

Mayor and Councillors  
COUNCIL

10 DECEMBER 2015

Meeting Status: **Public**

Purpose of Report: For Decision

## **KAPITI AIRPORT PRIVATE PLAN CHANGE REQUEST - AIRPORT ZONE PROHIBITED ACTIVITIES**

### **PURPOSE OF REPORT**

- 1 To consider and determine the appropriate way forward for a private plan change request made by Kāpiti Coast Airport Holding Limited to change the current prohibited activity status of specific retail and noise sensitive activities in the Airport Zone under the operative Kāpiti Coast District Plan.

### **DELEGATION**

- 2 The Council has the authority to make this decision.

### **BACKGROUND**

- 3 On 23 July 2015, Council received a request from Kāpiti Coast Airport Holding Limited (KCAHL) for a private plan change pursuant to clause 21(1) of the First Schedule of the Resource Management Act 1991 (RMA).
- 4 The plan change request seeks to remove prohibited activity status for the following activities in the Airport Zone under the operative District Plan:
  - Noise sensitive activities outside of the Air Noise Boundary not specifically provided as a permitted activity, sought to be classified as a **discretionary activity**;
  - One only department store, sought to be classified as a **non-complying activity**;
  - One only supermarket, sought to be classified as a **discretionary activity**;
  - More than one store of between 151m<sup>2</sup> and 1,500m<sup>2</sup> gross floor area that retains groceries or non-specified food lines, sought to be classified as a **discretionary activity**; and
  - Any consequential amendments to the District Plan that may be necessary to achieve the purpose of the private plan change request.
- 5 Currently these activities are prohibited within the Airport Zone, so resource consent cannot be sought for them.
- 6 The above changes represent the full extent of the changes sought by KCAHL in the request. These changes are also consistent with some of the decisions

sought by KCAHL in its submission on the Proposed District Plan (PDP). A marked up version of the changes sought to the operative District Plan provisions is contained in **Attachment 1**.

## ISSUES AND CONSIDERATIONS

- 7 Any person may request a change to the District Plan under s74(2) RMA and Council must consider any such request.
- 8 The activities subject to the request were made prohibited activities by way of a consent order following agreement reached through Environment Court mediation on appeals to Plan Change 73, which introduced the Airport Zone into the operative District Plan.
- 9 After an assessment of the information provided by KCAHL to support the plan change request, officers considered that further information should be sought from the applicant to ensure that the Council had sufficient information to consider the request.
- 10 A further information request was issued by Council officers on 18 August 2015, seeking additional information on:
  - Assessment of potential noise and vibration effects;
  - Further assessment of potential effects on the local road network;
  - Further assessment of potential economic effects; and
  - A further assessment of the implications of the change in relation to existing provisions of the Operative District Plan and the alternatives.
- 11 Further information in response to the Council's request was received from KCAHL on 5 November 2015. This information has been assessed by Council officers and technical advisers and, while not all of the information requested has been supplied, officers consider that there is sufficient information to enable a decision to be made under Clause 25 of the First Schedule of the RMA about how to treat the plan change request, and that the grounds for rejection under Clause 23(6) do not apply.<sup>1</sup> The outstanding matters could be addressed through the next steps of the process if it proceeds.
- 12 Council is now required to consider the request and make a decision under Clause 25 about how to treat the plan change request.
- 13 Under Clause 25, the Council has **four options** – it may:
  - a. **Adopt** the request, or part of the request, as if it were a proposed policy statement or plan made by the local authority itself; or
  - b. **Accept** the request, in whole or in part, and proceed to notify the request; or
  - c. Decide to deal with the request as if it were an **application for a resource consent**; or
  - d. **Reject** the request in whole or in part.

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<sup>1</sup> Clause 23(6) of the First Schedule provides for a local authority to be able to reject a plan change request or decide not to approve a plan change request, if it considers that insufficient information has been provided in order to enable it to consider or approve the request.

- 14 It is important to note that the initial process for considering private plan change requests under clause 25 of the RMA is essentially procedural: the Council should not be considering the detailed merits of the request. That is something that should primarily be done at the hearing of submissions received on the plan change.

## OPTIONS

### Adopt the plan change

- 15 One option is for the Council to adopt the plan change as if it were made by Council. This option could be appropriate if there was clearly more of a public benefit than a benefit for current and future landowners resulting from the plan change. In this particular case, the main beneficiary will be the landowner. Therefore, it is not considered appropriate for Council to adopt the plan change as if it were its own.

