mediating these appeals are

likely to be aligned with the timeframe for progressing and resolving any similar appeals to Council's decision on the Proposed District Plan. Given that PPC84 relates to the Operative District Plan and is a separate issue from the Proposed District Plan it is necessary to present this as a separate matter for consideration and decision of the Council.

- 18 It is also important to note that the recommendations of the Panel are presented to the Council after careful consideration of the submissions and further submissions and hearing extensive evidence from experts and a range of legal submissions. If Council is of a mind not to accept and aspect of the report or a recommendation of the Panel, the Council would need to consider the submissions and rehear the evidence on the matter itself. This would be a lengthy process which would result in additional costs to the applicant. Alternatively, the Council could seek clarification or refer particular factual matters back to the Panel for reconsideration. That would also take time and come at an additional cost to the applicant.

ISSUES AND OPTIONS

Issues

- 19 In accordance with Section 34 and Section 34A of the RMA the Independent Hearing Panel has been delegated authority from the Council to consider all submissions received on PPC84, to consider PPC84 against sections 32 and 32AA and to report to Council recommending whether the PPC84 provisions should be declined, approved or approved with amendments and the reasons why.
- 20 In accordance with Clause 29(4) of Schedule 1 of the RMA, it is Council's role to make a decision to decline the plan change or approve it or approve it with modifications, after having particular regard to the Panel's evaluation, Council must also notify its decisions on PPC84 and serve a copy of the decision on Kāpiti Coast Airport Holdings Limited and submitters to PPC84.
- 21 In summary the key recommendations of the Hearing Panel are as follows:
- *The Hearing Panel focused on the "matters" raised by the submitters on a "point by point" basis and organised their recommendations in relation to the following issues:*
 - Issue 1: Trade Competition*
 - Issue 2: Tangata Whenua Consultation*
 - Issue 3: Prohibited Activity Status*
 - Issue 4: Definition of Supermarket*
 - Issue 5: Economic and Retail Effects*
 - Issue 6: Traffic Effects*
 - Issue 7: Urban Amenity Effects*
 - Issue 8: Noise Sensitive Activities*
 - Issue 9: Positive Effects*
 - Issue 10: Plan Objectives and Policies*
- 22 I have set out below brief summaries from the Panel's recommendation report in relation to: Tangata Whenua Consultation, Prohibited Activity Status, Economic and Retail Activities, Traffic Effects, Urban Amenity Effects, Noise Sensitive Activities and Plan Objectives and Policies:

Tangata Whenua Consultation

- *Our discussion centres on two points or questions:*

(a) is the Ngahina Trust an iwi authority; and

(b) was there an obligation to consult with the Ngahina Trust?

- *With no disrespect to the Ngahina Trust, we find that the answer to both questions is “no”. Consequently, we disagree with Mr Holder’s main conclusion, namely that the Plan Change Request should not have been notified because of a failure to consult with the Ngahina Trust.*
- *We acknowledge Mrs Taylor’s point that the Ngahina Trust has “an important interest in sustaining and promoting the good of the Paraparaumu Town and Civic Centres”, and we would add, just as the Trust’s joint venture partner the Alpha Corporation has.*
- *However, this “important interest” does not lead to a statutory obligation for consultation with the Ngahina Trust prior to notification, for the reasons we summarised in Section 2 above.*
- *Clearly the Ngahina Trust was able to participate in the submission and hearing process. Furthermore, as Mrs Taylor said in answer to one of our questions, if the Trust had been consulted prior to notification the response would have been to refer the Plan Change Request to their experts.*
- *Before leaving the issue, we wish to make two further points:*
 - (a) the land which the Ngahina Trust has a direct interest in is not within the Airport Zone itself; and*
 - (b) as Mr Schofield confirmed in his closing reply, Policy 5 under Objective 2 of the Airport Zone remains unchanged.³*
- *Accordingly, we find that while the Ngahina Trust was fully entitled as a submitter on PPC84 to participate in the hearing, there was no obligation on the KCAHL as the Plan Change Requestor to have consulted with the Trust prior to notification of PPC84.*
- *Finally in relation to this matter, we record that Mr Tizard formally advised that the Ngahina Trust adopted the expert evidence presented on behalf of Coastlands et al.*

Prohibited Activity Status

- *In summary, we record that on balance, and having given careful consideration to the opinions expressed by the three planning witnesses,*

³ Policy 5: Ancestral Connection of Tangata Whenua:

Provide for the ancestral connection of tangata whenua with the Airport land, specifically by providing opportunities for tangata whenua to exercise kaitiakitanga over the Buffer land, and to recognise that earthworks activities need to be subject to accidental discovery and other protocols and Historic Places Act approvals. In particular, two specific areas have been identified which should be the subject of further investigation prior to any earthworks commencing in those areas.

we do not consider that a compelling case has been made for the continuation of Prohibited Activity status for the retail activities currently listed in Rule D.9.1.6 of the Operative District Plan.

- *Nevertheless, for the further reasons we summarise below, we do accept that it will be necessary to ensure that any amended Plan provisions for the Airport Mixed Use Precinct incorporate appropriate measures that will enable a robust s104 assessment of future retail development, with the assessment focused on, inter alia, establishing the significance of any adverse effects on the role and function of the District's Centres, including, and in particular, the Paraparaumu Sub-Regional Centre.*

Economic and Retail Effects

- *After giving careful consideration to this evidence, we reached the position where we have concluded that while there could well be adverse effects on the vitality and viability of the Paraparaumu Town Centre, if there was additional retail activity of the type sought by PPC84 located at the Airport, we have not been able to conclude that such effects would reach the high threshold of certainty of significant adverse effects [our emphasis] that we believe should apply to Prohibited Activities. Certainly, PPC84 itself would not (directly) give rise to such effects.*
- *If PPC84 is made operative, and if at some time in the future a resource consent application is made for a supermarket or department store, then we are in no doubt that a primary focus of the necessary effects assessment (s104/s104D and Schedule 1) will be the degree of impact on the vitality and viability of the Paraparaumu Town Centre. In our opinion this is when such an assessment should be undertaken - namely, when the 'facts' of a proposed retail development are known.*

Traffic Effects

- *We accept that further retail development at the Airport will give rise to an increase of traffic movements to and from the Airport, and if the further development includes a second supermarket or a department store, it is almost inevitable that such increases will be quite significant.*
- *Consequently, any process to enable an assessment of further retail development at the Airport needs to be robust.*
- *However, for the same reasons as we recorded in relation to our assessment of economic and retail effects we have concluded that the appropriate time for the consideration and assessment of traffic effects associated with retail development at the Airport is when a resource consent application is made, rather than as part of this plan change process. To this end we adopt and agree with the advice of the Council's independent traffic engineer, Mr Don Wignall, who advised that:*

**If PC84 is approved, then it should be substantially modified, as proposed in the s42A report to ensure that the adverse effects of higher traffic generating developments are either avoided or adequately mitigated.⁴*

- *Although we discuss the issue of the Plan objectives and policies under Issue 10 below, we can also (at this point) confirm our agreement with Ms Penfold's conclusion that the policy framework needs to be more robust than that currently in the Operative District Plan, so as to ensure that there is clear direction on the need to ensure that significant adverse effects on the safety and efficiency of the strategic transport network (including Kapiti Road and the roads connecting to Kapiti Road) are avoided.*

Urban Amenity Effects

- *We accept that 'urban amenity effects' could be the consequence of a significant diminution in the vitality and viability of the Paraparaumu Town Centre. However, and in the absence of being able to assess the effects of an actual development, it is at least uncertain as to what those effects might be, and how significant they might be. Therefore, and as we (also) have concluded in respect of economic and retail effects and traffic effects, we consider that such urban amenity effects would be assessed at the time of a resource consent application, as such effects would be the consequence of any significant diminution in a centre's vitality and vibrancy.*

Noise Sensitive Activities

- *Accordingly we recommend that the following provisions be made for noise sensitive activities in the Airport Zone:*

Permitted Activities:

Rule D.9.1.1 (ii) Within the "Airport Mixed Use Precinct"

One hotel/motel activity

Rule D.9.1 (v) Within all of the Airport Zone

Residential accommodation for those whose employment requires residence within the Zone.

Note: this is a current operative rule. PPC84 did not seek to change this existing provision

Discretionary Activities:

Rule D.9.1.4 (v) Noise sensitive activities between the Outer Noise Boundary and the Airport Noise Effects Advisory Overlay not specifically provided for as a permitted activity.

Non Complying Activities:

Rule D.9.1.5 (xi) Noise sensitive activities outside the Air Noise Boundary but inside the Outer Noise Boundary not specifically provided for as a permitted activity.

Prohibited Activities

⁴ Don Wignall, 15 March 2017- Memo to Private Plan Change Hearing Panel.

Rule D.9.1.6 (i) Noise sensitive activities within the Airport Noise Boundary.

Plan Objectives and Policies

- *We consider there are two issues for us to assess and determine:*
 - (a) *with the recommended amendments (sought by the NZTA and accepted by Mr Schofield in his Closing Statement) to Policy 2 (Objective 1.0) Policy 5 (Objective 2.0), and the addition of Policy 2A (Objective 2.0), is the policy framework adequate?; and*
 - (b) *if we agree to make amendments to the policy framework, given that the Plan Change Request as initially requested by KCAHL notified did not propose any changes to the Operative District Plan objectives and policies, do we have scope to make the amendments?*
- *Firstly we answer the second question in the affirmative. We agree with Mr Schofield's conclusion on the issue of scope which was that:*

... there is scope to strengthen the policy framework as consequential amendments in response to concerns raised by submitters to assist with future resource consent applications under PC84. Such changes would be consequential to give better effect to the purpose of the plan change and ensuring the provisions are most appropriate, having regard to their effectiveness and efficiency.⁵
- *Turning to the first question, again our answer is in the affirmative.*
- *After considering the conflicting evidence on the robustness (or otherwise) of the policy framework, we reached the position where we agreed that the policy framework had to be robust, but that the current ODP objectives and policies do not fulfill this objective. Therefore, we concluded that the policy framework had to be strengthened.*
- *We then turned to the amendments proposed, firstly by Ms Penfold in her evidence and secondly by Mr Schofield in his closing. We have adopted both Ms Penfold's recommended new Policy 2A and amended Policy 5, although with some amendments to Policy 2A, and Mr Schofield's amended Objective (Objective 2). We consider that these amendments to the ODP are necessary to provide robust policy framework for assessments of resource consent applications under Section 104 (discretionary activities) and Section 104/Section 104D (non-complying activities).*
- *In our opinion the amended policy framework gives stronger and clearer direction to the need to assess the potential for adverse traffic effects and adverse effects on the vitality and viability of the Paraparaumu Town Centre as part of the assessment of any resource consent applications for high traffic-generating retail activities such as supermarkets and department stores.*

⁵ Council's Response to Matters Arising, Robert Schofield, Planning, 9.3, p14.

CONSIDERATIONS

Legal considerations

- 23 As set out above, under sections 34 and 34A of the RMA, the Council has delegated the Independent Hearing Panel authority to consider all submissions received on PPC84, to assess PPC84 under sections 32 and 32AA, and to report to Council recommending whether the PPC84 provisions should be declined, approved or approved with amendments (based upon the submissions received and the evidence heard) and to set out the reasons for its recommendation.
- 24 Under Clause 29 of Schedule 1 of the RMA, it is Council's role to make a decision on PPC84. The Council has discretion to decline PPC84, to approve PPC84, or to approve PPC84 with modifications, after having particular regard to the Panel's evaluation. If the Council is minded to not accept an aspect of the report or a recommendation of the Panel, it would need to rehear the submissions and evidence on that point itself before making a decision. Alternatively, the Council could seek clarification or refer particular factual matters back to the Panel for reconsideration. That would also take time and come at an additional cost to the applicant. Under Clauses 11 and 29 of that Schedule, Council must also publicly notify its decision on PPC84 and serve it on Kāpiti Coast Airport Holdings Ltd and the submitters to PPC84.

Financial considerations

- 25 As this is a private plan change the costs have been borne by Kāpiti Coast Airport Holdings Ltd

Tāngata whenua considerations

- 26 As set out in the summary of the issues discussed by the Panel in their report and recommendations the issue of status of tangata whenua was a matter raised and addressed through the hearing process. It is anticipated that this decision will be of interest to iwi.

SIGNIFICANCE AND ENGAGEMENT

Significance policy

- 27 This matter has a low level of significance under Council Significance and Engagement policy.

Consultation already undertaken

- 28 PPC84 was publicly notified in line with the requirements of Schedule 1 of the RMA 1991.
- 29 The decision of Council will be publicly notified and a copy of the decision and recommendation report will be available on Council's website.

RECOMMENDATIONS

- 30 That Council receives this report SP-17-334 Council Decision on Private Plan Change 84 to the Operative Kapiti Coast District Plan.
- 31 That Council receives the “Report and Recommendations of Hearing Panel” dated 8 September 2017, acting under delegated authority pursuant to section 34(1) and 34A of the Resource Management Act 1991, for the hearing of submissions and further submissions on the Private Plan Change 84 to the Operative Kapiti Coast District Plan.
- 32 The Council approves Private Plan Change 84 in accordance with Clause 29 of Schedule 1 to the Resource Management Act 1991 with the modifications to the Private Plan Change as recommended in the report and recommendations of the Hearing Panel.
- 33 That Council adopts the recommended decision on Private Plan Change 84 to the Operative Kapiti Coast District Plan and reasons for that decision set out in the Hearing Panel’s report including the Panel’s evaluation under section 32AA.
- 34 The Council resolve to publicly notify its decision on Private Plan Change 84 to the Operative Kapiti Coast District Plan on 25 October 2017 and to serve the decision on Kāpiti Coast Airport Holdings Ltd and submitters.

Report prepared by	Approved for submission	Approved for submission
Nicki Williams	Max Pedersen	Sarah Stevenson
Manager Research, Planning & Policy	Group Manager Community Services	Group Manager Strategy & Planning

ATTACHMENT

- Attachment 1 Report and Recommendations of Hearing Panel to Kāpiti Coast District Council
- Attachment 2 The Operative District Plan Planning Map 11 showing the area of land zoned Airport within PPC84
- Attachment 3 The Operative District Plan Planning Map 11 showing that the Airport is divided into several precincts.

IN THE MATTER OF: THE RESOURCE MANAGEMENT ACT 1991

AND:

IN THE MATTER OF: PRIVATE PLAN CHANGE 84 TO THE OPERATIVE KAPITI
COAST DISTRICT PLAN

REQUESTOR: KAPITI COAST AIRPORT HOLDINGS LIMITED

IN RESPECT OF: RECLASSIFICATION OF ACTIVITIES IN THE AIRPORT ZONE

REPORT AND RECOMMENDATIONS OF HEARING PANEL
TO KAPITI COAST DISTRICT COUNCIL
8 SEPTEMBER 2017

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HEARING PANEL REPORT AND RECOMMENDATIONS

Proposal Description:

Private Plan Change 84 to the Kapiti Coast District Plan: Reclassification of Activities in the Airport Zone.

Panel Members:

Alistair Aburn (Independent Commissioner, Chair)

Diane Ammundsen (Independent Commissioner)

Miria Pomare (Independent Commissioner)

David McMahon (Independent Commissioner)

Cr Mike Cardiff (Commissioner)

Date of Hearing:

13, 15 February and 20 March 2017

1.0 INTRODUCTION

Report Purpose

- 1.1 This report sets out our recommendations to the Kapiti Coast District Council ("KCDC" or "the Council") on Private Plan Change 84 ("PPC84" or the "Plan Change") to the Operative Kapiti Coast District Plan.
- 1.2 We were appointed by the Council to hear submissions on the Plan Change and to consider and make recommendations to the Council as to whether the Plan Change should be declined, approved or approved with amendments.¹
- 1.3 The Plan Change was privately initiated by Kapiti Coast Airport Holdings Limited (KCAHL). It seeks to reclassify certain activities in the Airport Zone.

¹ Pursuant to Schedule 1, Part 2, Clause 29(4)(a), RMA.

Role of Hearing Panel and Report Outline

1.4 As noted above, our role is to make a recommendation to Council on the approval (or otherwise) of the Plan Change. The final decision-making power rests with the Council, and in the event that Council adopts our recommendations, then this report will become the Council Decision.

1.5 Prior to the hearing we familiarised ourselves with the Plan Change, the submissions and further submissions, the Section 42A report, the evidence filed by KCAHL, and the evidence filed by the submitters and further submitters. We also undertook a site visit to familiarise ourselves with the parts of the Airport Zone subject to the Plan Change.

1.6 After this Introduction, our report is organised into four sections:

(a) Background to and Context of the Plan Change:

This non-evaluative section (Section 2) is largely factual and contains an overview of the Plan Change. In this section we also summarise the submissions received on the Plan Change, ending with a brief overview of the hearing process itself and our subsequent deliberations.

In this section we also outline the background to the Plan Change by briefly summarising the 'planning history' of the Airport Zone.

(b) Evaluation of Key Issues:

This section (Section 3) contains an assessment of the main issues raised in submissions on the Plan Change and, where relevant, provides a summary of the evidence presented to the hearing. We conclude with a summary of our recommendations, with reasons, having had regard to the applicable statutory considerations. This part of our report is evaluative as it records the results of our deliberations on the substantive matters before us.

(c) Statutory Considerations

This section (Section 4) addresses the statutory requirements outlined at the beginning of Section 3.

(d) Recommendation(s)

This section (Section 5) records our statutory recommendations to the Council.

- 1.7 Before turning to the factual background to the Plan Change (Section 2), we would like to record our appreciation to all parties to the hearing for the constructive and helpful manner in which they assisted us in our task.

2.0 PLAN CHANGE 84

Scope of Plan Change Request

- 2.1 Plan Change 84 is a private plan change request from KCAHL the owners of the Kapiti Coast Airport (aka Paraparaumu Airport), the purpose of which was set out at Section 2 of the Plan Change Request as follows:

The purpose of this plan change request is to remove prohibited activity status from certain activities so as to enable KCAHL to undertake master planning of the land currently owned in the Airport Zone, and so that resource consents can ultimately be sought in the future. ²

- 2.2 The Plan Change Request explained that:

At present, there are four prohibited activities within the Airport Zone. These are:

(a) noise sensitive activities not specifically provided for as a permitted activity (whether or not within the Air Noise Boundary, Outer Control Boundary, or outside any of the noise contours);

(b) department stores;

(c) supermarkets; and

(d) more than one store of between 151m² and 1,500m² gross floor area that retails groceries or non-specified food lines

and commented that:

While these activities remain prohibited under the District Plan, no consents can be sought, and KCAHL cannot effectively engage with the market and develop a commercially grounded master plan. ³

- 2.3 Under the heading “Justification for re-classifying certain activities from prohibited to non-complying or discretionary”, the Plan Change Request commented that:

² Private Plan Change Request to Kapiti Coast District Plan - Airport Zone: Prohibited Activities, para 2.6, p3.

