

**Before a Hearings Commissioner appointed by
the Kāpiti Coast District Council**

Under

the Resource Management Act 1991
(Act)

And

In the Matter

of an application under section 88 of
the Act by Kapiti Retail Holdings
Limited for the construction and
operation of a Countdown
supermarket at 160 Kāpiti Road,
Paraparaumu RM210151.

**Supplementary Legal Submissions for
Kapiti Retail Holdings Limited**

Dated: 5 May 2022

Lane Neave

Vero Centre, Level 8/48 Shortland Street, Auckland
CBD, Auckland 1010

Solicitor Acting: Joshua Leckie/Katharine Hockly

Email: joshua.leckie@laneneave.co.nz/
katharine.hockly@laneneave.co.nz

Phone: 03 409 0321/03 409 0321

lane neave.

INTRODUCTION AND SUMMARY

Directions

1. The following submissions are on behalf of Kapiti Retail Holdings Limited (**KRHL**), the applicant for resource consent to construct and operate a Countdown supermarket and two retail tenancies at 160 Kāpiti Road, Paraparaumu (**Proposal**).
2. These submissions are made in accordance with Minute 4 issued by the Hearing's Commissioner on 5 April 2022 and Minute 6 issued on 3 May 2022. In Minute 4, the Commissioner directed that legal counsel provide submissions following the planning and traffic joint witness conferencing as to:
 - (a) whether the development potential assessed for the Airport Zone is appropriately limited to permitted activities or should also include controlled activities; and
 - (b) the assumptions to be made regarding traffic growth and volumes.
3. In Minute 6, the Commissioner directed that in addressing issue 2 (referred to in 2(a) above), the parties should give specific attention to the following questions:
 - (a) To what extent will a transportation assessment be required/considered for an application for controlled activity up to a cumulative total of 43,050m² GFA.
 - (b) Whether traffic effects from the Airport Zone can be considered even before the threshold of 43,050m² of GFA is triggered, noting that one of the matters of control is the traffic generated from the Airport Zone.
 - (c) What is the intent and application of Rule TR-R2, and whether the relevant threshold to apply here is 100vpd or 200vpd.
4. These legal submissions address the above matters.

Joint Memorandum

5. In Minute 6, the Commissioner noted that a Joint Memorandum of parties would be most helpful in addressing the above matters. Counsel has liaised with Counsel for the Templeton Kāpiti Limited (**TKL**) on this matter. However, given the fundamental difference of opinion of the parties on the matters at issue, Counsel for TKL and KRHL agree that the filing of separate submissions is likely to be more efficient. As such a Joint Memorandum of parties has not been prepared.

6. The Kāpiti Coast District Council (**Council**) has filed a separate memorandum, dated 4 May 2022. Further, Young Supermarkets Limited and Modern Merchants Limited have filed a separate memorandum dated 5 May 2022.

Summary of KRHL position

7. In terms of issue 2(a) above, we submit that the receiving environment against which the effects of the Proposal are to be assessed is required to be limited to permitted and consented activities. Controlled activities are not to be considered as part of the receiving environment for the reasons set out at paragraphs 11 - 23 of this memorandum.
8. In terms of the specific questions listed at paragraph 3 above, KRHL answers as follows:
 - (a) The matter of control in Rule AIRPZ-R13 relating to effects on the transport network triggers resource consent requirements and allows the Council to consider the traffic effects of all new buildings within the Airport Mixed Use Precinct (except for Minor Buildings). This includes development under the threshold of a cumulative total of 43,050m² GFA. As part of their requirement to consider these transport effects, the Council may require a transport assessment.
 - (b) The correct interpretation of Rule TR-R2 is that it imposes a 100vpd threshold on the Airport Zone. This interpretation is consistent with the relevant policy framework as set out at paragraphs 26 - 33 of this memorandum.
9. Overall, we submit that the Council will be able to impose conditions that directly deal with traffic generation and effects on the transport network from the Airport Mixed Use Precinct when TKL applies for consents to develop land in the Airport Mixed Use Precinct. In light of the above, it is inappropriate to require KRHL to mitigate the effects of such future development as part of the current Proposal.
10. In terms of issue 2(b) above, there remains disagreement between the traffic experts as to the realistic growth rates during the weekday and Saturday peak periods. However, Mr Kelly has provided sensitivity testing modelling that demonstrates that KRHL's proposed mitigation offsets the effects of the Proposal even at a rate of 2% growth, which is beyond what all experts consider to be realistic. This modelling demonstrates that the Proposal can mitigate its effects on the network regardless of the disagreement between the experts as to potential realistic growth.