### Treat as a resource consent application

- 16 A second option is for Council to treat the request as a resource consent application. This approach could be appropriate if there was a specific development proposal.
- 17 The plan change seeks to change the activity status of specific activities within the Airport Zone – it does not relate to a specific development proposal per se. It would not therefore be appropriate to treat the current request as a resource consent application.

### Reject the plan change request

- 18 A third option is to reject the plan change request, in whole or in part (i.e. decide that it should not proceed to notification as a proposed plan change). The grounds for rejection of the request at this stage are set out in clause 25(4) of the First Schedule of the RMA.
- 19 The only grounds on which the Council may reject the request are as follows:
- a. the request is frivolous or vexatious;
  - b. the substance of the request has been considered and given effect to or rejected by Council or the Environment Court within the last two years;
  - c. the request is not in accordance with sound resource management practice;
  - d. the request would make the District Plan inconsistent with Part V of the RMA (purpose and contents of District Plans);
  - e. the District Plan has been operative for less than two years.
- 20 The following comments are made in relation to each of these grounds:
- a. *Vexatious or Frivolous*
- 21 Documentation has been provided by KCAHL that supports the plan change, and that documentation deals with valid resource management issues. The plan change request is therefore not considered to be vexatious (defined in the Oxford English Dictionary as not having sufficient grounds for action and seeking only to annoy) or frivolous.

*b. The substance of the request has been considered and given effect to or rejected by Council or the Environment Court within the last two years*

- 22 The substance of this request has not been considered and given effect to or rejected by the Environment Court or the Council within the last two years. The provisions of the current Airport Zone became operative on 21 January 2010, well over two years ago. The Council has considered the Airport Zone provisions as part of its review of the operative District Plan, but the hearing of submissions on the airport provisions in the PDP has not yet commenced. This would not therefore be a valid ground for rejection of the request.

*c. Sound Resource Management Practice*

- 23 Provisions which would not be in accordance with sound resource management practice include those that would be outside the scope of the RMA or are beyond what is considered reasonable.
- 24 As noted above, the request deals with valid resource management issues and effects (which have been assessed by reputable experts), and could not therefore be considered to be an inappropriate or irresponsible use of the plan change mechanism.
- 25 While it is unusual to receive a plan change request to an operative district plan at the time that submissions to a proposed district plan are about to be heard on the same matter, any person may do so under the RMA. There is case law that says process and timing considerations are relevant to sound resource management practice. Arguably, requesting a private plan change at the same time that a plan review is taking place could be considered inconsistent with sound resource management practice, except for the fact that the activity status in the operative District Plan would act as a constraint on seeking consents in the period before decisions on the PDP are released and any appeals resolved.

*d. Make the Plan inconsistent with Part V of the RMA*

- 26 Part V of the RMA sets out the purpose and the contents which must be included in District Plans. The plan change request is to change the activity status of a set of specific land uses within the Airport Zone: the proposed changes are consistent with the form and nature of the provisions of the Plan. The District Plan was drafted in the manner required by the Act (i.e. the Plan must state the objectives, policies and rules and may include issues, methods and environmental results), and the plan change request is consistent with this structure and approach. The plan change therefore would not make the Plan inconsistent with Part V of the Act.

*e. District Plan has been operative for less than two years*

- 27 The District Plan was made operative in 1999, and Plan Change 73 which introduced the current Airport Zone provisions, has been in effect for over five years. Therefore, this request cannot be rejected on these grounds.

#### Accept the plan change request

- 28 None of the grounds for rejecting the request are considered to apply, and it would be inappropriate to adopt the plan change or treat it as a resource consent application. It is therefore recommended that Council accepts the plan change request for public notification.

- 29 Once Council has made its decision on how to proceed with the request, it must notify the applicant of the decision and the reasons. The applicant may, if the request is rejected in part or whole, appeal to the Environment Court.