³ Op cit, para 2.7 and para 2.8, p3.

The test under section 32 RMA requires consideration of what activity status is “most appropriate”. Where there are a small number of alternatives, the question can be asked as to which provision (in this case activity status) is “better” for achieving the purpose of the RMA (having regard to costs and benefits).

Prohibited status is not considered to be “most appropriate”. As explained in the Court of Appeal, prohibited status simply means that no consent can be sought. In other words, the only way that a prohibited activity can proceed is to undertake a plan change first. That would then need to be followed by a resource consent application (unless the plan change were to make a prohibited activity permitted).⁴

- 2.4 The details of the requested amendments to the District Plan proposed by PPC84 (as described in the public notice) are:

The plan change seeks to remove prohibited activity status of some specified land use activities so that resource consent can be sought. The plan change would enable resource consent to be sought for:

- *noise sensitive activities (e.g. residential activities) in the Airport Zone but outside of the Air Noise Boundary as a discretionary activity; and*
- *the following retail activities:*
 - *one department store as a non-complying activity;*
 - *one supermarket as a discretionary activity, and more than one supermarket as a non-complying activity; and*
 - *more than one retail store between 150m² and 1,500m² in floor area that retails groceries or non-specified food items as a discretionary activity.⁵*

- 2.5 The Plan Change Request stated that the existing objectives and policies relating to the Airport Zone contained in the Operative District Plan were considered appropriate and did not require alteration.⁶

Notification and Submissions

- 2.6 The Plan Change Request was publicly notified on 24 February 2016. Seven submissions were received from the following parties:

- Coastlands Shoppingtown Ltd;
- Ngahina Developments Ltd;
- Alpha Corporation Ltd;
- Sheffield Properties Ltd;

⁴ Op cit, para 2.9 and para 2.10, p3.

⁵ Public Notice, Plan Change 84 to the Operative District Plan - Airport Zone, 24 February 2016.

⁶ Private Plan Change Request to Kapiti Coast District Plan - Airport Zone: Prohibited Activities, para 2.14, p4.

- Richard Mansell;
 - Ngahina Trust; and
 - New Zealand Transport Agency (NZTA).
- 2.7 Following the lodging of submissions KCAHL applied to the Environment Court under Section 311 of the Resource Management Act (“RMA” or “the Act”) for declarations regarding the status of each of the submitters, apart from the New Zealand Transport Agency, under the trade competition provisions of the RMA.
- 2.8 In its decision, the Court recorded that it found that Coastlands Shoppingtown Ltd, Sheffield Properties Ltd and Ngahina Developments Ltd were trade competitors of KCAHL. However, the Court recorded that it was unable to reach the conclusion that Alpha Corporation Ltd and Richard Mansell were trade competitors of KCAHL.⁷
- 2.9 Following the release of the Court’s decision, a summary of submissions was prepared by the Council and notified for further submissions on 14 September 2016. Five further submissions were received from:
- Coastlands Shoppingtown Ltd;
 - Ngahina Developments Ltd;
 - Alpha Corporation Ltd;
 - Sheffield Properties Ltd; and
 - Richard Mansell.
- 2.10 As noted in the Section 42A report, all of the submitters and further submitters were opposed to PPC84. They all, aside from the NZTA, were opposed to the Plan Change in principle on the basis that it was:
- incomplete in that it failed to provide an adequate effects assessment;
 - lacked sufficient information to meet Schedule 1 requirements;
 - contrary to the RMA;
 - likely to generate adverse environmental effects;
 - inadequate in its evaluation of costs and benefits;
 - contrary to the Operative District Plan;
 - contrary to the Proposed District Plan;
 - contrary to Strategic Directions of KCDC; and
 - contrary to intentions and provisions of PC73.
- 2.11 Concern was also expressed about the effects of PPC84, including:
- economic effects;

⁷ Decision: [2016] NZEnvC 137, 22 July 2016.

- retail effects;
- traffic effects; and
- urban design and urban form effects.

- 2.12 The NZTA submission, which was also opposed PPC84, was focused on traffic effects.
- 2.13 None of the submissions raised any issues in relation to noise and noise sensitive activities.
- 2.14 We return to the issues raised by the submitters and further submitters in greater detail in our evaluation in Section 3 below.

Background to the Airport Zone

- 2.15 To enable a more complete understanding of the Plan Change Request a short outline of the more recent 'planning history' of the Airport Zone may be of assistance. Certainly, we were keen to understand that background.
- 2.16 For a long period of time, Paraparaumu Airport occupied land zoned Open Space. It was not until 2005 that the zoning changed to Airport Zone as a consequence of Plan Change 18. PC18 was a private plan change request submitted by a previous owner Paraparaumu Airport Ltd (PAL); PAL having purchased the Airport from the Government in the late 1990s.
- 2.17 The new Airport Zone provided for a mix of aviation and non-aviation activities across six precincts, including a General Business Precinct. Permitted activity retailing in the General Business Precinct was limited to premises not exceeding 249m² and, with the exception of businesses in an aircraft passenger terminal, individual retail outlets should not form part of any contiguous grouping.
- 2.18 Following a change of ownership in 2006 a second private plan change request (Plan Change 73) was made, with its purpose being stated as:

.... To provide for the integrated resource management of the land for aviation, urban and open space activities so as to enable the community to provide for their social, economic, and cultural wellbeing and for their health and safety in a way envisaged by the Resource Management Act 1991.

More specifically, the purpose is to refine the existing operative provisions of the "Airport Zone" to enable the appropriate environment for the airport to be effectively used and developed on a sustainable basis.

- 2.19 The 'new' Airport Zone reduced the six precincts to four and broadened the activities permitted in a new Airport Mixed Use Precinct, including specified retail activities that would not adversely impact the sustainability and therefore the role and function of the Paraparaumu Town Centre. Plan Change 73 (as notified) did not, however, make provision for Prohibited Activities.

- 2.20 In its March 2008 report and recommendations to Council on PC73, the Hearing Commissioners made a number of pertinent comments including:

*[208] ... we have accepted the proposition that non-aviation commercial activities are necessary to generate income for the upgrading, further development and maintenance of the airport. The question that now has to be evaluated is what type of commercial activities are appropriate, what floor space is necessary and what special conditions, if any, are required to control such effects.*⁸

*[213] We acknowledge the district plan objectives and policies that reinforce the role of the Paraparaumu Town Centre as an administrative, social and cultural focus for the District, but these provisions do not necessarily preclude appropriate commercial activity elsewhere. Indeed, a number of activities proposed for the airport, large floor retail DIY stores and warehouses, would be incompatible with this role and should not be located within the Town Centre.*⁹

*[214] We have given careful attention to these matters and we believe that the objectives and policies of the District Plan do not preclude the provision of commercial activities at the airport provided due regard is given to the nature and extent of those and the potential for adverse effects on the Town Centre.*¹⁰

- 2.21 The challenge that the PC73 Hearing Commissioners identified was “*how to achieve a successful town centre as well as a successful airport, both of which are important strategic goals for the Council*”.¹¹

- 2.22 Noting that the economic evidence presented by the experts for the Requestor (PAL), the Council and Coastlands was diverse on the point regarding potential for adverse retail effects, the Commissioners confirmed that they had requested the relevant experts to confer during the course of the hearing to see if a consensus could be reached.

- 2.23 Then, at paragraph [218] the Commissioners recorded that:

[218] The mix of activities, and the conditions and thresholds pertaining to them, continued to be discussed by the Applicant, the Council and Coastlands with the results being conveyed to us in closing submissions of Mr Matheson who advised that a compromise position had been reached. This was confirmed in further submissions filed by Counsel for Coastlands.

- 2.24 A key aspect of this compromise recorded at paragraph 219 was:

⁸ Proposed Plan Change 73, Hearing Commissioners Report and Recommendations, March 2008, p70.

⁹ Op cit, p71.

¹⁰ Op cit, p71.

¹¹ Op cit, p72.

Department Stores, Supermarkets (being stores over 1,500m² gross floor area) and more than one store of between 151m² and 1,500m² gross floor area that retails groceries or non-specified food lines are to be Prohibited Activities at the request of Coastlands.

2.25 Referring to the compromise position, the Commissioners recorded that:

[221] We have considered this compromise position in respect of the provision of non-aviation commercial activities at the Airport and are satisfied that the activities and controls now proposed will achieve a satisfactory balance between the airport and the Town Centre such that the strategic goals for each and the relevant objectives of the District Plan can be met.

[222] The introduction of a comprehensive set of carefully drafted rules, including Prohibited Activities, for the Airport Zone is an efficient and effective way of implementing the policies of the District Plan, including those for the Paraparaumu Town Centre.

[223] The important policy imperatives regarding the retention and efficient operation of the airport are achieved, and PAL is given a level of certainty as to what is permitted, in order that it can proceed with confidence to develop the airport.

[224] In achieving this balance we believe that sustainable management of the resources of the airport and the Town Centre are promoted in terms of s5 of the Act through the provision of activities that will lead to economic growth for the District, the creation of employment, and increased and enhanced access for the community to essential retail and commercial services.¹²

2.26 The Commissioners report and recommendations were adopted by Council.

2.27 Subsequently, appeals were lodged with the Environment Court by three parties:

- B P Cammack and A M R Evans;
- Paraparaumu Airport Coalition Incorporated; and
- Te Whanau A Te Ngarara Inc.

2.28 At paragraph [13] of their Interim Report, the Court recorded that:

The issues arising out of the appeals which were the subject of debate before us fell into the following general categories:

- *Airport safety*
- *Airport noise*

¹² Op cit, pps 73-74.

- *Economic issues*
- *Tangata whenua issues*
- *Traffic.*¹³

2.29 In relation to economic issues the Court considered two aspects:

- whether (or not) Paraparaumu Airport was a commercially viable operation; and
- whether (or not) development at the airport would have adverse effects on the Paraparaumu Town Centre.

2.30 In relation to the second matter the Court stated that:

*[177] ... A particularly significant aspect of Plan Change 73 is a series of restrictions and spatial limitations on the type, scope and size of retail or commercial activity which might be undertaken in the Airport Zone. These restrictions and limitations were included in Plan Change 73 and were expanded by the Council Hearing Commissioners, to ensure that development at the airport was not in competition with the Town Centre.*¹⁴

2.31 The Court commented further when addressing “*planning matters*”, including the comment that:

*[287] Accordingly, Plan Change 73 establishes a complex series of controls on the commercial and retailing activities which might establish in the Airport Zone at Paraparaumu. These controls are intended to ensure that the sorts of retail activity which establish in the zone are either those requiring ‘big box’ large scale buildings which do not fit readily within the Town Centre or alternatively are small scale activities seeking to provide services to people employed within or visiting the Airport Zone. It was these provisions of Plan Change 73 as finally approved by the Hearing Commissioners which led to their conclusion that Plan Change 73 achieved a satisfactory balance between retail/commercial activities at the Airport and those at the Town Centre and satisfied the relevant objectives and policies of the District Plan.*¹⁵

2.32 In the previous paragraph [286] the Court cited the applicable rules, including Rule D.9.1.6 being the rule that established Prohibited Activity status for department stores, supermarkets and more than one store of between 151m² and 1,500m² gross floor area that retails groceries or non-specified food lines.

¹³ B P Cammack and A M R Evans & Others v Kapiti Coast District Council, Interim Decision, Decision No W069/2009.

¹⁴ Op cit, p45.

¹⁵ Op cit [287], p75.

2.33 In the end result, the Court accepted that given the restrictions imposed through the proposed rule structure for retailing in the Airport Zone, potential adverse effects on the viability and vibrancy of the Town Centre would not be significant.

2.34 Before we complete this section on the "Background to the Airport Zone" we consider it relevant to note the following points made by Ms Carruthers in her opening legal submissions for the PPC84 hearing on behalf of KCAHL when referring to Plan Change 73:

3.2 It is worthwhile, at this juncture, to correct a small misunderstanding in the reporting officer's summary of how the prohibited activity provisions came to be included in the District Plan through Plan Change 73 ("PC73").

3.3 PC73, requested by the Airport's former owner, Paraparaumu Airport Limited ("PAL"), sought to unlock the development potential of the Airport land by providing a framework for retail and other commercial activity on parts of the land that was not required for the Airport's operations. The retail activities enabled by PC73 were settled through negotiations with Council and Coastlands.

3.4 The closing submissions for PAL recorded that prohibited activity status was not appropriate for Department Stores and Supermarkets, nor for grocery and non-specified food line stores between 151m² and 1,500m², but that it would accept that relief if the Commissioners considered it to be appropriate. PAL was also willing to agree to those restrictions to fully and finally settle Coastland's concerns, but recorded that such agreement should not be seen as PAL accepting that those restrictions should remain for all time, nor that they were appropriate in legal and or planning terms.¹⁶

2.35 In his Section 42A report, Mr Schofield had advised that:

The activities subject to the request were made prohibited activities by way of a consent order following agreement reached through the Environment Court mediation on appeals to Plan Change 73, which introduced the Airport Zone into the ODP.¹⁷

2.36 In our view nothing turns on the exact way (and timing) in which the agreement was reached on the prohibited activity status. The matter that is now to be determined is the appropriateness (or otherwise) of prohibited activity status in relation to particular types of retail development in the Airport Zone. We turn our attention to this in our evaluation section, Section 3 below.

¹⁶ Legal Submissions on behalf of Kapiti Coast Airport Holdings Ltd on Private Plan Change 84, 13 February 2017, p.8.

¹⁷ Section 42A Report on Private Plan Change 84 (19 December 2016), para 3.5, p7.

Pre-Hearing Directions

- 2.37 In preparation for the hearing a minute (Minute 1) was issued to all parties on 5 December 2016. In summary, Minute 1 confirmed the dates for the hearing, the composition of the Hearing Panel, the timing of the release of the Section 42A report, and the requirements for pre-circulation of expert evidence.
- 2.38 A second minute (Minute 2) was issued on 10 February 2017. Minute 2 was a preliminary response to an email from counsel for the Ngahina Trust which suggested that there was a jurisdictional issue that was fundamental to the conduct of the hearing, namely the failure to consult the Ngahina Trust *“as tangata whenua, as required by Clause 3(1)(d) of the First Schedule of the Resource Management Act”*. Minute 2 advised the parties that we considered that the more appropriate and helpful way forward would be for counsel to address the matter at the commencement of the hearing.

The Hearing

- 2.39 The hearing commenced at 9.00am on Monday 13 February 2017 in the Council Chambers, Kapiti Coast District Council, Rimu Road, Paraparaumu and continued on Wednesday 15 February 2017 and concluded on the morning of Monday 20 March 2017.
- 2.40 Aside from the jurisdictional issue regarding consultation with tangata whenua (to which we will return), the hearing was focused on the presentation of evidence and submissions from all the parties, as follows:

Monday 13 February 2017

- Council Opening
Mr Robert Schofield (Section 42A Reporting Planner)
- KCAHL
Ms Bronwyn Carruthers (Legal Counsel)
Expert Witnesses:
 - Neil Donnelly (Corporate)
 - Fraser Coleman (Economics)
 - Poul Israelson (Planning) ¹⁸
- Ngahina Trust
Mr John Tizard (Legal Counsel))
Expert Witness:
 - Mr Matthew Holder (Planner)

¹⁸ We also received a pre-circulated statement of evidence from Mr Tim Kelly, KCAHL's consultant traffic engineer, but record that Mr Kelly was unable to attend the hearing.

- Kura Marie Taylor (Trustee and Chairperson of Ngahina Trust) ¹⁹

Wednesday 15 February 2107

- Coastlands Shoppingtown Ltd/Sheffield Properties Ltd/Ngahina Development Ltd/Alpha Corporation Ltd/Mr Richard Mansell

Mr Matthew McLelland QC and Ms Phernne Tancock (Legal Counsel)

Expert Witnesses:

- Mr Richard Cathie (Corporate) (on behalf of Coastlands Shoppingtown, Alpha Corporation and Sheffield Properties only)
- Dr John Small (Economic) (on behalf of Alpha Corporation and Mr Richard Mansell only)
- Mr Michael Copeland (Retail) (on behalf of Alpha Corporation and Mr Richard Mansell only)
- Mr Mark Georgeson (Traffic)
- Mr James Lundy (Urban Design)
- Mr Chris Hansen (Planning)

Witnesses:

- Mr Richard Mansell

- New Zealand Transport Agency ("NZTA")

Expert Witnesses:

- Mr Alan Kerr (Transportation Planner)
- Ms Angela Penfold (Resource Management Planner)

Monday 20 March 2017

- Council Officer's Reply

- Mr Robert Schofield (Section 42A Reporting Planner)
- Mr Don Wignall (Transportation Planning/Traffic Advisor)
- Mr Phil Osborne (Economics Advisor)
- Mr Tim Health (Retail Advisor)

- KCAHL Closing

Ms Bronwyn Carruthers (Legal Counsel)

Minute 3

- 2.41 Following the adjournment of the hearing at the end of Day 2 (Wednesday 15 February 2017) the Panel issued a further minute (Minute 3). The main focus of Minute 3 was to provide some directions to the

¹⁹ Due to disrupted travel arrangements, although Mrs Taylor was scheduled to attend the hearing on Monday 13 she attended on Wednesday 15.

Council's reporting planner and expert advisors on matters we wanted them to address in the Council's right-of-reply/closing statement.

- 2.42 The Minute also responded to a request from Ms Penfold on behalf of the NZTA for the Hearing Panel to receive supplementary information relating to an issue of scope that had been raised during the hearing; namely would we have scope to amend Plan objectives and policies for the Airport Zone given that the Plan Change Request included the clause:

Any consequential amendments to the District Plan that may be necessary to achieve the purpose of this private plan change request.

- 2.43 Following careful consideration of Ms Penfold's request, the Panel advised in Minute 3 that the NZTA's request to table further information was not agreed, principally on the grounds of procedural fairness.²⁰ We nevertheless accepted that the issue of scope in relation to the NZTA requested amendments to the Airport Zone policies was a 'live issue' which the Panel anticipated would be covered in Mr Schofield's right-of-reply and Ms Carruthers' closing submissions - as proved to be the case. We return to this issue in Section 3 below.

Deliberations and Hearing Closure

- 2.44 Our 'in committee' deliberations commenced at 9.00am on 30 March 2017 and concluded at 4.00pm on that day. During the day we also undertook a second site visit.
- 2.45 As we reached the point where we agreed that we had all the necessary information to enable us to determine the matters arising from the Plan Change Request and submissions, we closed the hearing and commenced preparing our report.