THE RECEIVING ENVIRONMENT AND TRANSPORT EFFECTS

11. For the Commissioner to correctly assess the transport effects of the Proposal the legal receiving environment must be correctly defined.
12. Section 104(1)(a) and 104D(1)(a) require a consent authority to consider the effects of a proposal on the *environment*. We submit that the receiving environment is limited to permitted and consented activities on the surrounding land and does not include controlled activities, even if it is likely that consent is to be sought for these activities. The case law around the definition of the receiving environment demarcates a clear line between what is consented or permitted as of right and activities that require resource consent, for which no consent has been granted.
13. The authoritative statement for what constitutes the receiving environment is from the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Limited (Hawthorn)*.¹ In *Hawthorn*, the Court of Appeal was tasked with considering whether the Environment Court was correct in its definition of the *environment* against which a resource consent is required to be assessed.
14. The Court of Appeal held that the definition of *environment* under the RMA had connotations of the future and for the environment to be considered as static would be artificial.² The Court of Appeal defined the receiving environment against which consents could be assessed as being:³

*“...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 statement of the environment**. We think the legitimate considerations should be limited to those that we have just expressed...”*
15. The Court of Appeal was appreciative that difficulties in defining the receiving environment might be encountered for areas that are undergoing significant change such as in the current circumstances. However, the Court of Appeal observed that it would be incorrect to find that the receiving environment could include the effects of future resource consents that had not yet been granted.
16. In a previous case *Wilson v Selwyn District Council*,⁴ the High Court had held that it was appropriate to ascertain the future state of the environment by asking whether

¹ *Queenstown-Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 (CA) at [84].

² At [42].

³ At [84].

⁴ [2005] NZRMA 76.

it was “not fanciful” that surrounding land be developed. The facts of that case were that the district plan contemplated the subdivision of neighbouring land as a controlled activity. The High Court had held that it was plain that the District Council did not regard it as fanciful that the land in the locality might be subdivided down into smaller sites with increased dwellings in accordance with this controlled activity consent framework.⁵

17. The Court of Appeal in *Hawthorn* rejected the High Court’s previous reasoning from *Wilson v Selwyn District Council* and observed that borrowing the “fanciful” criterion from the permitted baseline line of cases was not justified when considering the meaning of *environment*. The Court of Appeal considered that the High Court had framed the issue too broadly in the context of a consent authority’s ability to consider future events.⁶ The Court of Appeal stated:⁷

“Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented.”

18. We submit that the findings and observations in *Hawthorn* require the Commissioner to restrict consideration to of the receiving environment to permitted activities and resource consents which have been granted.
19. The rule framework for the Airport Zone further supports restricting the assessment of the receiving environment to permitted and consented activities. The relevant framework is as follows:
- (a) Any new building in the Airport Mixed Use Precinct requires a controlled activity consent under Rule AIRPZ-R13. One of the matters of control is ‘*expected traffic generation from the Airport Zone*’. Therefore, the Council can impose conditions on all consents for new buildings to ensure that traffic generation is appropriately managed, including in relation to road upgrades.
 - (b) In addition, any development over 43,050m² in the Airport Mixed Use Precinct also specially requires a transport assessment, which considers the impact of the cumulative development of the area on the safety and efficiency of the transport network in accordance with Rule AIRPZ-R13-7(a). The required transport assessment must include:

⁵ At [62].