## **OTHER CONSIDERATIONS**

### **Notification of the plan change**

- 30 If Council accepts the request, it must prepare the plan change in consultation with KCAHL and the proposed plan change must be publicly notified within four months of Council making its decision. The proposed plan change would not have any legal effect upon notification.
- 31 Once the proposed plan change is notified, submissions and then further submissions would be received. This would be followed by a hearing of submissions and the release of decisions. Once decisions are released they can be appealed to the Environment Court. If there are no appeals, the plan change can be made operative, at which point it will take legal effect.
- 32 It is likely that there will be considerable public interest in the plan change given the experience with Plan Change 73, and the submissions and further submissions received on the same matters in the PDP. The airport is also of strategic importance to the District.
- 33 It is recommended that public notification is avoided over the Christmas/Summer holiday period, and that notification should therefore occur as soon as practicable in the New Year following the preparation of the proposed plan change.
- 34 Clause 5(3)(b) of the First Schedule of the RMA provides for a minimum submission period of 20 working days, and a further submission period of 10 working days for proposed plan changes.
- 35 Should the recommendations be accepted, an indicative timeframe<sup>2</sup> for the processing and hearing of the private plan change request would be as follows:
- Late February – late March 2016 (public notification and submission period)
  - April – May 2016 (summary of submissions & further submissions period)
  - Late July/early August 2016 (hearing)<sup>3</sup>
  - November/December 2016 (decision issued)
  - January/February 2017 (appeals period).

### **Relationship with the PDP & the PDP hearings process**

- 36 There is a strong relationship between the plan change request and the changes sought in KCAHL's submission on the PDP and the Airport Zone provisions. There is therefore likely to be similar submitters and submission points on the plan change. Consideration therefore needs to be given to the scheduling of the plan change hearings process and the appointment of the hearings panel within the wider context of the PDP hearings process.

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<sup>2</sup> Timeframes are indicative only and subject to change given unforeseen issues that may arise

<sup>3</sup> Timing subject to hearing panel availability & PDP hearings workload

- 37 Much of the work required to evaluate the implications and potential consequences of the plan change is also required to address submissions on Chapter 6 of the PDP (noting however that the RMA s32 evaluation requirements would differ as the PDP is being processed under the previous version of s32, whereas this plan change would be evaluated under the current s32 requirements).
- 38 In addition, the decision-making issues for the plan change hearings panel would be largely the same, in terms of the sustainable management of the District's natural and physical resources, the purpose and principles of the RMA, the relationship with the objectives and policies of the Plan, and case law relating to the issues at hand.
- 39 To ensure consistent and efficient decision-making on these matters, it is considered desirable for the PDP Hearings Panel to also hear submissions and make a decision on the plan change.
- 40 The draft PDP hearings schedule programmes the hearing of submissions on Chapter 6 for late April to early May 2016 (following the hearings of submissions on whole of plan issues and district-wide objectives). The indicative timing for the plan change process (outlined above) means the hearing of submissions on the plan change would occur after the Chapter 6 hearing.
- 41 Advice from Council's legal advisers indicates there are no legal impediments to the proposed timing, provided the Council's approach complies with the various timeframes and other requirements of Schedule 1 of the RMA. There is also no barrier to hearing a private plan change request in conjunction with another Schedule 1 process or a consent application.<sup>4</sup>

#### Coordination steps

- 42 The Council will need to formally appoint a panel to hear the plan change and it is recommended that its composition be the same as the PDP Hearings Panel. The plan change panel will also need its own delegation. Careful consideration needs to be given to the co-ordination of process and decision-making requirements (e.g. ideally both panels should have the same powers, be it to make a recommendation or a decision on submissions). There is some flexibility in Schedule 1 of the RMA in terms of the timing of decisions (subject to the overall statutory requirement that decisions must be released within 2 years of the date of notification in accordance with clause 10(4) of Schedule 1), so the timing of decisions on the PDP and the plan change should be co-ordinated if possible.
- 43 The panel will need to ensure that the decisions for each process (the plan change and the PDP) rely only on the submissions and evidence filed for the respective process. The panel will need to be careful not to inadvertently "blend" consideration of PDP submissions and evidence with submissions and evidence on the private plan change. Submitters may seek to rely on evidence filed in the other process to avoid repetition, which would be acceptable provided that the reliance is explicit and recorded in their documents.
- 44 There is no particular requirement in terms of hearing the Chapter 6 submissions before or after the plan change. However, it would be useful to hear the broader subject matter (Chapter 6) before the more specific issues (plan change). The

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<sup>4</sup> Note that the Environment Court hears plan change requests and consent applications together where the subject matter is sufficiently related and the circumstances warrant that approach.

hearings panel will need to consider the scheduling of the plan change hearing in relation to the timing of the hearing of Chapter 6 submissions.