Jurisdictional Issue

- 2.46 As we have already noted, a jurisdictional issue was raised by counsel for Ngahina Trust (Mr John Tizard) concerning consultation with tangata whenua.
- 2.47 In an email dated 8 February 2017, Mr Tizard had advised that:

The brief of evidence the Ngahina Trust has filed from Matthew Holder has raised a jurisdictional issue, namely the failure to consult the Trust, as tangata whenua, as required by Clause 3(1)(d) of the First Schedule to the Resource Management Act.

²⁰ The further information that NZTA requested be submitted was a January 2017 legal opinion addressing whether changes to the Operative District Plan objectives and policies were within the scope of the Plan Change Request.

Mr Tizard opined that the issue was “... *fundamental to the conduct of the hearing*”.

- 2.48 As we have already noted, in Minute 2 issued on 10 February 2017 we advised that we considered it appropriate for counsel to address the issue at the commencement of the hearing. In the Minute we also asked that counsel provide appropriate comment on the decision of the Environment Court in Briggs v Kapiti Coast District Council, and in particular paragraphs 10 and 11 of that decision, which were:

[10] The consultation principles apply to local authorities when preparing a plan change. These principles, which are to be applied in a manner to be determined 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 an 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. ²¹

- 2.49 In his opening submissions on behalf of Ngahina Trust, Mr Tizard contended that “*there was an absolute duty to consult tangata whenua*” who may be affected before notification of a proposal, citing as authority the High Court’s decision Waikato Tainui te Kauhanganui Inc v Hamilton City Council. ²²

- 2.50 In closing his submissions, Mr Tizard said that:

It is hardly conceivable that the legislature intended that a right given to any person to request a plan change, generally instigated for that person’s benefit, should carry with it the ability to avoid the consultation provisions imposed on a local authority which, generally, instigates any plan change for the public benefit. ²³

- 2.51 Following receipt of Mr Tizard’s submissions we requested counsel for the Kapiti Coast District Council to provide answers to three questions. The questions were:

Q1: 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?

Q2: If the law is not correctly stated in Briggs, as contended by counsel for Ngahina Trust, what (if any) implications are there for:

²¹ D R Briggs v Kapiti Coast District Council, Decision No: [2011] NZEnvC 57.

²² Waikato Tainui te Kauhanganui Inc v Hamilton City Council [2010] CIV2009-419-1712.

²³ Mr John Tizard, Submissions of Counsel for Ngahina Trust on Jurisdiction, 13 February 2017, p11.

- (a) the hearing continuing to hear submissions and evidence; and/or
- (b) the Panel's recommendation on PC 84 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"?

Q3 Is the law in relation to the obligation to consult with tangata 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?

2.52 In a Memorandum dated 15 February 2107, Simpson Grierson advised as follows:

1. *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 (Question 1 above).
2. The Hearing Panel is entitled to continue to hear submissions and evidence and make its recommendation on PC 84 to the Council (Question 2 above).
3. 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.

A copy of the Simpson Grierson memorandum is attached [Appendix 1].

2.53 Upon receipt of the advice from Simpson Grierson we continued with the hearing of submissions and evidence, on the grounds that there was no jurisdictional barrier to continuing with the hearing.

3.0 EVALUATION OF ISSUES

Key Issues

3.1 In this section we have grouped our discussion around the key issues that have been raised in submissions and in this way we have focused on the "matters" raised by the submitters, rather than addressing each individual submission on a 'point by point' basis.²⁴

²⁴ Clause 19(2)(a) of Schedule 1 of the Act sets out that a plan change decision may address submissions by grouping them according to either the provisions of the plan change to which they relate, or to the matters to which they relate [our emphasis]

3.2 We stress that this is not to downplay the importance of the individual submissions. However, by adopting this approach we consider that our evaluation is appropriately focused on the key issues raised by the Plan Change Request.

3.3 Following this approach we have organised our discussion as follows:

- Issue 1: Trade Competition
- Issue 2: Tangata Whenua Consultation
- Issue 3: Prohibited Activity Status
- Issue 4: Definition of Supermarket
- Issue 5: Economic and Retail Effects
- Issue 6: Traffic Effects
- Issue 7: Urban Amenity Effects
- Issue 8: Noise Sensitive Activities
- Issue 9: Positive Effects
- Issue 10: Plan Objectives and Policies

3.4 Before addressing each of the above issues we firstly summarise the relevant statutory framework.

Statutory Framework

3.5 A local authority's power for a plan change, including a private plan change request, is set out in Clause 29(4) of Schedule 1 of the Act. It states:

29(4): After considering a plan or change, the local authority may decline, approve, or approve with modifications, the plan or change, and shall give its reasons.

3.6 Furthermore, in making its decision, the local authority must undertake the further evaluation required under Section 32AA of the Act and have regard to that evaluation. We address this in Section 4 below.

3.7 An important point to clarify at this point is that we are not the 'decision makers'. That role is the Council's. Rather we are 'recommenders'. However, we have structured our report in accordance with the statutory framework so that should Council adopt our recommendations, which we record in Section 5 below, this report can be adopted as the Council's decision.

3.8 We leave further discussion of the statutory framework to Section 4.

Issue 1: Trade Competition

- 3.9 In his Section 42A report Mr Schofield drew our attention to the legislative requirements relating to trade competition, noting that Section 74(3) of the Act states that:

In preparing or changing a district plan, a territorial authority must not have regard to trade competition or the effects of trade competition.

- 3.10 Also, as Mr Schofield noted, Clause 6 of Schedule 1 of the Act contains a corresponding restriction on the lodging of submissions by people who could gain an advantage in trade competition through the submission. Specifically in respect of submissions on privately initiated plan changes, Clause 29(1B) states:

A trade competitor of the person who made the request may make a submission only if directly affected by an effect of the plan or change that –

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

- 3.11 Mr Schofield also drew our attention to the Environment Court's decision which found that three submitters on PPC84, Coastlands Shoppingtown Ltd, Sheffield Properties Ltd and Ngahina Developments Ltd, were trade competitors of Kapiti Coast Airport Holdings Ltd.²⁵

- 3.12 Notwithstanding that three of the submitters have been declared to be trade competitors, we are nevertheless mindful of the Environment Court's observation that:

[29] We observe that the consequence of declaring Coastlands, Sheffield and Ngahina to be trade competitors does not ipso facto exclude them from the Council hearing process. They are entitled to participate in that process, except to the extent that their submissions are in contravention of s308B(2). That is matter to be determined by the Council, either under s41C or when hearing the parties' cases.

- 3.13 Mr Schofield correctly advised that there is an onus on the trade competitors to ensure that their submission meets this statutory limitation.²⁶

- 3.14 In approaching our task we have also be mindful of the further observation made by the Environment Court when it recorded that:

²⁵ Kapiti Coast Airport Holdings Limited v Alpha Corporation 2016 NZEnvC 137. We note that the Environment Court, based on the information before it, declined to make a declaration that Alpha Corporation Ltd and Mr Richard Mansell were trade competitors of Kapiti Coast Airport Holdings Limited.

²⁶ S42A Report, 4.30, p20.

*Whether or not a particular activity is trade competition is something that must be determined on the facts. Sometimes, such as in the case of rival supermarket operators that determination is easy, at other times it will be less easy.*²⁷

- 3.15 In his Section 42A report Mr Schofield canvassed in some detail examples of what might be considered to constitute trade competition in the context of a plan change, drawing appropriately on case law. We do not intend to canvass that discussion in any detail.
- 3.16 Rather, our approach has been to consider all the evidence presented by all submitters and determine whether (or not) they are raising matters that extend beyond trade competition effects.
- 3.17 In the end we concluded that the Plan Change did have the potential to give rise to effects that could extend beyond trade competition effects. These effects included traffic effects and effects on the overall amenity of other centres, including, and in particular the Paraparaumu Town Centre.
- 3.18 Before closing our evaluation of this issue we consider it appropriate to record the position of KCAHL. In her opening legal submissions (at paragraphs 1.9) Ms Carruthers stated that:

As the Panel will be aware, this plan change request has attracted the attention of other retail providers within the Kapiti Coast District, namely Coastlands Shoppingtown Limited ("Coastlands") and a number of associated "surrogate" entities (being Alpha Corporation, the Ngahina Trust, Ngahina Developments Limited, Sheffield Properties Limited, and Mr Mansell, who is a director and shareholder of a number of entities, but is submitting in his "personal" capacity). Three of those six submitters were found by the Environment Court to have submitted in contravention of clause 29(1A) of Schedule 1 to the RMA, in that they did not (at the time their submissions were lodged) declare their trade competitor status, thus limiting their ability to submit on the private plan change request.

- 3.19 At paragraph 2.10 Ms Carruthers opined that:

*It is beyond dispute that the Coastlands-related entities have had a long history seeking to obstruct development on KCAHL's land, and that they have continued to do so (through a variety of similar submissions, without an evidential basis) on this plan change request. While I will return to the issue of trade competition later in my submissions, it is worthwhile at this juncture to note that extreme caution must be given to considering the concerns of the Coastlands-related entities, and the weight that should be given to those submitters' concerns, to avoid conflating legitimate resource management concerns with those that can only relate to trade competition (and thus are barred from consideration under s74 of the RMA).*²⁸

- 3.20 In closing her opening legal submissions on the issue Ms Carruthers expressed the view that:

²⁷ Kapiti Coast Airport Holdings Limited v Alpha Corporation 2016 NZEnvC 137, [12] at p6.

²⁸ Legal Submissions on Behalf of Kapiti Coast Airport Holdings Ltd on Private Plan Change 84, 13 February 2017, p4.

[5.10] In conclusion, there are no effects alleged by the trade competitors that satisfy the test in clause 29(1A) of Schedule 1 of the RMA, and therefore those effects can be disregarded. To the extent that any of those claims are raised by the other three submitters, the Panel must take extreme caution in determining whether or not the submission (and any supporting evidence) is motivated by a legitimate resource management concern, or is instead motivated by commercial (or competition-related) concerns with their related entities.

[5.11] In particular, the evidence produced by Alpha Corporation and Mr Mansell on economic issues falls foul of Judge Dwyer's warning in the trade competition decision, and should therefore be given little or no weight. Diversion of sales from the Town Centre, discussed at length in Mr Copeland's evidence, is a classic example of a trade competition effect. Mr Copeland also relies on advice from counsel for Coastlands that enabling KCAHL to apply will increase the likelihood for those activities to be granted, ignoring the fact that any application for consent will need to meet the statutory tests in s104 of the RMA before it can be approved (and in the circumstances where the Council retains full discretion to decline consent).

[5.12] The fact that economic issues (such as diversion of sales) have been addressed in evidence of [sic] behalf of submitters that KCAHL deems to be "surrogates" of the trade competitors, and not in the evidence of the trade competitors themselves, should sound a significant warning to this Panel regarding the gaming and, in our submissions, cynical approach taken by the submitters to this plan change request. That should be taken into account when considering the little (if any) weight that can reasonably be attributed to it. ²⁹

- 3.21 Counsel for Coastlands, Ngahina, Sheffield, Mr Mansell and Alpha Corporation had a different take on the issue of trade competition. Again we do not consider it necessary to represent in full the argument(s) advanced by counsel. We do nevertheless record that we have in particular had regard to the following:

[11] In our submission, the most important part of the decision is the Court's observation at [29]:

We observe that the consequence of declaring Coastlands, Sheffield and Ngahina to be trade competitors does not ipso facto exclude them from the Council hearing process. They are entitled to participate in that process, except to the extent that their submissions are in contravention of s308B(2). That is a matter to be determined by the Council, either under s41C or when hearing the parties cases. ³⁰

²⁹ Op cit, p18. We understand the point being made by Ms Carruthers in [5.12] of her submissions relates to the fact that the economic evidence of Mr Copeland and the retail distribution evidence of Dr Small was called on behalf of Alpha Corporation Ltd and Mr Richard Mansell only, whereas the traffic evidence of Mr Georgeson, the urban design evidence of Mr Lundy and the planning evidence of Mr Hansen was called on behalf of Coastlands Shoppingtown Ltd, Sheffield Properties Ltd, Ngahina Developments Ltd, Mr Richard Mansell and Alpha Corporation Ltd.

³⁰ The added emphasis was in the original.

[13] *While the “trade competitor” status requires a submitter on a private plan change request to meet additional requirements under Schedule 1, cl 29(1B) RMA, which provides they may only make a submission if they are directly affected by an effect of the proposed change, that adversely effects the environment, and does not relate to trade competition or the effects of trade competition. In this case these requirements are not onerous. The expert traffic, planning and urban design evidence filed on behalf of Coastlands, Sheffield and Ngahina Developments demonstrates direct adverse effects on these submitters (which is largely corroborated by the Council and the NZTA’s witnesses) these effects are not related to trade competition. Direct effects include:*

- a. traffic effects, including safety, traffic network issues, congestion delays and reduction of service, erosion of existing network capacity, necessity for infrastructure upgrades;*
- b. urban design, vitality and amenity effects;*
- c. investor uncertainty in terms of community infrastructure civic, cultural, public, transport and facilities*
- d. undermining efforts at urban renewal and rejuvenation efforts in the PTC; and*
- e. planning effects.*

[15] *Significant vitality and amenity effects on the PTC resulting from PC84 go beyond trade competition effects and are legitimate matters to be considered. These are direct effects on Coastlands, Ngahina and Sheffield (and vice versa). In this case it is artificial to try and separate the two.*

[16] *The Panel is prevented from considering trade competition effects under s74(3) RMA in any event. The trade competitor status of these three submitters should not detract from the Panel’s assessment of the request, despite the Requester’s repeated urgings to the contrary.*

Discussion and Findings

3.22 Firstly, we do not have to rule on whether or not Coastlands, Sheffield and Ngahina are trade competitors of KCAHL. The Environment Court has already declared that they are. In relation to Mr Mansell, based on his submission presented to the Panel at the hearing, we consider that he is also a trade competitor of KCAHL in his capacity as Managing Director of Coastlands. As Mr Mansell stated in answer to a question from the Panel:

I can’t separate the two, I was born into it?

Given Mr Mansell’s acknowledgement that he cannot separate his personal position from his business or ‘trade’ position, and we record that we appreciate his forthright statement, we consider that he is appearing, at least in part, as a trade competitor. Certainly his answers to Commissioner Pomare regarding the potential loss of a supermarket were, in our opinion, comments made from the perspective of a trade competitor.

- 3.23 Notwithstanding our finding that we consider Mr Mansell to be a trade competitor when he represents Coastlands in his capacity as Managing Director, the point that we must have regard to, and not only in respect of Mr Mansell, but also in respect of the other three trade competitors, is whether or not the evidence that was called on their behalf establishes that the Plan Change could potentially result in effects that extend beyond trade competition effects.
- 3.24 We have been mindful of the requirement to disregard trade competition effects during our evaluation of the 'effects based' evidence, to which we return when addressing Issues 5, 6 and 7 below.
- 3.25 In relation to Alpha Corporation, we find ourselves in the same position as the Environment Court and feel unable to conclude that Alpha Corporation is a trade competitor of KCAHL. However, we do observe that at least some of the evidence called on their behalf clearly, in our opinion, concerned trade competition effects. Here we in particular note Dr Small's statement that if a supermarket was to establish at the Airport "*a supermarket would close at PTC*".³¹ In our opinion such an outcome would be the consequence of trade competition. We return to this point when discussing Issue 5 (Economic and Retail Effects).
- 3.26 At this point we also make the observation that at the plan change stage it is difficult to ascertain exactly what the degree or 'severity' of effects might result if, in the future, developments enabled by the new provisions are advanced through the resource consent process. It is at this point that we believe it will become clearer if effects associated with a specific development (e.g. a supermarket or a department store) will 'extend beyond' trade competition effects. This is a point we return to below when discussing both economic and retail effects (Issue 5) and traffic effects (Issue 6).

Issue 2: Tangata Whenua Consultation

- 3.27 We have already addressed the 'jurisdictional issue' regarding tangata whenua consultation in Section 2 above. In this section we address the evidence that was presented on behalf of the Ngahina Trust, being the evidence of:
- Mrs Kura Marie Taylor, Trustee of Ngahina Trust and Chairperson since 1994; and
 - Matthew Peter Holder.³²
- 3.28 **Mrs Taylor** advised us that the Ngahina Trust, which had been created in October 1981 under Section 438(1) of the Maori Affairs Act 1953, is an Ahu Whenua Trust under Section 124 of the Te Turi Whenua Act 1993, and that it was her understanding that an Ahu Whenua Trust focuses on "*the retention, administration and management of Maori land by Maori land owners*".

³¹ As noted above at para 2.40, Dr Small's evidence was called on behalf of Alpha Corporation) and Mr Richard Mansell).

³² We record that Mr Tizard in his opening legal submission on behalf of the Ngahina Trust confirmed that the Trust adopted the expert evidence presented on behalf of the other submitter parties.

- 3.29 Mrs Taylor also advised us that in 1982 the Ngahina Trust entered into an equal joint venture with the Alpha Group to form Ngahina Developments Ltd to develop the Trust's land, adding that:

... the land would never be sold but would remain in joint ownership and be developed in partnership reflecting the spirit of the Treaty of Waitangi, respectful relationships, sensitivity of cultural differences, transparency, loyalty and trust.

- 3.30 Referring to PPC84, Mrs Taylor said:

Ngahina Trust is concerned that it has never been consulted or approached about the present proposed plan change. As Tangata Whenua we are really puzzled. I reiterate, we are reasonable thinking people with long past associations to Paraparaumu. We would have expected some approach, particularly as we have been so involved in the growth and enhancement of the civic and Town Centres

adding that:

We have an important interest in sustaining and promoting the good of the Paraparaumu Town and Civic Centres.

- 3.31 Mrs Taylor concluded her evidence by saying that:

When we learned of this plan change, we consulted with our partner, the Alpha Group, as to its potential effect on the Town and Civic Centres. As I have said, we are not experts and rely on expert evidence. That advice is that the plan change would have adverse effects on the town centre and we must therefore oppose it as it is prejudicial to what we stand for, re-establishing our connection to our historical land and sustaining and growing it.

- 3.32 The second witness for the Ngahina Trust was **Mr Matthew Holder**. Mr Holder is a qualified planner with 21 years' experience in the field of resource and environmental management. He advised that he had been requested by the Ngahina Trust to:

... consider the matter of consultation in relation to the Trust and whether or not the Trust should have been formally consulted during the processing of this request - that is prior to its notification. Accordingly, my evidence is confined to this matter only with specific consideration to the Part 2 Matters and 1st Schedule of the Resource Management Act. I do not consider the wider Planning issue with respect to the Plan Change and the Trust's submission in respect of the requested change.

- 3.33 Mr Holder said that it was his opinion that the Ngahina Trust, as Tangata Whenua of the area affected by PPC84, should have been consulted prior to notification, adding that it was his opinion that "*Clause 3(1)(d) requires consultation before notification of a proposed variation*".

