

**Before an Independent Hearings Commissioner appointed by
the Kāpiti Coast District Council**

Under the Resource Management Act 1991
In the matter of an application under s 88 of the Act by Kāpiti Retail
Holdings Limited for the construction and operation of a
Countdown supermarket at 160 Kāpiti Road, Paraparaumu
(RM210151)

**Memorandum of counsel on behalf of Young Supermarkets Limited and
Modern Merchants Limited**

Date: 5 May 2022



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INTRODUCTION

1 This memorandum is lodged by counsel for Young Supermarkets Limited (**YSL**) and Modern Merchants Limited (**MML**) in response to the direction at paragraphs [6] and [8] of Minute 6 of the Commissioner dated 3 May 2022.

2 The Minute requests any comment from counsel on two matters relating to plan interpretation (set out at paragraph [3.1] and [3.2] of the Minute), as well as the following more general issue (set out at paragraph [5] of the Minute):

... the assumptions to be made regarding traffic growth, volumes and whether the development potential assessed for the Airport Zone is appropriately limited to permitted activities or should also include controlled activities.

3 It is submitted that the answer to the more general issue, as well as the planning witnesses agreeing that all new buildings in the ‘Development Area’ require a controlled activity consent,¹ means that these plan interpretation issues may be largely academic in the context of this resource consent application.

4 It is understood that following the Commissioner considering the parties’ positions on the three issues set out in Minute 6, there will be further directions (including a further opportunity for YSL and MML to make broader submissions on outstanding matters),² before Kāpiti Retail Holdings Limited's (**KRHL**) right of reply.³

5 This memorandum is therefore limited to briefly addressing the legal issues relevant to the more general issue set out above, on the basis that a further opportunity for submissions will be provided.

ANALYSIS

6 The proposal’s effects on the environment must be assessed under s 104(1)(a) of the Resource Management Act 1991 (**RMA**).

7 As to what constitutes ‘the environment’, the Court of Appeal has held in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, that the

¹ Joint witness statement – planning dated 14 April 2022 at [36].

² See Minute 4 at [5]-[7].

³ See Minute 4 at [8].

word ‘environment’ as used in s 104(1)(a) of the RMA is not limited to the environment as it exists at the time of a decision. Instead:⁴

[84] ... In our view, the word “environment” embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed.

8 The Court of Appeal has therefore made it clear that, for the purposes of the assessment to be made under s 104(1)(a) of the RMA, the effects of activities for which resource consents might be granted in the future should not be brought into account when considering the future state of the environment.

9 This position seems reasonably clear, although it is acknowledged that the comments of the Court of Appeal in context related to resource consents for discretionary activities, rather than controlled activities.

10 It is submitted however that this question does not resolve the wider issue relevant to an assessment of effects of ‘the assumptions to be made regarding traffic growth’. In terms of this question, it should be noted that Tim Kelly in his memorandum appended to the Transportation Joint Witness Statement:

10.1 Adopts a notional growth rate of 2% per annum in terms of traffic growth along Kāpiti Road, with the modelling results summarised on pages 3 and 4 of that memorandum.

10.2 Adopts a doubling of Friendship Place traffic movements, with the modelling results summarised on pages 4 and 5 of that memorandum.

⁴ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [84].

- 11 Irrespective of land use activity status that may facilitate such growth, the applicant has accepted that accounting for growth forms part of the assessment of effects. There is no analysis required as to the land use activity status that will generate the assessed Kāpiti Road growth. It is not clear why a notional growth rate of 2% (which all transport experts consider to be the ‘outer bound’ for growth rates)⁵ has not also been applied by Tim Kelly to the Friendship Place modelling. From YSL’s and MML’s perspective, there is an unexplained inconsistency with the growth rates, which on their face are significantly different.
- 12 If a more appropriate growth rate for Friendship Place traffic movements is modelled, it may become apparent that further and more future-proofed mitigation (such as the signalisation of the Kāpiti Road and Friendship Place intersection) would be required now, in the context of KRHL’s application. Such a growth rate is not based on, or limited to, development by reference to district plan land use status, but rather it would reflect the growth that may be reasonably anticipated on the wider transport network (including on Kāpiti Road, which the applicant has already accepted as a relevant assessment method).
- 13 From the perspective of YSL and MML, it is a more efficient outcome (including in terms of s 7(b) of the RMA) if the mitigation works that will be required on Kāpiti Road and Friendship Place are done once and done right. It would be a highly undesirable outcome if KRHL completes mitigation works to the existing roundabout in the context of the present application, which at some point in the not-too-distant future will become not fit for purpose.

Date: 5 May 2022



.....
Stephen Quinn
Counsel for Young Supermarkets
Limited and Modern Merchants Limited

⁵ Joint witness statement – transportation dated 29 April 2022 at [23].