### Policy considerations

- 45 The proposed plan change will be fully assessed against the objectives and policies of the District Plan, and other statutory plans, following the closing of the submissions/further submissions process.

### Legal considerations

- 46 Clauses 21-29 of the First Schedule of the RMA set out the legal procedures that must be followed in any request for a plan change, and the key provisions for the purpose of the Council's current decision are summarised above.

### Financial considerations

- 47 If the request is accepted by Council, the costs of processing the plan change will be met by the applicant. This will enable sufficient resources to be deployed to the processing of the plan change while the planning team is also servicing the PDP process.

### Tāngata whenua considerations

- 48 The plan change request will likely be of considerable interest to tāngata whenua.

## **SIGNIFICANCE AND ENGAGEMENT**

### Degree of significance

- 49 The Council's Significance and Engagement policy does not cover consultation processes required under the RMA 1991.

### Publicity

- 50 As discussed, it is anticipated that there will be significant community interest in the plan change, given the interest in the previous Airport plan change (Plan Change 73) and the interest expressed to date in this latest request.
- 51 It will be important to communicate that accepting the plan change to proceed to public notification is a procedural matter only, that the public will have the opportunity to make submissions on the plan change request, and that no decision has been given on matters of content or merit.

## **CONCLUSION**

- 52 It is considered that the applicant has provided sufficient information to allow the Council to accept the plan change request and proceed with public notification.

**RECOMMENDATIONS**

- 53 That the Council, pursuant to clause 25(2)(b) of the First Schedule of the Resource Management Act 1991, accepts the proposed plan change request made by Kāpiti Coast Airport Holding Limited to change the activity status of retail and noise sensitive activities outside the Air Noise boundary within the Airport Zone, for the following reasons:
- There is sufficient information to proceed to publicly notify the plan change;
  - The plan change addresses valid resource management issues;
  - Public notification would provide an opportunity for interested persons to lodge submissions and become involved in the process;
  - The merits of the plan change will be examined following submissions through the hearings process; and
  - There is no reasonable ground on which to reject the request.
- 54 That the Council notes that acceptance of the plan change request and a decision to proceed to notification is procedural only and does not affect the Council's ability to consider the merits of the requested plan change at a later stage.
- 55 That the Council proceeds to prepare the plan change in consultation with Kāpiti Coast Airport Holding Limited and notifies the plan change under Clause 26 of the First Schedule of the RMA as soon as practicable in the New Year in line with the indicative timeframe in paragraph 35 of this report (**SP-15-1766**).
- 56 That the Council agrees to appoint the PDP Hearings Panel to hear the private plan change and any submissions, and to make decisions to recommend to Council.

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**ATTACHMENT**

- Appendix 1** Private Plan Change Request by Kāpiti Coast Airport Holding Limited – amendments sought to the District Plan

## APPENDIX 1

### AMENDMENTS SOUGHT TO THE DISTRICT PLAN - MARK-UP

The text shown in black ~~strike through~~ and underlined, are the amendments sought by KCAHL.

#### 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) Supermarkets.
- (vii) More than one store of between 151m<sup>2</sup> and 1,500m<sup>2</sup> gross floor area that retails groceries or non-specified food lines.

#### D.9.1.5 Non-Complying Activities

The following are non-complying activities:

- (i) Offensive trades.
- (ii) The keeping of free flight birds.
- (iii) Retail and commercial service activities, not being a prohibited activity, that are not listed as permitted activities in rule D.9.1.1 or do not comply with the permitted activity retail/commercial activity floorspace threshold standards in D.9.2.1.
- (iv) Aircraft operations occurring between 10.30pm and 6am that are not exempt by the "Noise from Aircraft Operations" permitted activity noise standard.
- (v) Any other activity not being a permitted, controlled, discretionary (restricted), discretionary or prohibited activity.
- (vi) Any development in the Airport Zone, not being a prohibited activity, which results in the development in the Airport Zone exceeding 339,400m<sup>2</sup> gross floor area.
- (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) Department Stores.~~

#### 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.~~
- ~~(iii) Supermarkets.~~
- ~~(iv) More than one store of between 151m<sup>2</sup> and 1,500m<sup>2</sup> gross floor area that retails groceries or non-specified food lines.~~