- 3.34 Mr Holder opined that the Ngahina Trust was an iwi authority as “*members of the Trust are of the Te Atiawa iwi*”, adding that he considered:

... there is a specific requirement in the RMA to consult with iwi in the preparation of a Plan Change request and any such consultation should precede notification. ³³

- 3.35 Mr Holder contended that the Ngahina Trust land would be directly or indirectly affected by the proposed change, and that by not consulting the Trust PPC84 had not properly considered sections 6(e), 7(a), 7(aa) and 8 of the Act; adding that on this basis the Plan Change Request should not have been notified.

- 3.36 In his closing reply, **Mr Schofield** the Reporting Officer advised that all three iwi authorities ³⁴ were directly notified of the Plan Change Request as part of the notification process; and that the Te Ohu Taiao Group comprising representatives from all three recognised iwi authorities, were given a briefing on PPC84 as part of a wider briefing on the Proposed District Plan (PDP) process, given the overlap with issues raised by PPC84 in relation to the Airport Zone in the PDP.

Discussion and Findings

- 3.37 Our discussion centres on two points or questions:

- (a) is the Ngahina Trust an iwi authority; and
- (b) was there an obligation to consult with the Ngahina Trust?

- 3.38 With no disrespect to the Ngahina Trust, we find that the answer to both questions is “no”. Consequently, we disagree with Mr Holder’s main conclusion, namely that the Plan Change Request should not have been notified because of a failure to consult with the Ngahina Trust.

- 3.39 We acknowledge Mrs Taylor’s point that the Ngahina Trust has “*an important interest in sustaining and promoting the good of the Paraparaumu Town and Civic Centres*”, and we would add, just as the Trust’s joint venture partner the Alpha Corporation has.

- 3.40 However, this “*important interest*” does not lead to a statutory obligation for consultation with the Ngahina Trust prior to notification, for the reasons we summarised in Section 2 above.

- 3.41 Clearly the Ngahina Trust was able to participate in the submission and hearing process. Furthermore, as Mrs Taylor said in answer to one of our questions, if the Trust had been consulted prior to notification the response would have been to refer the Plan Change Request to their experts.

³³ Mathew Peter Holder, Evidence in Chief, paras 12 and 13 at page 5.

³⁴ Te Āti Awa ki Whakarongotai, Ngāiti Raukawa and Ngāiti Toa Rangatira.

- 3.42 Before leaving the issue, we wish to make two further points:
- (a) the land which the Ngahina Trust has a direct interest in is not within the Airport Zone itself; and
 - (b) as Mr Schofield confirmed in his closing reply, Policy 5 under Objective 2 of the Airport Zone remains unchanged.³⁵
- 3.43 Accordingly, we find that while the Ngahina Trust was fully entitled as a submitter on PPC84 to participate in the hearing, there was no obligation on the KCAHL as the Plan Change Requestor to have consulted with the Trust prior to notification of PPC84.
- 3.44 Finally in relation to this matter, we record that Mr Tizard formally advised that the Ngahina Trust adopted the expert evidence presented on behalf of Coastlands *et al.*

Issue 3: Prohibited Activity Status

- 3.45 PPC84 seeks to remove Prohibited Activity status from a number of activities in the Airport Zone under the Operative District Plan. We were advised by counsel for KCAHL that the Prohibited Activity status 'regime' was "*settled through negotiations with Council and Coastlands*" as part of the Plan Change 73 proceedings. Ms Carruthers nevertheless explained that:

The closing submissions for PAL recorded that prohibited activity status was not appropriate for Department Stores and Supermarkets, nor for grocery and non-specified food line stores between 151m² and 1,500m², but that it would accept that relief if the commissioners considered it to be appropriate. PAL was also willing to agree to those restrictions to fully and finally settle Coastlands' concerns, but recorded that such agreement should not be seen as PAL accepting that those restrictions should remain for all time, nor that they were appropriate on legal and or planning terms. ³⁶

- 3.46 We heard from three experienced planners. Each of them addressed the issue of Prohibited Activity status, both generally and specifically in relation to the Airport Zone.
- 3.47 **Mr Schofield** told us that:

³⁵ Policy 5: Ancestral Connection of Tangata Whenua:

Provide for the ancestral connection of tangata whenua with the Airport land, specifically by providing opportunities for tangata whenua to exercise kaitiakitanga over the Buffer land, and to recognise that earthworks activities need to be subject to accidental discovery and other protocols and Historic Places Act approvals. In particular, two specific areas have been identified which should be the subject of further investigation prior to any earthworks commencing in those areas.

³⁶ Legal Submissions on behalf of Kapiti Coast Airport Holdings Ltd on Private Plan Change 84, 13 February 2016, para 3.4 at p8.

In my experience it is accepted planning practice (and confirmed through case-law) that prohibited activity status should be used sparingly, requiring a very high threshold of certainty of unacceptable adverse effects. Such an approach is particularly important when classifying land uses that can vary widely in scale and nature, such as retail activities. Prohibited activity status is usually and should be reserved for activities where the adverse effects of the activity are so significant and unacceptable, and for which there is no mitigation that will adequately address those effects, to have the plan indicate that obtaining resource consent is reasonably acceptable or likely. Case law also directs that prohibited activity status may be appropriate if there is a need to act on a precautionary basis where an activity could potentially create significant adverse effects but there is insufficient information to be able to adequately assess the effects.³⁷

3.48 Mr Schofield added that:

The decision to use prohibited activity status should therefore be backed with strong evidence of its necessity, including justification through objectives and policies. Therefore, while I acknowledge that the prohibited activity status provisions were approved by the Environment Court as part of PC73, I consider the plan change request has some merit in terms of its statement that the use of prohibited activity status to manage some forms of retail activities is inappropriate.³⁸

3.49 **Mr Poul Israelson**, the Technical Director of the Wellington Office of Harrison Grierson, is a planner with 22 years' experience. He presented evidence on behalf of KCAHL. Mr Israelson told us that he was of the same opinion as Mr Schofield with regard to the use of Prohibited Activities in District Plans, adding that he did not:

... consider that prohibited activity status is suitable for the management of adverse effects that may result from business activity and noise where effects are known and manageable. Prohibited activities are generally used to prevent activities from being considered by a council where it is known that significant adverse effects will occur and that the level of such effects are so significant to be irreversible.³⁹

3.50 A contrary opinion to that of Mr Schofield and Mr Israelson was advanced by **Mr Christopher Hansen**.

3.51 Mr Hansen, a Director and Principal Planning Consultant with Chris Hansen Consultants Limited, is a planner with over 34 years' experience. He presented evidence on behalf of Coastlands Shoppingtown Limited, Sheffield Properties Limited, Ngahina Development Limited, Alpha Corporation Limited and Mr Richard Mansell.

3.52 Mr Hansen told us that in his opinion Prohibited Activity status was a legitimate planning tool that is available to Council to restrict the types of retail activities proposed by PPC84 for reasons confirmed by the Courts.⁴⁰

³⁷ S42A Report, 5.40 at p35.

³⁸ Op cit, 5.41 at p35.

³⁹ Poul Israelson, Evidence in Chief, 5.1 at p5.

⁴⁰ Christopher Hansen, Evidence in Chief, 4.4 at p6.

3.53 Accepting that a key planning issue was whether Prohibited Activity status was appropriate for retail activities in the Airport Mixed Use Precinct, Mr Hansen drew our attention to Coromandel Watchdog v Ministry of Economic Development [2007] NZCA 473] adding that case law can provide some guidance when the use of prohibited activity status is appropriate. He then listed the following six 'situations' where Prohibited Activity status may be appropriate:

- (a) where the council takes a precautionary approach;
- (b) where the council takes a purposively staged approach;
- (c) where the council is ensuring comprehensive development;
- (d) where it is necessary to allow an expression of social or cultural outcomes or expectations;
- (e) where it is intended to restrict the allocation of resources; and
- (f) where the council wishes to establish priorities.⁴¹

3.54 Mr Hansen, commenting on the "Adequacy of the PPC84 Application", said that:

The PC84 request took the view that the change in activity status sought will have no environmental effects, and that any environmental effects that might arise from a future land use the subject of an application can be dealt with through the consenting process. The s32 evaluation that was incorporated into the request therefore assessed the alternatives to the activity status proposed, and determined prohibited activity status is not the 'most appropriate'. No environmental effects were identified or assessed.

While at first glance such a view might be seen as logical and defensible, I do not consider it has planning merit in this case for the reason that the request will enable activities to occur that are currently prohibited deliberately, and for a reason. PC73 incorporated the prohibited activity status in response to significant effects and risk being identified on achieving the Consolidated Approach adopted by the Council in response to the outcomes for the PTC agreed with the community.⁴²

3.55 Mr Hansen had earlier in his statement told us that he considered it important to:

... consider PC84 in a planning context by reviewing the history that culminated in the approach incorporated into the operative District Plan. In particular, the Vision Statement developed as part of the 'Kapiti Coast: Choosing Futures' process between 2003 - 2005 established a set of outcomes for the Paraparaumu Town Centre (PTC) agreed to with the community. This Vision Statement led to the development of the 'Consolidation Approach' that has been incorporated into the ODP to ensure competing commercial and retail activities are restricted outside of the PTC. In my opinion, this provides an important context that expresses a social expectation of how the planning mechanisms in the District Plan will achieve the outcomes agreed to with the community for the PTC.⁴³

⁴¹ Op cit, 9.17, p19.

⁴² Op cit, 11.10, p24.

⁴³ Op cit, 11.1, p22.

3.56 Returning to the six reasons he had cited from case law (refer 3.53 above), Mr Hansen expressed the following opinions:

- (a) precautionary approach: this is an appropriate approach for Council to take in this situation where the details of the size of a department store or supermarket are unknown, and the effects are difficult to determine. The precautionary approach is essentially the status quo position, and is valid;
- (b) purposively staged approach to development: the ODP provisions for the Airport Zone take a purposively staged approach to the development within the Airport Mixed Use Precinct, and set thresholds with standards and conditions where retail GFA areas are met. PPC84 has not established that there has been a significant change in the retail traffic or urban form environment of Kapiti that would mean the thresholds included in the ODP are no longer valid and the prohibited status of specified activities should be changed;
- (c) comprehensive development: the retail activities PPC84 intends are premature and incompatible with the Consolidation Approach and outcomes for the PTC included in the Vision Statement agreed to with the community;
- (d) expression of social or cultural outcomes: prohibiting department stores, supermarkets and small-scale retail in the Airport Mixed Use Precinct is totally consistent and implements the Vision Statement and Consolidated Approach to the ODP and is the expectation of the community; and
- (e) establish priorities: it is valid for prohibited activity status to be applied to department stores supermarkets and small-scale retail in the Airport Mixed Use Precinct in order to ensure the priorities and wider social and economic outcomes of the PTC, recognised as a regionally significant centre, are preserved.

3.57 Drawing his comments on the appropriateness of Prohibited Activity status in the circumstances of the Airport Zone to a close, Mr Hansen told us that he considered prohibited activity status was appropriate for departments stores, supermarkets and fine grain retail in the Airport Mixed Use Precinct, because:

... I do not believe the effects of these activities can be 'conditioned out' through a consenting process. In other words, it is not clear to me what consent conditions could be put on a supermarket or department store or small scale retail that would mitigate retail, economic, traffic or urban form effects on the PTC. I note Mr Georgeson shares this concern regarding traffic effects and the need for infrastructure to mitigate effects. Any consent conditions on a non-complying or discretionary activity consent would need to be robust and effective, and I fail to see how the conditions could be formulated to address significant effects that are difficult to determine and mitigate against. ⁴⁴

⁴⁴ Op cit, 11.75, p48.

Discussion and Findings

- 3.58 Before recording our discussion and findings, we note that in response to our questions regarding the use of Prohibited Activity status in District Plans, none of the planning witnesses were able to identify any example of where Prohibited Activity status is employed in a District Plan to manage the location of retail activities; notwithstanding that many District Plans do employ measures to manage what is often described as 'out-of-centre' retailing. In other words, based on the answers we were given, the Operative Kapiti Coast District Plan may well be one of the very few, if not the only District Plan, that employs Prohibited Activity status as a 'method' to manage retail activities.
- 3.59 Firstly we record that we agree with Mr Schofield that Prohibited Activity status should be used sparingly and in situations where there is certainty of unacceptable (i.e. severe) adverse effects.
- 3.60 We have given careful consideration to Mr Hanson's evidence on the 'six situations' where Prohibited Activity status may be appropriate. Nevertheless, we are not persuaded that in the situation before use that Prohibited Activity status is necessary. Rather, we are of the opinion that adopting a Prohibited Activity approach to managing the effects of retail activities is a rather extreme approach, an opinion we consider is supported by the fact that (apparently) no other district plan adopts this approach.
- 3.61 Mr Hanson refers to the Vision Statement agreed to with the community and the expression of social and cultural outcomes or expectations. However, we consider it is pertinent to note that there was no broad-based concern expressed by the wider community. Rather, the only submissions were from trade competitors and parties allied to those trade competitors; that is, aside from the New Zealand Transport Agency.
- 3.62 In summary, we record that on balance, and having given careful consideration to the opinions expressed by the three planning witnesses, we do not consider that a compelling case has been made for the continuation of Prohibited Activity status for the retail activities currently listed in Rule D.9.1.6 of the Operative District Plan.
- 3.63 Nevertheless, for the further reasons we summarise below, we do accept that it will be necessary to ensure that any amended Plan provisions for the Airport Mixed Use Precinct incorporate appropriate measures that will enable a robust s104 assessment of future retail development, with the assessment focused on, inter alia, establishing the significance of any adverse effects on the role and function of the District's Centres, including, and in particular, the Paraparaumu Sub-Regional Centre.

Issue 4: Definition of Supermarket

- 3.64 During the course of the hearing there was a good deal of discussion around what constitutes a supermarket. In part this discussion arose as a result of the presence of an existing New World retail store in the Airport Mixed Use Precinct, which a number of parties referred to as a 'supermarket'.

3.65 We were advised that the New World retail store was approved as a “*retail grocery outlet (maximum gross floor area of 1,500m²)*” as a Non-Complying Activity under Rule D9.1.5. The Decision Report on the application (we had requested a copy of the report) confirmed that the proposed retail grocery outlet was not a supermarket (as defined by the Airport Zone rules) because the gross floor area did not exceed 1,500m².

3.66 The definition of supermarket in the Operative District Plan is:

*Supermarket means an activity of more than 1,500m² 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.*⁴⁵

3.67 In his ‘matters arising’ closing statement, Mr Schofield recommended altering the definition of supermarket as follows:

Supermarket means an activity of more than 1,500m² 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 1,000m².

Discussion and Findings

3.68 We agree that the definition of supermarket should be amended as recommended by Mr Schofield.

3.69 We accept that with this amendment the existing New World will constitute a “supermarket”. Consequently, any additional (i.e. second) supermarket in the Airport Zone will require consent as a Non-Complying Activity; whereas any expansion of the existing 1,500m² New World would require consent as a Discretionary Activity. In the circumstances of the Airport Zone, we consider that this consenting regime is appropriate.

Issue 5: Economic and Retail Effects

3.70 Putting to one side trade competition effects, a major issue that we had to address was whether (or not) the enablement of additional retail activities at the Airport would result in significant economic and retail effects, effects that could in turn give rise to a significant diminution in the vitality and viability of the Paraparaumu Sub-regional Centre and the District’s town centres, to a point whereby the public amenity of those centres would be significantly eroded.

3.71 We received written evidence from experts on behalf of Council, KCAHL and the submitters as follows:

⁴⁵ The definition was introduced through Plan Change 73 (21/01/10).

Council

- Philip Osborne (economics)
- Tim Heath (retail)

KCAHL

- Fraser Coleman (retail)

Submitters

- Mike Copeland (economics)
- Dr John Small (retail)

3.72 The evidence was extensive and diverse. It is not possible therefore to provide more than a summary of the principal conclusions reached by the individual experts.

3.73 **Philip Osborne** is a senior economist with Property Economics a specialist property and retail economics consultancy engaged by the Council to provide advice to the Council's Section 42A report author, Robert Schofield.

3.74 In his report dated December 2016, which was appended as Appendix 3 to the Section 42A Report, Mr Osborne opined that:

Kapiti currently exhibits signs of 'commercial sprawl' with businesses being attracted to fringe locations outside of the PTC and in fact many centres. As previously stated, although this may be beneficial to these individual businesses within the current Kapiti economic environment, these locational decisions will, and have, impact upon Kapiti Coast's overall efficiency, productivity and employment rates. ⁴⁶

3.75 Elsewhere in the report under the heading "PDP Hearing Response to KCAHL Submission" Mr Osborne further opined that: ⁴⁷

The retail and economic analysis indicates no additional retail enablement should be provided at the airport above what is already consented. Further proliferation of retail and commercial office activity at the airport,

⁴⁶ Kapiti Coast Airport Plan Change 84: Economic Overview, Property Economics, December 2016, p12.

⁴⁷ Although the Panel considered it was not appropriate for Mr Osborne to 'conflate' comment on KCAHL's submission on the PDP, given that the report was to address PPC84, which was an plan change to the Operative District Plan and not the PDP, it nevertheless seemed to us that Mr Osborne may well have had reached a similar conclusion to the further enablement for retail activities under PPC84.

*given it services the same market as the PTC, can only serve to dilute the PTC and undermine its redevelopment and improvement in offer and environment being encouraged in the PDP.*⁴⁸

3.76 **Tim Heath** is a Director of Property Economics and an expert in strategic property research. He was the author of the December 2016 report “Kapiti Coast Airport: Private Plan Change 84” which was appended as Appendix 2 to the Section 42A Report. The Report was described as providing an assessment of the “*retail economic merits of PC84*”.

3.77 Mr Heath concluded, inter alia, that:

- (a) Prohibited Activity status for department stores was a “*hardline*” approach, adding that he was “*comfortable with the non-complying activity status proposed*”;
- (b) from an economic perspective it would be more efficient to allow the existing New World to expand if and when required to ensure a portion of market growth can be accommodated within the existing store; and
- (c) regarding the request for smaller retail stores to be classified as Discretionary Activities, his retail and economic analysis concluded that no additional retail enablement should be provided at the Airport above what is already consented.⁴⁹

3.78 Although a separate report from that prepared by Mr Osborne, Mr Heath’s report included the same comment as that included in the Osborne report and quoted in paragraph 3.753 above.

3.79 We accept that **Mr Schofield** as the s42A report author was entitled to draw on the advice provided by the Property Economics advisors and he did so in the section of his report headed “Management of Retailing Activities” at pages 35 through 39.

3.80 Firstly, in what can best be described as a ‘setting the scene’ statement, Mr Schofield recorded that:

The ODP’s objectives and policies recognise Kapiti Airport as a regionally strategic infrastructure asset, a significant resource for aviation and non-aviation activities, and as important for the economic development of the District. The Airport Zone policies and rules in the ODP support these aims by recognising and providing for the multiple uses and roles of this area and its infrastructure. The provisions enable existing and new aviation activities and aviation related services to be maintained and enhanced. The provisions also provide for a range of commercial and other non-aviation employment/business generating activities where this is consistent with the ODP objectives and policies for business activities and centres. Retail and commercial activities are limited in scale, location and type within the Airport Zone to ensure they do not

⁴⁸ Op cit, p23.

⁴⁹ Kapiti Coast Airport Private Plan Change 84, Property Economics, December 2016, p18.

cause significant adverse effects; in particular, on the role and function of the District's centres hierarchy, particularly the vitality and viability of the Paraparaumu town centre, and on the transport network. ⁵⁰

[our emphasis]

- 3.81 At paragraph 5.45 of his Section 42A report Mr Schofield confirmed that the advice supplied to Council by its economic [and traffic] advisors urged a:

... high level of caution considering the enablement of further development of retail activities within the Airport Zone (i.e. beyond the existing provisions), given the significant adverse effects that further development of these activities in this location would have on the Paraparaumu Sub-regional Centre ...

adding that:

... both sets of experts advise that Council take a firm stance on the request to expand the potential for significant amounts of further retail development via an amendment to the prohibited activity rules. ⁵¹

- 3.82 Referring specifically to retail effects, Mr Schofield recorded that Mr Heath was comfortable with Non-Complying Activity status for one department store and that the existing supermarket should be enabled to expand to allow its more efficient use; but that Mr Heath was recommending that small grocery retailing stores should be Non-Complying.

- 3.83 At paragraph 5.53 of the Section 42A report, Mr Schofield recorded that:

Considering the changes sought in the round, while I acknowledge that a prohibited status is difficult to justify for some retail activities in the Airport Zone, I consider that given the economic and traffic advice provided by Council's experts on this matter, the further enablement of retail activities in the Airport Zone as sought under PC84 could have significant and unacceptable adverse effects in terms of the objectives and policies of the ODP and the PDP. I therefore consider it appropriate for the ODP to retain a higher level of control over such activities to impose a high level of rigour in assessing the effects of proposals. ⁵²

- 3.84 Mr Schofield then advised that:

... in response to the comments of submitters, and on the basis of the expert evidence provided on this matter, in relation to retailing activities, I would recommend making several amendments to PC84

- 3.85 In summary, the amendments recommended by Mr Schofield were:

⁵⁰ Section 24A Report, 5.38 at page 35.

⁵¹ Op cit, para 5.47, p36.

⁵² Op cit, para 5.53, p37.

- (a) deletion of the prohibited activity rule for supermarkets and its replacement with a full discretionary rule for one only supermarket in the Airport Zone, with any additional supermarkets being a Non-Complying Activity. Mr Schofield noted that this change aligned with the change sought by PPC84;
- (b) providing for one department store as a Non-Complying Activity and more than one department store as a Prohibited Activity, again noting that this aligns with the change sought by PPC84; and
- (c) deletion of the Prohibited Activity rule for more than one store between 151m² and 1,500m² GFA that retails groceries or non-specified food lines and its replacement with a Non-Complying Activity rule. Mr Schofield noted that this recommendation differed from the PPC84 request that sought such uses to be classified as Discretionary Activities.

3.86 Mr Schofield said that in his view:

... the recommended rule amendments maintain consistency with the ODP's approach to limiting the type and extent of retail activities within the Airport Zone in order to maintain the role and function of the District's Centres, particularly the Paraparaumu Sub-Regional Centre. ⁵³

3.87 In his opening statement at the commencement of the hearing Mr Schofield had told us that:

It is correct that the Council's traffic and retail economic advisers have significant concerns about the potential effect of the possible establishment of the retail activities that PC84 seeks to provide through the resource consent process. The critical question at the heart of the requested plan change is whether these concerns are such that warrant the continuation of prohibited activity status, or whether the resource consent process would provide a sufficiently rigorous enough route to address such concerns, to ensure that applications are declined where the adverse effects could not demonstrably be able to be avoided, remedied or mitigated.

3.88 After receiving the Council's evidence we did have some concerns about an 'apparent dis-connect' (as we saw it) between some conclusions reached by the expert economic and retail advisors and Mr Schofield's recommendations. Accordingly, we issued Minute 3 in which we noted that:

The Panel anticipates that Mr Schofield will respond to a number of matters that have been raised during the hearing. Without prescribing what those matters will be, a key matter for the Panel will be Mr Schofield's 'reconciliation' of his recommendations with the technical evidence produced on behalf of the Council by Mr Heath, Mr Osborne and Mr Wignall. ⁵⁴

⁵³ Op cit, para 5.58, p39.

⁵⁴ Hearing Panel Minute 3 issued on 23 February 2017, para 21, p3.

3.89 The Minute also requested that both Mr Heath and Mr Osborne confirm that:

...the evidential basis for the conclusion that some retail activities currently listed as Prohibited Activities should be enabled as either Discretionary Activities or Non-Complying Activities, notwithstanding the conclusion that:

The retail and economic analysis indicates that no additional retail enablement should be provided at the airport over and above what is already consented. ⁵⁵

3.90 In reply to our directions, **Mr Osborne** stated, inter alia, that in his opinion:

" ... there is limited risk in moving the activities proposed from Prohibited to Non-Complying. The risks associated with dislocated retail activity, and the unhealthy competition of centres that represent significant economic assets to the wider community, can I believe be assessed through a non-complying activity status while still safeguarding against incremental effects through recognition of the underlying objectives of the Plan". ⁵⁶

3.91 In his closing **Mr Heath** told us that:

"Retail is a dynamic and very competitive market where constant change and reinvention is required to maintain performance. As such I cannot conclude any retail application in the future will be 'bad' or generate adverse effects, but am of the view that based on current information and formats, any additional retail opportunity sought at the airport needs to be thoroughly tested, and this in my view is best done through the Non-Complying Activity status, which also sends a clear signal to the market that securing additional retail consents at the Airport will be difficult and have a very high threshold to reach.

Discretionary Activity status is my view (sic) is a more permissive planning status that indicates additional retail activity is considered alright at the airport as long as a few defined assessment criteria can be satisfied. This in my view goes too much the other way (from Prohibited status) and would encourage retail applications at the airport with a lower threshold to reach (comparatively to Non-Complying) and where zone integrity is often not considered - just effects. ⁵⁷

3.92 Mr Heath stated further that in his opinion:

... Non-Complying Activity status for retail activity in the Airport Zone cannot automatically be considered as 'enabling', or 'supporting' additional retail activity in the Airport Zone. To the contrary, and as mentioned

⁵⁵ Op cit, para 13, p2.

⁵⁶ Philip Osborne, 17 March 2017, Economic Response to Hearing Panel Minute 3, p1.

⁵⁷ Tim Heath, 17 March 2017, Retail Response to Hearing Panel Minute 3, p1.

earlier, I consider a Non-Complying Activity status a difficult threshold to break through (particularly given the background context within Kapiti and the level of land supply available for such activities in the PTC).⁵⁸

- 3.93 **Mr Schofield** in his Closing Statement advised us that he did not consider that there was a 'disconnect' between the conclusions of the Council advisers on retail economics and the recommendations in the Section 42A report, adding that:

I consider there are insufficient grounds to retain the current prohibited activity status for the subject activities; instead I am of the view that a robust resource consent process is required to enable the Council to determine on a case-by-case basis the merits of any proposal.

In my opinion, the non-complying gateway tests under s104D provide a sufficiently robust process to enable future decision-makers to assess the effects, to make a judgement about consistency with objectives and policies, and to decline or grant the consent as appropriate. Such a process would be executed on a staged basis, as development at the Airport proceeds, such that the cumulative effects can be revised in the event that any new activities are proposed.⁵⁹

- 3.94 On the point of any apparent 'disconnect' between the advice of the technical advisors and his recommendations, Mr Schofield told us that there was :

... no disconnect between the advice of the Council's technical advisors and the recommendations contained in the s42A report, and the strongly worded advice of Council's' traffic and economic advisors was fundamental to informing my position on these matters. As the reporting planner advising the Council, I have taken into account their advice as it might best apply to the planning framework and recommend what I consider the most appropriate classifications, drawing on my planning experience and expertise.⁶⁰

- 3.95 In the end, Mr Schofield recommended the following amendments to the Airport Zone rules in the ODP:

- only one supermarket as a Discretionary Activity, with additional supermarkets treated as Non-Complying Activities;
- one department store as a Non-Complying Activity, with any additional department store remaining as a Prohibited Activity; and
- more than one store of between 151m² and 1,500m² GFA that retails groceries or non-specified food lines treated as Non-Complying Activities.

- 3.96 Turning now to the evidence of KCAHL and the submitters.

⁵⁸ Op cit, p2.

⁵⁹ Robert Schofield, Council's Response to Matters Arising, p2.

⁶⁰ Op cit, p3.

Kapiti Coast Airport Holdings Limited

- 3.97 Two witnesses presented evidence on behalf of KCAHL in relation to the retail activities in the Airport Zone, being Mr Fraser Coleman (retail economist) and Poul Israleson (planner).
- 3.98 **Mr Fraser Coleman**, the managing director of Insight Economics an Auckland-based economics consultancy, is an economist who has 20 years' commercial experience, the last 17 of which he has worked as an economic consultant.
- 3.99 Mr Coleman's principal conclusion was that the changes sought by KCAHL would not have significant adverse effects, but would deliver a range of benefits.
- 3.100 Much of Mr Coleman's evidence was directed toward explaining why he came to a different conclusion to that reached by the Council's economic and retail advisers, with a particular focus on the rules governing grocery and non-specified food retail stores between 151m² and 1,500m² GFA.
- 3.101 It appeared to us that a key point Mr Coleman wished to make was that Mr Heath failed to take into account the 'convenience nature' of these small-scale food retailing store types. He told us that in his opinion:

Mr Heath's position appears to overlook the convenience nature of the retailing in question. Instead, he appears to assume that the store types covered by this aspect of the relief sought serve a comparison shopping function. This is not the case, however.

There is widespread acceptance amongst economists and retail analysts that convenience retail like that in question should be distributed widely - not confined to centres - because doing so increases consumer choice, promotes competition, and improves accessibility.

In other words, there would be clear social and economic benefits from allowing such retail activities to establish outside the Town Centre, and the operative District Plan even notes this itself (by requiring a consolidation of retail activities except those that provide a convenience function).⁶¹ As such, the extension

⁶¹ The footnote reference was Mr Coleman's. He drew our attention to Objective 3.2 and Policy 3.2.1 of the operative District Plan, which are:

Objective 3.2: Retain and enhance the vitality and viability of the District's main centres at Paraparaumu, Waikanae and Otaki as part of an economically and socially strong community.

Policy 3.2.1: Ensure retail activities (other than small scale convenience shopping for day to day needs) is located within the District's main centres and that development of retail activities enhances the District as a place that is accessible, healthy and safe for pedestrians and cyclists.

of grocery and non-specified food lines stores to the Kapiti Landing site is a more appropriate means to achieve the objective and policy (by ensuring that convenience retail is spread throughout the District, rather than being centralised in town centres).⁶²

3.102 Mr Coleman concluded the point with the further comment that:

As a result the lack of conflict between those activities and those which occur (and are encouraged to occur) at the Town Centre, the proposed relief for grocery and non-specified food items is also a more appropriate means of achieving Objective 19.1 and Policy 19.1.2 (providing for commercial activities in the Airport Zone), whilst not undermining the role and function of the Town Centre, consistent with Objective 19.2 and Policy 19.2.2 of the operative District Plan.⁶³

3.103 Mr Coleman concluded by confirming that he supported Discretionary Activity status for such store types (as requested by KCAHL) and not Non-Complying Activity status as recommended by Mr Schofield.

3.104 **Mr Poul Israelson**, KCAHL's planner, supported Mr Coleman's position.

3.105 Mr Israelson confirmed that the only difference in position between himself and Mr Schofield concerning the provisions for retail activities in the Airport Zone was in relation to the activity status for the grocery and non-specified food retail stores between 151m² and 1,500m² GFA. He confirmed his support for the Plan Change request for Discretionary Activity status, whereas Mr Schofield recommended Non-Complying Activity status.

3.106 In support of his position, Mr Israelson told us that he considered it was:

... important to recognise that an application for a discretionary activity may be granted or refused for any resource management reason. An application for resource consent for a discretionary activity needs to be fully assessed in accordance with section 104 and Schedule 4 of the RMA. This includes an assessment against the relevant provisions of any planning document, including the objectives and policies of the Operative or Proposed Plan; Regional Policy Statement; National Policy Statements or Standards, and Part 2 of the RMA. By applying discretionary activity status, I consider there is more than sufficient scope for the Council to assess and manage the potential effects of the activities in question".⁶⁴

3.107 Mr Israelson told us that he considered the 'key' question' was: when is it appropriate to apply either discretionary or non-complying activity status? Noting that the ability to establish retail activity for groceries or non-specified food lines, albeit with restrictions on GFA, already exists at Kapiti Airport, Mr Israelson told us that he considered that:

⁶² Fraser Coleman, Evidence in Chief, p7.

⁶³ Op cit, p8.

⁶⁴ Poul Israelson, Evidence in Chief, p6.

... the primary factor that should determine the status of activities in question is the potential level of adverse environmental effects that they may create. It cannot be the activities themselves as they are already provided for in the zone in some form or another. In my opinion, it is a question of at what point will the effects of these activities potentially become significantly adverse? It is this point that should be the trigger between discretionary and non complying activity status. ⁶⁵

- 3.108 Drawing on Mr Coleman's evidence relating to the convenience nature of stores between 150m² and 1,500m² GFA, and the potential effects associated with those stores, Mr Israelson told us that he considered the appropriate point to make in relation to the differentiation between Discretionary and Non-Complying Activities is:

... when the effects of a particular activity are unknown or the effects have the potential to be significant.

- 3.109 Accepting Mr Coleman's evidence that potential effects would not be significant, Mr Israelson confirmed that he considered it appropriate for such stores to be classified as Discretionary Activities and not (as recommended by Mr Schofield), Non-Complying Activities.

- 3.110 We next turn to the evidence presented on behalf of the submitters from the following witnesses:

- Mr Michael Copeland (economics);
- Dr John Small (retail); and
- Mr Christopher Hansen (planning).

- 3.111 Firstly, we record that Mr Copeland's and Dr Small's evidence was on behalf of two submitters: Alpha Corporation Limited and Mr Richard Mansell. On the other hand, Mr Hansen's evidence was on behalf of five submitters, the above two plus the three parties that the Environment Court deemed to be trade competitors, namely Coastlands Shoppingtown Limited, Sheffield Properties Limited and Ngahina Developments Limited.

- 3.112 **Mr Copeland's** extensive 46 page brief of evidence can, in our view, be adequately captured by citing his conclusions, which were:

13.1 PC84 will not deliver the economic benefits claimed by the requestor - i.e. it will not lead to:

- (a) an increase in the size of the local market;*
- (b) reduced travel time and cost for local shoppers;*
- (c) additional employment opportunities within the District; and*
- (d) greater retail competition.*

⁶⁵ Op cit, p7.

13.2 *PC84 will lead to the earlier efficient utilisation of the airport land, but this will be at the expense of efficient utilisation of other land within the District. This is not a district-wide benefit.*

13.3 *PC84 will make it more likely that supermarkets and department stores - i.e. 'anchor stores' will be developed on the Airport Zone land. This will lead to a more dispersed pattern of development within the District leading to reduced agglomeration and amenity benefits and increased transport and infrastructure costs. Based on Mr Small's evidence and the arguments and analysis presented in the Property Economics reports, the adverse economic effects will be significant.*

13.4 *PC84 is not consistent with 'people and communities economic wellbeing' or the 'efficient use and development of natural and physical resources'.⁶⁶*

3.113 **Dr Small** described his evidence in the following terms:

This is an economic analysis of proposed plan change 84 (PPC84) submitted to the Kapiti Coast District Council (KCDC). I have empirically modeled the likely effects of PPC84 on the Paraparaumu Town Centre (PTC), focusing initially on the diversion of retail trade and then drawing inference from that diversion as to the likely effect on public benefits including amenity benefits at the PTC over the next few years.⁶⁷

3.114 Dr Small told us that his principal conclusions were:

- (a) the PTC would lose 21% of its retail turnover if PPC84 was approved; and
- (b) the loss of 21% of its patronage (i.e. 'trade diversion' from the PTC to the Airport) would significantly reduce the PTC's public benefits and amenities.

3.115 Consequently, it was Dr Small's opinion that the:

... main economic question at issue is whether PPC84 is likely to have a significant effects on the public benefits and amenities currently provided in and by the Paraparaumu Town Centre (PTC).

3.116 Dr Small told us that in his opinion the:

... clear intent of PC84 is to allow KCAHL to add extra anchors in the form of a supermarket and a department store, which would expand the demand of KCAHL's retail space ...

adding that:

⁶⁶ Michael Copeland. Evidence in Chief, p46.

⁶⁷ Dr John Small, Evidence in Chief, p3.

This would significantly advance the timing of retail development at the airport while also changing the retail mix. ⁶⁸

[Dr Small's emphasis]

3.117 If PPC84 was approved, Dr Small was of the opinion that:

... the airport would become a full-scale competitor to the PTC except in respect of Council activities. It would have retail anchors for three major categories: hardware, supermarkets and department stores. With these in place it would attract a wider variety of smaller, fine-grained tenants. ⁶⁹

3.118 Referring to the commercial impact on the Paraparaumu Town Centre, Dr Small's conclusion was that "*PC84 would significantly undermine the commercial base of the PTC*". He also told us, without any qualification, that "*a supermarket will close at PTC*".

3.119 **Mr Chris Hansen**, the submitters' planning witness, advised us that Mr Copeland's and Dr Small's findings "*have informed my planning assessment relating to the retail effects of PC84*".

3.120 It seemed to us that Mr Hansen's primary 'planning assessment' conclusion was that PPC84 would not, in his opinion, be effective in achieving the objectives of the Operative District Plan, including those objectives which focus on maintaining and enhancing the vitality and viability of the District's main centres, including the Paraparaumu Town Centre.

Discussion and Findings

3.121 Given that all of the submitters opposing PPC84 were in one way or another 'associated' with the Paraparaumu Town Centre, it is perhaps not surprising that a major thrust of their evidence was on retail and economic effects.

3.122 Nevertheless, and notwithstanding that some of the submitters are declared trade competitors, we are required to consider the degree of effect and establish whether any potential retail and economic effects could result in a significant diminution in the vitality and viability and therefore public amenity of the Paraparaumu Town Centre. Any such effects would not be trade competition effects.

3.123 As has been the case in many council hearings and Environment Court cases where retail effects are an important consideration, and as is apparent from our summary above, we received extensive and conflicting evidence.

⁶⁸ Op cit, 6.14.2, p9.

⁶⁹ Op cit, 6.15, p9.

- 3.124 After giving careful consideration to this evidence, we reached the position where we have concluded that while there could well be adverse effects on the vitality and viability of the Paraparaumu Town Centre, if there was additional retail activity of the type sought by PPC84 located at the Airport, we have not been able to conclude that such effects would reach the high threshold of certainty of significant adverse effects [our emphasis] that we believe should apply to Prohibited Activities. Certainly, PPC84 itself would not (directly) give rise to such effects.
- 3.125 If PPC84 is made operative, and if at some time in the future a resource consent application is made for a supermarket or department store, then we are in no doubt that a primary focus of the necessary effects assessment (s104/s104D and Schedule 1) will be the degree of impact on the vitality and viability of the Paraparaumu Town Centre. In our opinion this is when such an assessment should be undertaken - namely, when the 'facts' of a proposed retail development are known.
- 3.126 Before concluding this section, we refer back to Dr Small's statement that a supermarket would close at the Paraparaumu Town Centre if the Airport was to *"become a full-scale competitor of the PTC"*. We consider that such an outcome (i.e. closure of an existing supermarket) would be a trade competition effect.
- 3.127 If, on the other hand the closure of an existing PTC supermarket was to give rise to other stores (also) closing, then a more widespread closure of stores might lead to a diminution in overall vitality and viability and therefore public amenity of the PTC. However, the evidence presented on behalf of the submitters does not lead us to that conclusion. In our opinion, such a conclusion could only be reached on the basis of an assessment of an actual development - for example, what might be the size of an expanded or additional supermarket, or a department store for that matter? This brings us back to our previous conclusion that any such s104 assessment would be part of the resource consent process and not the plan change process.⁷⁰

Issue 6: Traffic Effects

- 3.128 The Panel received written evidence from experts on behalf of Council, KCAHL and the submitters as follows:

Council:

Mr Don Wignall

KCAHL:

Mr Tim Kelly⁷¹

⁷⁰ We accept that some private plan changes can be based on a specific development such that specific effects can be more 'accurately' assessed. However, that is not the case with PPC84.

⁷¹ We record that although Mr Kelly prepared a pre-circulated brief of evidence he was unable to attend the hearing. Consequently, we were unable to 'test' Mr Kelly's evidence through our questions.

New Zealand Transport Agency:

Mr Alan Kerr

Ms Angela Penfold

Other Submitters:

Mr Mark Georgeson

- 3.129 In the Section 42A report Mr Schofield noted that one of the potential effects identified by submitters was that:

"The alteration of traffic patterns of a scale anticipated by PPC84 could have significant effects on the performance of both the strategic and local road network".

- 3.130 On behalf of the Council, Mr Don Wignall, of Transport Futures Limited, undertook an assessment of the Plan Change. Mr Wignall's report was attached as Appendix 4 to the s42A report, in which he advised that the purpose of his assessment was:

*... to review traffic, transport and access related issues raised by PC84, including representations by the applicant and submitters.*⁷²

- 3.131 Mr Wignall advised that the main points/conclusions of his review were:

- *Council remains firmly of the view that the operational (sic) DP thresholds, representing the commencement of key stages of development, remain appropriate and that threshold-based ITAs should be included as requirements in the PDP. The suitability of the thresholds to represent key stages of development have been confirmed through (earlier) plan change processes and incorporated into the operational (sic) DP.*
- *It is recognised that the Expressway will affect the precise timing of new infrastructure projects. For this reason, Integrated Transport Assessments need to be completed prior to Airport development occurring above defined thresholds.*
- *The purpose of the Expressway is to assist strategic 'longer distance (through) north and south traffic' movements and the Expressway will not relieve the local road network in the vicinity of the Airport. The Expressway does not represent a "game changer", and does not obviate the need for development-related infrastructure investment (and other required measures).*

⁷² Don Wignall, Memo, 19 December 2016, PC84 - Traffic and Transport Issues, p1.

- *Based on forecasts of post-Expressway opening conditions, substantial increases in Airport development without additional infrastructure investment would cause levels of service on the local road network to decline substantially. This would also result in safety, amenity, accessibility and environmental problems.*
- *It is important that any infrastructure required in the future is identified and planned well in advance of network problems occurring, such as a notable decline in road network LOS performance. This requires ITAs to be undertaken in a timely manner and for appropriate actions to be taken following the identification of future infrastructure requirements (and other required measures).⁷³*
- *No technical transport evidence has been provided by KCAHL to justify why the proposed plan change PC84 either could or should be allowed.*
- *PC84 would have the effect of locating higher traffic generating activities, such as a department store, on Airport land. Analysis undertaken by Council has demonstrated that this would intensify traffic pressures, generate substantial adverse effects and potentially trigger the need to adjust other Airport thresholds in the operative DP and in the PDP.*

3.132 As noted above, **Mr Tim Kelly** KCAHL's traffic and transportation advisor prepared a statement of evidence which was circulated prior to the hearing. However, Mr Kelly was unable to attend the hearing.

3.133 In his tabled evidence, Mr Kelly acknowledged that:

There is no disagreement between the parties that the activities for which a change in status is sought would have associated traffic generating characteristics and effects. However, for these activities to have such effects they firstly require consent which, in turn, would require detailed assessments of transportation impacts and a demonstration that any adverse effects upon the operation of the road network would be appropriate (or able to be avoided, remedied or mitigated). Otherwise consent would not be granted.⁷⁴

3.134 Referring to the Section 42A report, Mr Kelly stated that:

The conclusions of the supporting KCDC traffic assessment raise concerns regarding the traffic impacts associated with the change in activity-mix which would be likely to eventuate. For example:

PC84 would have the effect of locating higher traffic generating activities, such as a department store, on Airport land. Analysis undertaken by Council has demonstrated that this would intensify traffic pressures, generate substantial adverse effects ...⁷⁵

⁷³ Op cit, p4.

⁷⁴ Tim Kelly, Evidence in Chief, p9.

⁷⁵ Memo from Don Wignall to Robert Schofield, 19 December 2016 (paragraph 2.21).

As I have described, the point in contention is not whether the activities in question would generate more traffic activity, but whether appropriate controls remain in place to provide an opportunity for potential traffic effects to be reviewed. ⁷⁶

3.135 My Kelly concluded, inter alia, that:

- *PC84 will not itself give rise to any traffic effects as it will not give 'Permitted' or 'Controlled' activity status to any potential development; and*
- *KCDC will not lose any opportunities to assess and review the effects of development within the Airport area upon the operation of the transportation network - indeed such opportunities may be increased through the consenting process.* ⁷⁷

3.136 Two witnesses appeared on behalf of the **New Zealand Transport Agency (NZTA)**, Mr Alan Kerr and Ms Angela Penfold.

3.137 In its submission, the NZTA opposed PPC84 because of concerns regarding the traffic impact of activities on the MacKays to Peka Peka Expressway, particularly the Kapiti Road interchange, as well as on the local transport network.

3.138 At the hearing, however, the NZTA confirmed that it no longer opposed PPC84 and advised that the outcomes that it was now seeking were:

- *change to the policies for the Airport Zone to provide guidance and expectations around managing the traffic effects of activities PPC84 relates to;*
- *an activity status of Non-Complying for all supermarkets; and*
- *all other activity statuses as proposed by the s42A report.* ⁷⁸

3.139 Ms Penfold also confirmed that the NZTA accepted the reasoning in the s42A report explaining why Prohibited Activity status was inappropriate.

3.140 **Mr Alan Kerr** ⁷⁹ drew our attention to the importance of Kapiti Road as a key east-west link between the Paraparaumu Town Centre and Paraparaumu Beach, including its connections to the existing State Highway and the new Expressway, adding that:

⁷⁶ Tim Kelly, Evidence in Chief. p10.

⁷⁷ Op cit, p11.

⁷⁸ Angela Penfold, Evidence in Chief, p4.

⁷⁹ Mr Kerr is a transportation planner with 16 years' experience. He is currently employed by Beca Limited as a Technical Director

*The performance of Kapiti Road is critical to Paraparaumu unlocking the transport benefits expected from the Expressway.*⁸⁰

- 3.141 Noting that both Mr Wignall and Mr Kelly agreed that additional high traffic generating activities, such as supermarkets and departments, have potential to impact on the operation of Kapiti Road, and given the high level of sensitivity of Kapiti Road to additional traffic in this location, Mr Kerr advised that:

*... it is critical that any subsequent resource consent is able to be fully scrutinised and that developments with significant transport impacts can be restricted, or the effects mitigated.*⁸¹

- 3.142 **Ms Angela Penfold** is a senior resource planner within the NZTA's Planning and Investment Group. She has 15 years' experience, the past seven years of which have been with the NZTA.

- 3.143 The principal focus of Ms Penfold's evidence was the 'policy framework' against which future applications would be assessed. Her overall position is 'captured' in the following paragraphs:

18. In my view, the objectives and policies of the Airport Zone would carry the most weight in any subsequent resource consent application. While there are district wide objectives and policies, and other zones also have provisions of relevance, the Airport Zone provisions are the most directly applicable, having been developed with the airport in mind. Additionally, the Airport Zone policies address many of the wider issues, including traffic and the impacts on the Paraparaumu town centre.

*19. Traffic and the impacts on the Paraparaumu town centre appear to be the two biggest resource management issues being considered for PPC84. They are addressed under Policy 2 and Policy 5 of Objective 2, which I have laid out below. Both of the policies seem to have been written on the assumption that certain activities would not occur. In particular, they are silent on the activities under consideration via PPC84. This has not been an issue while those activities had prohibited activity status as resource consent applications were not possible, and therefore do not need to be tested against the policies. However, if PPC84 is going to remove the prohibited activity status, then the policy gap cannot remain.*⁸²

- 3.144 Referring to Policy 5 of the Operative District Plan (Airport Zone), which states:

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

⁸⁰ Alan Kerr, Evidence in Chief, p2.

⁸¹ Op cit, p3.

⁸² Angela Penfold, Evidence in Chief, p4.

Ms Penfold opined that the policy implies that the only transport issue is ensuring that development is linked to the timing of appropriate provision of infrastructure, which is not the case for department stores and supermarkets, adding that:

... at this point in time it is unknown how much capacity the transport network will have to accommodate these activities. ⁸³

3.145 Consequently, Ms Penfold told us that in her opinion Policy 5 *“provides no useful guidance to decision makers considering resource consent applications for supermarkets and department stores”*.

3.146 Ms Penfold also expressed concern about Policy 2 which addresses commercial activities. The policy states:

Commercial Activity: It is desirable that specifically identified retail and commercial activities are permitted, subject to specified threshold standards, so that the nature and scale of such activities does not undermine the role and function of the Paraparaumu Town Centre and is linked to development within the Airport Mixed Use Precinct.

3.147 Ms Penfold noted that the policy addresses only permitted retail and commercial activities which are listed in Rule D9.1.1(ii), noting further that the list of permitted retail activities does not include department stores or supermarkets.

3.148 Referring to what she described as *“Implications for Non-Complying Activities”*, Ms Penfold said that of particular concern was the application of the Section 104D ‘gateway tests’, which require decision-makers to be satisfied that either:

- the adverse effects of the activity will be minor; or
- the activity will not be contrary to the objectives and policies of relevant Plans.

3.149 Ms Penfold then told us that in her view, because Policy 5 (traffic) limits itself only to matters of timing and Policy 2 (commercial activity) limits itself only to permitted activities, it would be very easy to show that a resource consent application is not contrary to them, adding that in her opinion this is:

... because it is impossible to be contrary to issues which are not addressed. ⁸⁴

3.150 Ms Penfold said that the effect of leaving the policies unchanged negated the importance of the gateway tests, and therefore made *“the Non-Complying Activity status inconsequential”*.

⁸³ Op cit, p5.

⁸⁴ Op cit, p6.

- 3.151 As a consequence of her concerns, Ms Penfold submitted that the Operative District Plan policies would not provide suitable direction and would not enable an appropriate assessment of resource consent applications, adding that:

*This is particularly important for a plan change request such as this one, where the primary argument seems to be that subsequent resource consent applications will be subject to a full and thorough assessment.*⁸⁵

- 3.152 Drawing our attention to the recent High Court decision in *Davidson Family Trust v Marlborough District Council*, Ms Penfold told us that it was her opinion:

*... the closing of the policy gap is critical for ensuring development is appropriately managed at the Airport.*⁸⁶

- 3.153 Ms Penfold's recommended approach to close what she considered to be a 'policy gap' was to amend Policy 5 to read as follows:

Policy 5: Traffic Effects

Development within the Airport Zone shall ensure that:

- (i) any traffic effects are avoided, remedied or mitigated through the timing of development; and*
- (ii) in the case of department stores, supermarkets and stores of between 151m² and 1,500m² that retail groceries or non-specified food lines, development is further restricted to ensure that:*
 - (a) significant adverse effects on the safety and efficiency of the strategic transport network are avoided; and*
 - (b) the safety and efficiency of the strategic transport network is protected through the remedy or mitigation of other adverse effects.*

- 3.154 Ms Penfold also recommended that the explanation of Policy 5 should be amended to include:

In relation to the Airport, the Strategic Transport Network includes:

- *Kapiti Road;*
- *roads connected 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).*

⁸⁵ Op cit, p6.

⁸⁶ Op cit, p7.

3.155 In relation to 'commercial activity', Ms Penfold recommended a new policy, Policy 2A, being:

Commercial Activity: resource consent is required for the following activities:

- *Department stores*
- *Supermarkets; and*
- *Stores of between 151m² and 1,500m² gross floor area that retail groceries or non-specified food lines*

in order to ensure they avoid significant effects, and protect the role, function, vitality and viability of the Paraparaumu Town Centre through the remedy and mitigation of other effects. ⁸⁷

3.156 By inserting Policy 2A Ms Penfold considered that a policy framework is established whereby Policy 2 is implemented through Permitted Activity status for identified activities, and Policy 2A is implemented through Non-Complying Activity status for identified activities.

3.157 Ms Penfold was of the opinion that the recommended changes were 'on' the Plan Change as they were crafted to address activities subject to PPC84.

3.158 Finally, Ms Penfold told us that it was her opinion that supermarkets should be a Non-Complying Activity.

3.159 The final traffic witness was **Mr Mark Georgeson** who presented evidence on behalf of Coastlands Shoppingtown Limited, Alpha Corporation Limited, Sheffield Property Limited, Ngahina Development Limited and Mr Richard Mansell.

3.160 Mr Georgeson is a chartered professional engineer who for the past 25 years has worked as a traffic engineer with Traffic Design Group, practicing as a traffic engineering specialist throughout New Zealand.

3.161 Mr Georgeson's pre-circulated 44 page brief of evidence was the most detailed of all the traffic evidence that we received. Helpfully, Mr Georgeson prepared a Summary which he presented at the hearing and in which he summarised his evidence under the following three headings:

- Airport development and Private Plan Change 73;
- PPC84 and increased traffic; and
- effects on Kapiti Road and the Town Centre.

Airport Development and PPC73

3.162 Mr Georgeson told us that the traffic effects related to Airport Zone growth undertaken for PPC73 showed that even with low traffic generating activities developed within the Airport Mixed Use Precinct ("AUMP"),

⁸⁷ Op cit, p8.

significant new roading infrastructure was required to facilitate the increase in development trips on the network. It was his view (or understanding) that:

*To actively manage this growth, safeguards were put in place through PPC73 which included restrictions on high traffic generating retail developments, prohibiting department stores and supermarkets, so as to protect the network from becoming overwhelmed from significant escalations of development traffic.*⁸⁸

PPC84 and Increased Traffic

- 3.163 Noting that Mr Kelly (KCAHL's traffic adviser) accepted that traffic generation could increase from 310 to 672 peak hour vehicle trips with PPC84 in place, Mr Georgeson said that he considered the traffic increase could be closer to 800-900. Mr Georgeson explained that his higher figure was based on both a supermarket and department store developing within the AMUP, whereas Mr Kelly's estimate was based on a development scenario that included a department store but not a supermarket.

Effects on Kapiti Road and the Town Centre

- 3.164 Mr Georgeson told us that he agreed with a statement made by Mr Wignall (the Council's traffic adviser) that with PPC84 traffic added to the network "*substantial operational problems on the local road network*" would result, adding that he considered that the traffic effects arising from PPC84 would specifically lead to:

- *erosion of network capacity along Kapiti Road and its connecting roads and intersections, including the town centre;*
- *deterioration of accessibility and journey times across the network, including to/from the town centre;*
- *a need to bring forward new and unplanned infrastructure, to accommodate increased traffic levels; and*
- *leave consented developments, including those of the submitters, to take account of greater levels of mitigation in order to address the balance of traffic arising from PPC84.*⁸⁹

- 3.165 In concluding, Mr Georgeson told us that he considered there was a considerable risk that PPC84 and its intentions of enabling higher traffic generating activities at the AMUP, within established development thresholds, "*will significantly reduce LoS on Kapiti Road and will exert similar loss of traffic performance within the town centre*". He said that he did not consider that the s42A report recommendations would provide the necessary confidence to ensure that the performance of the network can be protected.

Discussion and Findings

- 3.166 It will be apparent from the above summary of the traffic evidence that although all the traffic engineers agreed that the level of traffic increases could be significant there was little or no agreement on other

⁸⁸ Mark Georgeson, Summary Evidence (14 February 2017), p2.

⁸⁹ Op cit, p4.

matters, including the timing of when such increases should be assessed - now as part of the Plan Change Request, or in the future when resource consent applications were made for 'actual' developments.

- 3.167 We accept that further retail development at the Airport will give rise to an increase of traffic movements to and from the Airport, and if the further development includes a second supermarket or a department store, it is almost inevitable that such increases will be quite significant.
- 3.168 Consequently, any process to enable an assessment of further retail development at the Airport needs to be robust.
- 3.169 However, for the same reasons as we recorded in relation to our assessment of economic and retail effects we have concluded that the appropriate time for the consideration and assessment of traffic effects associated with retail development at the Airport is when a resource consent application is made, rather than as part of this plan change process. To this end we adopt and agree with the advice of the Council's independent traffic engineer, Mr Don Wignall, who advised that:

**If PC84 is approved, then it should be substantially modified, as proposed in the s42A report to ensure that the adverse effects of higher traffic generating developments are either avoided or adequately mitigated.⁹⁰*

- 3.170 Although we discuss the issue of the Plan objectives and policies under Issue 10 below, we can also (at this point) confirm our agreement with Ms Penfold's conclusion that the policy framework needs to be more robust than that currently in the Operative District Plan, so as to ensure that there is clear direction on the need to ensure that significant adverse effects on the safety and efficiency of the strategic transport network (including Kapiti Road and the roads connecting to Kapiti Road) are avoided.

Issue 7: Urban Amenity Effects

- 3.171 **Mr James Lundy** a planner and urban designer with over 37 years' experience gave evidence on behalf of Coastlands Shoppingtown Limited, Alpha Corporation Limited, Sheffield Property Limited, Ngahina Development Limited and Richard Mansell. Mr Lundy is a director of the urban design firm James Lundy Urban Design Limited.
- 3.172 Mr Lundy opined that:

"... the special environment of the Kapiti Coast requires correct decisions to be made now regarding retail uses to ensure local and town centres are vibrant, diverse mixed use and transport orientated and that Paraparaumu remains a the major Centre for the Kapiti Coast communities. Allowing 'Out of Town retail

⁹⁰ Don Wignall, 15 March 2017- Memo to Private Plan Change Hearing Panel.

centres' to apply for resource consent to have anchor stores such as Department stores, or further supermarkets;

- *signals the ability for Kapiti Landing to become a Retail Node not anticipated in previous strategies and counter to both long term public and private investment in and around existing Centres;*
- *will weaken and damage the viability of existing Town Centres;*
- *will significantly damage the viability [sic] Paraparaumu Town Centre which requires commercial demand and has more than sufficient capacity to absorb more retail, commercial and residential apartments driven by location, community services and the transport hub;*
- *will degrade the existing Centres;*
- *will result in loss of revitalisation opportunities for Paraparaumu Town Centre that exists now;*
- *B. Hiller Space Syntax Theory indicates that commercial use will relocate alongside the expressway interchange thus undermining the purpose of the Expressway and strategy of enhancing the old State Highway as a local Arterial and "Main Street"; and*
- *will hinder and compromise Paraparaumu Town Centre's ability to function and succeed as a vibrant Town Centre.⁹¹*

3.173 When presenting a summary of his evidence at the hearing, Mr Lundy expressed surprise that neither KCAHL nor the Council had sought specialist urban design advice given the *"implications and significant effects on existing Town and Transit Centre development because of PPC84"*.

3.174 Mr Lundy told us that he failed to see any urban design merit in the case for dispersing anchor retail to the Airport land and undermining the transformation of the existing Town Centre. It was his opinion that for the Paraparaumu Town Centre to function and succeed as a vibrant town centre, department stores and supermarkets needed to remain as prohibited activities at the Airport, adding that:

"In my professional opinion, I do not consider that any conditions could be imposed on a new department store or supermarket that would protect Paraparaumu Town Centres vitality and vibrancy".⁹²

Discussion and Findings

⁹¹ James Lundy, Evidence in Chief, 3 February 2107, p6.

⁹² James Lundy Summary Brief of Evidence, 14 February 2017, 5.8 at p11.

- 3.175 We accept that Mr Lunday is an experienced urban designer with considerable direct experience on the Kapiti Coast. However, and notwithstanding his comment that he was surprised that no other party, including the Council or KCAHL, had sought specialist urban design advice, we have not found Mr Lunday's evidence to give us cause for concern to the point that we would recommend that the Plan Change be declined on urban design/urban amenity grounds.
- 3.176 We accept that 'urban amenity effects' could be the consequence of a significant diminution in the vitality and viability of the Paraparaumu Town Centre. However, and in the absence of being able to assess the effects of an actual development, it is at least uncertain as to what those effects might be, and how significant they might be. Therefore, and as we (also) have concluded in respect of economic and retail effects and traffic effects, we consider that such urban amenity effects would be assessed at the time of a resource consent application, as such effects would be the consequence of any significant diminution in a centre's vitality and vibrancy.

Issue 8: Noise Sensitive Activities

- 3.177 Although the primary focus of PPC84 was in relation to removing the Prohibited Activity status from specified types of retail activities, it also sought to remove Prohibited Activity status from:

Noise sensitive activities outside of the Air Noise Boundary not specifically provided for as a permitted activity^{93 94}

and requested that they be classified as Discretionary Activities instead. Noise sensitive activities within the Air Noise Boundary would remain Prohibited Activities.

- 3.178 The Section 42A report confirmed that no submission addressed this part of the Plan Change.
- 3.179 No expert witness presented evidence at the hearing. However, we did have access to two expert statements:
- (a) a report from Malcolm Hunt Associates, which was appended to the Section 42A report as Appendix 5; and
 - (b) reports prepared by Laura McNeill of Marshall Day Acoustics, which were attached to the evidence of Poul Israleson.

⁹³ Operative District Plan Rule D9.1.6(i).

⁹⁴ Noise Sensitive Activities means:

residential accommodation of all types, hotels, motels, pre-schools, schools, educational facilities, libraries, child care centres and hospitals.

- 3.180 We have not found it necessary to summarise the expert reports. Rather, and given that counsel for KCAHL agreed with the position ultimately reached by Mr Schofield the Section 42A Report writer, and given that there was no expert evidence recommending a different position to that recommended by Mr Schofield in his Closing Statement, we consider it is sufficient to cite the following passage:

*In the opening legal submission presented on behalf of KCAHL, a case was made in paragraphs 4.8 to 4.11 for making noise sensitive activities outside of the Air Noise Boundary (ANB) and inside the Outer Air Noise Boundary as non-complying activities, but outside the ONB but within the Airport Noise Effects Overlay (ANEAO) as discretionary activities. It was contended that this approach would be consistent with the management of noise sensitive activities in the residential areas around the Airport. The s42A report recommended that noise sensitive activities in the Airport Zone outside the ANB be made non-complying activities, including those parts of the Zone outside the ONB. I have been advised by the Council's noise expert, Mr Hunt, that the change sought by KCAHL is an appropriate amendment.*⁹⁵

- 3.181 We also note that Mr Israelson, the only planner aside from Mr Schofield to address the matter, endorsed the position reached, when he stated that:

*... I consider it appropriate that noise sensitive activities be provided for as discretionary activities when they are located outside of the Noise Notification Area contour contained in the ODP. However, I consider that non-complying activity status would be more appropriate where such activities are located between the Air Noise Boundary and the Noise Notification Area contour.*⁹⁶

Discussion and Findings

- 3.182 The Panel has accepted the recommendations of the two planners (Mr Schofield and Mr Israelson), recommendations that were informed by the expert noise evidence of Mr Hunt and Ms McNeill respectively.

- 3.183 Accordingly we recommend that the following provisions be made for noise sensitive activities in the Airport Zone:

Permitted Activities:

- Rule D.9.1.1(ii) Within the "Airport Mixed Use Precinct"
 - One hotel/motel activity
- Rule D.9.1 (v) Within all of the Airport Zone
 - Residential accommodation for those whose employment requires residence within the Zone.

Note: this is a current operative rule. PPC84 did not seek to change this existing provision

⁹⁵ Robert Schofield, Council's Response to Matters Arising, p17.

⁹⁶ Poul Israelson, Evidence in Chief, p9.

Discretionary Activities:

- Rule D.9.1.4(v) Noise sensitive activities between the Outer Noise Boundary and the Airport Noise Effects Advisory Overlay not specifically provided for as a permitted activity.

Non Complying Activities:

- Rule D.9.1.5(xi) Noise sensitive activities outside the Air Noise Boundary but inside the Outer Noise Boundary not specifically provided for as a permitted activity.

Prohibited Activities

- Rule D.9.1.6(i) Noise sensitive activities within the Airport Noise Boundary.

Issue 9 Positive Effects

3.184 As is apparent from the discussion so far, the focus of the submitter's evidence was on adverse effects. However, given that the RMA includes "*positive*" effects within the definition of effects, it is appropriate that we also have regard to the potential for positive effects.

3.185 On behalf of KCAHL **Mr Neil Donnelly** presented a statement of evidence which principally provided background to the Plan Change Request. Mr Donnelly, a qualified planner, is the General Manager of Resource Management at the Todd Property Group Limited. KCAHL is a wholly owned subsidiary of Todd Property.

3.186 Mr Donnelly told us that the airport land holding is approximately 125 hectares, of which 40 hectares is used for airport operations. He then said:

... even disregarding the 40 hectares used by airport patrons, the remaining 80-plus hectares not required for current or future airport operational needs represents the single largest urban land holding in the Kapiti District. It is therefore a significant resource that has the potential to greatly enhance Kapiti if managed in an appropriate fashion. ⁹⁷

3.187 Commenting that the airport land would never be "*a town centre in the traditional sense*" Mr Donnelly told us that it was his opinion that:

... Kapiti Landing has significant potential to be developed into at least a district-wide asset of value to the community, and potentially of sub-regional significance. Kapiti Landing is a significant piece of easily

⁹⁷ Neil Donnelly, Evidence in Chief, p1.

*developable land, owned by a willing investor, located mid-way between the town centre and the beach and will soon be easily accessible from the Expressway. To not recognise the potential of this in a planning sense would, in my opinion, represent a poor outcome. Planning as an exercise, in my view, is not solely about mitigating effects or directing land uses, but is necessarily proactive in nature and allows the capture of opportunity. The current prohibited activity status for supermarkets, department stores, grocery stores, and noise sensitive activities precludes some of these opportunities.*⁹⁸

3.188 Mr Connelly also told us that:

*... a cogent future for the 125 hectares centrally located within the District will not be known with any greater certainty without undertaking and completing what will be a complex master planning exercise. The resource management regime currently proposed to apply to the site, both in terms of site-specific provisions and wider district applicability, is not conducive to such an approach and I have been unwilling to commence such an operation in light of this. This is a large part of the reason why development to date is more reactive and ad hoc than is optimal.*⁹⁹

3.189 Mr Donnelly concluded by saying that:

*... all that KCAHL is trying to achieve through its private plan change is to recognise the potential of its role within the Kapiti community by unlocking prohibited activity status for a range of activities that will increase the quality of offering, without detracting from the role and function of the existing Paraparaumu Town Centre and other centres throughout the district.*¹⁰⁰

3.190 Not unsurprisingly, given that they opposed the Plan Change, none of the submitters made any comment on positive effects.

Discussion and Findings

3.191 We can fully understand KCAHL's aspirations to 'unlock' appropriate opportunities at the Airport, as we accept that such opportunities would enhance the overall economic viability and hence 'sustainability' of the Airport. However such positive outcomes or effects should not, as Mr Connelly accepts, be at the expense of another key Kapiti strategic resource, the Paraparaumu Town Centre.

3.192 In the end, we have not felt it necessary to give any significant weight to positive effects. Rather, we have found it necessary to determine whether or not removing Prohibited Activity status from specified retail, activities can be recommended. To this end, our focus has been on adverse effects given that Prohibited Activity status should (perhaps) only be imposed on activities that are very likely to result in significant and

⁹⁸ Op cit, p2.

⁹⁹ Op cit, p2.

¹⁰⁰ Op cit, p2.

unacceptable adverse effects. Given this focus, the issue of positive effects has not been a major consideration for us.

- 3.193 We accept that at the time of a resource consent application for a Discretionary or Non-Complying Activity it may be appropriate to identify positive effects resulting from further retail development at the Airport, notwithstanding that the primary focus will almost inevitably be on adverse effects given the s5(2)(c) RMA obligation to avoid, remedy or mitigate adverse effects.

Issue 10: Plan Objectives and Policies

- 3.194 Firstly, we record that PPC84, as initially requested by KCAHL, did not propose any change to any of the Operative District Plan objectives and policies. Thus, the conclusion that we must draw is that the Requestor (KCAHL) considered that the operative objectives and policies continued to be appropriate, notwithstanding the requested change in activity status for the specified activities.

- 3.195 **Mr Israleson** on behalf of KCAHL confirmed this when he told us that:

The fact remains that PC84 was deliberately drafted so that the potential effects of non-aviation activities would be assessed within the current policy framework through a resource consent process. ¹⁰¹ [our emphasis]

- 3.196 In pre-circulated evidence on behalf of the New Zealand Transport Agency, **Ms Angela Penfold**, a planner with 15 years' experience, expressed concern about the 'robustness' of the ODP policy framework, which she considered "*would not provide suitable direction and would not enable an appropriate assessment for resource consents*". ¹⁰²

- 3.197 In his opening statement and the commencement of the hearing, Mr Schofield advised that:

While I consider that the existing policy framework for both the Airport and Commercial Zones should be an adequate basis for decision-makers to use, and noting that applications have to be also assessed against the provisions of the PDP as well, I am not adverse to the suggestion of strengthening the policies as Ms Penfold recommends.

- 3.198 Mr Hansen also commented on the policy framework. He told us that he did:

... not consider the resource consent process is sufficiently robust to enable effects of a specific proposal will be address [sic] to be able to determine whether it is contrary to the objectives of the ODP

¹⁰¹ Poul Israelson, Evidence in Chief, 6.5, p10.

¹⁰² Angela Penfold, Evidence in Chief, 27, p6.

adding that:

I find it difficult from a planning perspective to accept that the ODP objectives and policies are fit for purpose for considering non-complying or discretionary activities that were prohibited in the ODP. ¹⁰³

- 3.199 After hearing the evidence, Mr Schofield in his Closing Statement stated that he accepted that the effectiveness of the Plan provisions could be improved by, inter alia:

Introducing a new policy under Objective 2.0 of the Airport Zone to strengthen the robustness of the policy framework and assist decision-makers in considering future resource consent applications.

- 3.200 The amended policy (Policy 2 under Objective 1.0) recommended by Mr Schofield was:

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 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.e.g. residential activity in some areas, offensive trades, certain retail/commercial activities etc), discretionary (e.g. work associated with heritage buildings) or controlled activities (i.e.e.g. external design, appearance and siting of buildings and associated development) to enable 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.~~

- 3.201 Mr Schofield commented that he did not believe that these amendments changed the management regime of the ODP, but rather better reflects the intent of the policy.

- 3.202 Mr Schofield also advised us in his closing reply that "he would accept the suggested policy changes recommended by Ms Penfold".

- 3.203 The amended Policy 5 under Objective 2 recommended by Ms Penfold was to read as follows:

¹⁰³ Christopher Hanson, Evidence in Chief, 11.54-11.55, p42.

Policy 5: Traffic Effects

Development within the Airport Zone shall ensure that:

- (a) any traffic effects are avoided, remedied or mitigated through the timing of development;*
- (b) in the case of department stores, supermarkets, and stores between 151m² and 1,500m² 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.*

3.204 In terms of the Explanation to Policy 5, Ms Penfold recommended that in relation to the Airport, 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)

3.205 Ms Penfold also drew our attention to Policy 2 of Objective 2.0 which relates to “commercial activity”. Policy 2 states:

It is desirable that specifically identified retail and commercial activities are permitted, subject to specified threshold standards, so that the nature and scale of such activities does not undermine the role and function of the Paraparaumu Town Centre and is linked to development within the Airport Zone.

3.206 Ms Penfold explained that Policy 2 only addresses permitted retail and commercial activities under Rule D9.1.1(ii). She said that she considered that an additional policy was necessary to address Non-Complying Activities (and we would add Discretionary Activities) and suggested the following (i.e. a new Policy 2A):

POLICY 2A: COMMERCIAL ACTIVITY

Resource consent is required for the following activities:

- *department stores*
- *supermarkets; and*
- *stores of between 151m² and 1,500m² gross floor area that retail groceries or non-specified food lines*

in order to avoid significant effects and protect the role, function, vitality and viability of the Paraparaumu Town Centre through the remedy and mitigation of other effects.

3.207 Referring to the recommended additional policy she told us that in her opinion:

Inserting a new Policy 2A establishes a structure whereby Policy 2 is implemented through permitted activity status for identified activities, and Policy 2A is implemented through non-complying activity status for identified activities.

Including a new policy, as opposed to amending Policy 2, is necessary because 'desirable' is a strong and provocative word to include in a policy and it is not suitable to apply it to the activities under consideration. To ensure I did not impinge on Policy 2 as it relates to other activities in the Airport mixed use Precinct, I thought it best to have an additional policy.

3.208 Concluding her evidence, Ms Penfold told us that she understood that the policies for the Airport Zone were developed in the understanding that resource consents for certain activities could not be applied for, and that this created a policy gap that need to be addressed by:

- (a) amending Policy 5 (Traffic) to ensure a wider range of measures can be considered to address effects; and
- (b) adding a new Policy 2A (Commercial activities) to address the impacts of the relevant activities on the Paraparaumu Town Centre

Discussion and Findings

3.209 We consider there are two issues for us to assess and determine:

- (a) with the recommended amendments (sought by the NZTA and accepted by Mr Schofield in his Closing Statement) to Policy 2 (Objective 1.0) Policy 5 (Objective 2.0), and the addition of Policy 2A (Objective 2.0), is the policy framework adequate?; and
- (b) if we agree to make amendments to the policy framework, given that the Plan Change Request as initially requested by KCAHL notified did not propose any changes to the Operative District Plan objectives and policies, do we have scope to make the amendments?

3.210 Firstly we answer the second question in the affirmative. We agree with Mr Schofield's conclusion on the issue of scope which was that:

... there is scope to strengthen the policy framework as consequential amendments in response to concerns raised by submitters to assist with future resource consent applications under PC84. Such changes would be consequential to give better effect to the purpose of the plan change and ensuring the provisions are most appropriate, having regard to their effectiveness and efficiency.¹⁰⁴

¹⁰⁴ Council's Response to Matters Arising, Robert Schofield, Planning, 9.3, p14.

- 3.211 Turning to the first question, again our answer is in the affirmative.
- 3.212 After considering the conflicting evidence on the robustness (or otherwise) of the policy framework, we reached the position where we agreed that the policy framework had to be robust, but that the current ODP objectives and policies do not fulfill this objective. Therefore, we concluded that the policy framework had to be strengthened.
- 3.213 We then turned to the amendments proposed, firstly by Ms Penfold in her evidence and secondly by Mr Schofield in his closing. We have adopted both Ms Penfold's recommended new Policy 2A and amended Policy 5, although with some amendments to Policy 2A, and Mr Schofield's amended Objective (Objective 2). We consider that these amendments to the ODP are necessary to provide robust policy framework for assessments of resource consent applications under Section 104 (discretionary activities) and Section 104/Section 104D (non-complying activities).
- 3.214 In our opinion the amended policy framework gives stronger and clearer direction to the need to assess the potential for adverse traffic effects and adverse effects on the vitality and viability of the Paraparaumu Town Centre as part of the assessment of any resource consent applications for high traffic-generating retail activities such as supermarkets and department stores.

4.0 STATUTORY CONTEXT / CONSIDERATIONS

- 4.1 As we noted at the beginning of Section 3 above, a local authority's power for a plan change, including a private plan change request, is set out in Clause 29(4) of Schedule 1 of the Act. It states:

29(4): After considering a plan or change, the local authority may decline, approve, or approve with modifications, the plan or change, and shall give its reasons.

- 4.2 We also noted that in making its decision, the local authority must undertake the further evaluation required under Section 32AA of the Act and have regard to that evaluation.
- 4.3 We again clarify the point that we are not the 'decision makers'. That role is the Council's. Rather, we are 'recommenders'. However, we have structured this part of our report so that it aligns with the statutory framework, so that should the Council adopt our recommendations, which we record in Section 5 below, this report can be adopted as the Council's decision.
- 4.4 Before turning to our position on the applicable statutory considerations we first highlight the position of Mr Schofield the Council's reporting officer. Under the heading "Consistency with the Act" Mr Schofield noted that six of the submitters on PPC84 had contended that:

- (a) the plan change does not promote the sustainable management of the Paraparaumu Town Centre which is defined as a physical resource under the RMA;
 - (b) PPC84 does not meet Section 32(1)(a) which requires an examination of the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA;
 - (c) PPC84 is contrary to Sections 7(b), 7(c) and 7(f) of the RMA;
 - (d) PPC84 is contrary to the objectives, policies and methods relevant to the Paraparaumu Town Centre;
 - (e) PPC84 does not adequately identify other reasonably practicable options, or the efficiency and effectiveness of provisions in achieving the objectives relevant to the Paraparaumu Town Centre;
 - (f) the level of detail in the Section 32 evaluation does not correspond to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal; and
 - (g) the efficiency and effectiveness of the provisions in achieving the wider objectives of the District Plan, including those relevant to the Paraparaumu Town Centre and wider District, were not assessed.
- 4.5 Mr Schofield also noted that the Ngahina Trust had contended that PPC84 was contrary to Section 7(a) kaitiakitanga, Section 7(aa) the ethic of stewardship, and Section 8 Treaty of Waitangi.
- 4.6 In response to the above 'contentions' Mr Schofield advised it was his opinion the subject to the recommended modifications outlined in his Section 42A report, that PC84 was consistent with the purpose and principles of the RMA, for the following reasons:
- (a) the reasonably practicable options for achieving the objectives of the ODP were identified in the s32 evaluation supporting the plan change - namely, different activity classifications - and their relative efficiency and effectiveness;*
 - (b) the changes to the rules are the most appropriate way to achieve the objectives of the ODP, in relation to other reasonably practicable options for achieving those options, after assessing the efficiency and effectiveness of the provisions;*
 - (c) PPC84 is consistent with the objectives and policies of the ODP, in that the recommended consent statuses for the activities would ensure a robust assessment of any proposal and its effects would be considered in relation to their achievement of the relevant objectives and policies or otherwise;*

- (d) *PPC84 would promote the efficient use of the District's natural and physical resources (2.7b), and maintain and enhance amenity values and the quality of the environment (s7c, s7f) by requiring resource consent applications to be considered against the implications for the town centres and traffic; and*
- (e) *there is no evidence that PPC84 is contrary to section 7(a) kaitiakitanga, section 7 (aa) the ethic of stewardship, and section 8 Treaty of Waitangi.*

4.7 At the conclusion of the submitters' evidence, and prior to the Council's closing, we issued Minute 3 dated 23 February 2017, wherein we sought comment from Mr Schofield on a number of matters including the following:

22. *Mr Schofield will also need to explain how any amendments to the current Operative District Plan rules are considered to be the most appropriate method for delivering the Plan/Plan Change objectives for the Airport Zone - firstly, if those objectives remain unchanged and secondly if the related policies are amended along the lines recommended by Ms Penfold on behalf of the NZTA. In short, the question posed by the combination of s32(1)(a) and s32(6) RMA is:*

Are the proposed amendments sought through Plan Change 84, which are amendments currently (subject to the matter of scope discussed below) limited to Plan rules, more appropriate than the operative provisions in achieving both:

- (a) the purpose of the Plan Change; and*
- (b) the settled objectives of the Plan.*

4.8 In his closing Mr Schofield provided a comprehensive reply to the question,¹⁰⁵ which we do not intend to repeat. However, we do cite the following two key points:

- (a) Purpose of the Plan Change Request and its Appropriateness in Meeting the Purpose of the RMA: as Mr Schofield noted, the primary purpose of PPC84 is changing the activity status of the subject land uses by removing the prohibited activity status that enables the possibility (and we emphasise "possibility") of additional retail activities being established on the Airport Zone through the resource consent process; adding that *"at the broadest level this enablement would promote the sustainable management purpose of the Act (s5)"*; and
- (b) Provisions of the Plan Change: as Mr Schofield noted, the evaluation under Section 32(1)(b) requires an examination of whether the Plan Change provisions are the most appropriate way to achieve the operative objectives of the ODP. This requirement led Mr Schofield to focus on the need to amend the operative ODP provisions beyond those sought through PPC84. In turn he advised that:

¹⁰⁵ Robert Schofield, Council's Response to Matters Arising, Sections 5, 6 and 7, pages 5-11.

Having considered the evidence presented to the Hearing I consider that the effectiveness of the plan provisions in giving effect to the purpose of the plan change could be improved by:

- i) amending the definition of “supermarket” as it applies to the Airport Zone to ensure that only one supermarket can locate within this zone; and*
- ii) introducing a new policy under Objective 2.0 of the Airport Zone to strengthen the robustness of the policy framework and assist decision-makers in considering future resource consent applications.* ¹⁰⁶

4.9 We now turn to our overall evaluation of the Plan Change request and ‘pose’ the following questions, questions which are derived from Section 32/Section32AA of the Act:

Are the proposed objectives the most appropriate way to achieve the purpose of the Act?

4.10 In the absence of any new proposed objectives, the purpose of the plan change ‘constitutes’ the objective.

4.11 The ‘purpose’ of PPC84 as stated by KCAHL was:

*... to remove prohibited activity status from certain activities so as to enable KCAHL to undertake master planning of the land currently owned in the Airport Zone, and so that resource consents can ultimately be sought in the future.*¹⁰⁷

4.12 As part of the section 32 analysis undertaken by KCAHL it was stated that:

The principal benefit of re-classifying the specified activities activity status from prohibited to discretionary or non-complying is allowing a party to apply for resource consent. This in itself does not have any effects on the environment, as the application for resource consent will be thoroughly assessed as part of that process, but does provide an opportunity to apply for resource consent for activities that could have social and economic benefits, if granted. ¹⁰⁸

4.13 We agree with Mr Schofield’s conclusion that PPC84 will achieve the purpose of the Act in that it will enable the opportunity of applications for resource consent to be made for activities that will contribute to the sustainable management of the Airport land resource, subject, of course, to resource consent being granted.

¹⁰⁶ Robert Schofield, Council’s Closing to Matters Arising, para 7.7, page 10.

¹⁰⁷ KCAHL, February 2016, Private Plan Change Request to Kapiti Coast District Plan - Airport Zone: Prohibited Activities, 2.6 at page 3.

¹⁰⁸ Op cit, 6.4 at page 9.

- 4.14 We make this last point as the PPC84 does not of itself guarantee any outcome. Rather, it provides an opportunity for resource consent applications to be made, an opportunity currently denied as a consequence of the Prohibited Activity status.
- 4.15 We note the reference in Section 5 RMA to managing the use, development and protection of natural and resources in a way, or at a rate, which enables [our emphasis] people and communities to provide for their social and economic wellbeing, subject to the requirements of Section 5(2)(c) in relation to avoiding, remedying or mitigating adverse effects.
- 4.16 In our opinion the proposed objective (purpose) of PPC84 is appropriate, and for that reason, as we said above, we agree with Mr Schofield. In reaching this conclusion we have also been mindful of the conclusion we reached when discussing the appropriateness of continuing with Prohibited Activity status (Issue 3 above) we said that we considered adopting a Prohibited Activity approach to managing the effects of retail activities was a *“rather extreme approach”*.

Are the provisions the most appropriate way to implement the “objectives” having regard to their efficiency and effectiveness, actual and potential environmental effects and reasonable alternatives?

- 4.17 Our answer to the above question is “yes” subject to the amendments we have proposed, which include amendments to the policy framework and amendments to the definition of “supermarket”. With these amendments we consider that the provisions are the most appropriate way to achieve the objectives of the Plan. We consider that the amended provisions are more appropriate than the notified provisions, particularly in respect of the policy framework, in that they will enable a more robust assessment of potential environmental effects and therefore provide for a more efficient administration of the resource consent process.
- 4.18 At this point we want to return to a point made by the Hearing Commissioners on Plan Change 73, namely that both the Paraparaumu Town Centre and the Airport are strategically important resources to the Kapiti District. Consequently, we have been mindful of the need to ensure that any amended provisions to the Airport do not give rise to significant adverse effects on the Paraparaumu Town Centre, including any significant diminution in its overall vitality and viability.
- 4.19 Enabling additional retail opportunities at the Airport, in the manner sought through PPC84, subject to the resource consent process which will, necessarily, focus on both ‘environmental effects’ and ‘consistency with Plan objectives and policies’ (Section 104 and Section 104D RMA), will not, in our opinion, undermine the strategic importance of the Paraparaumu Town Centre. If any particular development for which resource consent was sought could be shown to undermine the strategic importance of the Paraparaumu Town Centre, then, and given the strengthened policy framework, we would anticipate that such developments would not be granted consent.

4.20 In conclusion, after considering the matters in Section 32 of the Resource Management Act 1991, we have concluded that PPC84, subject to our recommended amendments, is the most appropriate means of achieving the objectives of the ODP having regard to:

- (a) other reasonably practicable options for achieving the objectives; and
- (b) the efficiency and effectiveness of the provisions in achieving the Plan objectives.

4.21 Our recommendations below confirm that having given careful consideration to the primary issue, namely whether it is appropriate in the circumstances of the Airport Zone to continue to apply Prohibited Activity status to the range of activity as listed in Rule D.9.1.6 of the ODP, it is our conclusion that it is not appropriate for the reasons we have discussed in our report.

Is the plan change consistent with any regional plans or proposed regional plans?

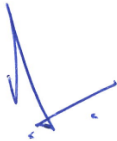
4.22 We were not presented with any evidence to indicate that the proposal to change the activity status of the specified activities was inconsistent with any Operative Regional Plan or the Proposed Natural Resources Plan.

5.0 RECOMMENDATIONS

5.1 Based on our consideration of all the material before us, including the Plan Change as notified, the submissions and further submissions, Section 42A report and technical appendices, and the evidence and submissions presented at the Hearing, including the Council's and Requestors closing statements, and after our consideration of Section 32 and Section 32AA and all other relevant statutory matters, we make the following statutory recommendations:

- (a) That Council accept the recommendations of the Hearing Panel in respect of Private Plan Change 84 (Kapiti Airport) as outlined in the Hearing Panel's report dated 8 September 2017.
- (b) That Council approve Private Plan Change 84 (Kapiti Airport) as amended in Appendix 2 and for the reasons stated in the Hearing Panel's report and that all submissions and further submissions on Private Plan Change 84 be accepted or rejected to the extent set out in the report and summarised in Appendix 3; and
- (c) That pursuant to Clauses 10 and 29(4) of the First Schedule of the Resource Management Act 1991, Council give public notice of its decision on submissions and further submissions on Private Plan Change 84 (Kapiti Airport).

DATED AT PARAPARAUMU THIS 8TH DAY OF SEPTEMBER 2017



Alistair Aburn (Commissioner and Chair)
for and on behalf of Plan Change 84 Hearing Panel

Commissioner Alistair Aburn
Commissioner Diane Ammundsen
Commissioner Miria Pomare
Commissioner David McMahon
Commissioner Mike Cardiff

APPENDICES

Appendix 1: Consultation Requirements for Private Plan Change Requests, Simpson Grierson, 15 February 2017

Appendix 2: Recommended Changes to Operative District Plan ("Track Changes")

Appendix 3: Recommendations on Submissions and Further Submissions on Private Plan Change Request 84 (Kapiti Airport)

APPENDIX 1

Our advice

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

Consultation requirements for private plan change requests

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.

- 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**
-

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.

Our reasons

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
-

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.¹ 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.

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

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¹ 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.

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 151m² and 1,500m² 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 151m² and 1,500m² 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).

PART D – RULES AND STANDARDS

D.9.1 Airport Zone Rules

...

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 151m² and 1,500m² GFA that retails groceries or non-specified food lines.~~
- ~~(viii) 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 339,400m² 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 151m² and 1,500m² 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 151m² and 1,500m² gross floor area that retails groceries or non-specified food lines.

PART Q: DEFINITIONS

Supermarket means an activity of more than 1,500m² 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 1000m².

APPENDIX 3

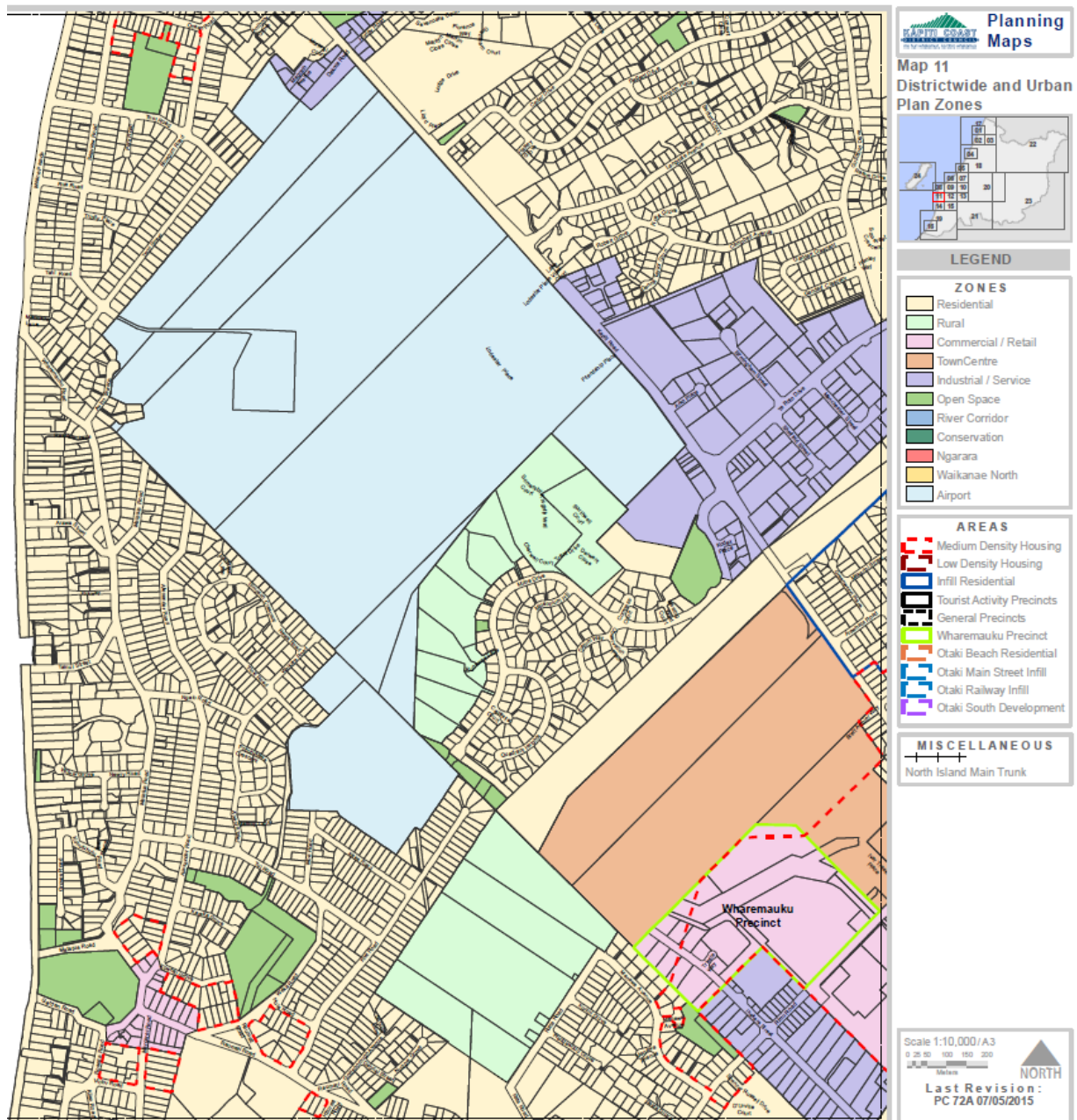
Sub No.	Submitter	Topic	Decision Sought	Panel's Recommendation	Panel's Reasons/Comments	Recommended Amendments to PPC84
PPC84-1	Coastlands Shoppingtown Ltd (Coastlands)	Entire Plan Change	Decline PPC 84 in its entirety	Accept in part	As outlined in Section 3 of the Panel's report.	Changes to the provision for grocery and non-specified food stores as outlined in Appendix 2.
<i>Further Submitters:</i> <i>Ngahina Developments Ltd (FS 2)</i> <i>Alpha Corporation Ltd (FS 3)</i> <i>Sheffield Properties Ltd (FS 4)</i> <i>Richard Mansell (FS 5)</i>			<i>Support [in part]</i> <i>Support</i> <i>Support [in part]</i> <i>Support</i>	<i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i>		Changes to policy framework as outlined in Appendix 2.
PPC84-2	Ngahina 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.
<i>Further Submitters</i> <i>Coastlands Shoppingtown Ltd (FS 1)</i> <i>Alpha Corporation Ltd (FS 3)</i> <i>Sheffield Properties Ltd (FS 4)</i> <i>Richard Mansell (FS 5)</i>			<i>Support [in part]</i> <i>Support</i> <i>Support [in part]</i> <i>Support</i>	<i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i>		Changes to policy framework as outlined in Appendix 2.
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.
<i>Further Submitters</i> <i>Coastlands Shoppingtown Ltd (FS 1)</i> <i>Ngahina Developments Ltd (FS 2)</i> <i>Sheffield Properties Ltd (FS 4)</i> <i>Richard Mansell (FS 5)</i>			<i>Support [in part]</i> <i>Support [in part]</i> <i>Support [in part]</i> <i>Support</i>	<i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i>		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
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.
<i>Further Submitters</i> 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.
<i>Further Submitters</i> 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.
<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 [in part] Support [in part] Support Support [in part] Support	Accept in part Accept in part Accept 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
PPC84-7	NZ Transport Agency	Entire Plan Change	Decline 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.	<i>Accept in part</i>	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
<i>Further Submitters</i> <i>Coastlands Shoppingtown Ltd (FS 1)</i> <i>Ngahina Developments Ltd (FS 2)</i> <i>Alpha Corporation Ltd (FS 3)</i> <i>Sheffield Properties Ltd (FS 4)</i> <i>Richard Mansell (FS 5)</i>			<i>Support [for declining PPC84]</i> <i>Support [for declining PPC84]</i> <i>Support [for declining PPC84]</i> <i>Support [for declining PPC84]</i> <i>Support [for declining PPC84]</i>	<i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i> <i>Accept in part</i>		Changes to policy framework as outlined in Appendix 2.

ATTACHMENT 2

Figure 1. Extent of Airport Zone, Operative District Plan



ATTACHMENT 3

Figure 2. ODP Airport Noise Boundaries and Areas Requiring Noise Insulation