⁶ At [74]

⁷ At [74]

- (i) assessment of the proposed staging of development;
 - (ii) traffic and transport generation;
 - (iii) transport network upgrades; and
 - (iv) the design of off-site roading links and intersections.
- (c) Further, any development that exceeds a cumulative gross floor area of 62,500m² requires a further transport assessment in accordance with Rule AIRPZ-R13 - 7(b) that considers the:
- (i) impact of the cumulative development of the area on the safe and efficient operation of the transport network; and
 - (ii) the assessment shall address the same factors as specified in AIRPZ-R13- 7(a).
- (d) Any development that exceeds 102,900m² cumulative GFA requires a Restricted Discretionary Activity consent in accordance with Rule AIRPZ-R18, subject to a matter of discretion relating to expected traffic generation from the Airport Zone and the effects on any local road network and State Highway 1 and the timing of any improvements works. Such a Restricted Discretionary Activity consent requires a transport assessment to be carried out that considers the impact of the cumulative development of the area on the safe and efficient operation of the transport network and addressed the same factors as specified in Rule AIRPZ-R13- 7(a).

20. The purpose of the above rule framework set out above was discussed in *Cammack v Kapiti Coast District Council*, being an interim decision on appeals on Plan Change 73, from which the rule framework derived.⁸ The Court cited the evidence of Mr Kelly provided in that case as follows:⁹

A system of thresholds has been developed to ensure that the rate of development is carefully linked to the provision of additional roading infrastructure. These thresholds seek to provide an assurance to the Kapiti community that the rate of traffic generation associated with the development will not precede the ability of the reading network to accommodate it.

Development will take place gradually over a considerable period of time. The earlier stages of development are proposed to be subject to controlled

⁸ W069/09, dated 3 September 2009.

⁹ At [252]

activity status, with development conditional upon the provision of both localised access and the commencement of construction of sections of the [Western Link Road]. The later stages of development would be subject to restricted discretionary status, which acknowledges the greater degree of uncertainty regarding future traffic demands and performance of the road network. As such, for later development to occur, a comprehensive transportation study that considers the effects on the road network would be required to demonstrate that the outcomes will be acceptable.

21. The above observation from the Environment Court demonstrates that it was the intention of the rule framework in the Airport Mixed Use Precinct to give the Council the ability to progressively manage traffic impacts. The rules allow the Council to ensure that the traffic generation impacts of the development at Airport Zone are managed either through wider network upgrades or by the developer at the time of development.
22. The result of the above rule framework is that any new building in the Airport Mixed Use Precinct will require an assessment of traffic generation on a case by case basis. If necessary, the Council will impose conditions on all built development in the Airport Mixed Use Precinct that directly deal with traffic generation and effects on the transport network. These conditions may include requirement for further mitigation with respect to the wider transport network.
23. As a result, there is no certainty as to what impact the potential future controlled activity development will have on the road network and what nature of mitigation will be required by the Council at the time of consent. This uncertainty is demonstrated by the Joint Witness Statement of the traffic experts, whereby the traffic experts agree that making allowance for controlled activity development in the modelling of the Proposal would require assumptions to be made about the mitigation associated with future controlled activity in the Airport Mixed Use Precinct.¹⁰ This is information that the parties do not have as controlled activity consents have not been sought or granted for the proposed development. In our submission this is precisely why the Court doesn't allow controlled activities to form part of the receiving environment.
24. At the hearing, counsel for TKL raised concerns that if the traffic impacts of the development in the Airport Zone are not managed as part of the current proposal this could result in frustrating TKL's future controlled activity consents. TKL claims it may somehow be prevented from mitigating its own traffic effects and therefore may not be able to comply with future conditions of its controlled activity that relate to traffic effects.

¹⁰ Joint Witness Statement: Transportation dated 29 April 2022 at [40].

25. We submit that the above proposition should be dismissed. It is accepted that it is a fundamental principle of resource management law that a consent authority may not impose conditions on a resource consent that effectively nullify that consent.¹¹ However, TKL has not provided any evidence to support its proposition that the Proposal may result in TKL not being able to comply with any future condition requiring it to mitigate its own traffic effects. To the contrary the road reserve at the Friendship Place roundabout is extensive as demonstrated by the plans at Appendix 1 to the evidence in Chief of Tim Kelly.¹² Further Templeton Retail Limited¹³ owns the land along the full south frontage of the roundabout, providing it with the ability to provide future mitigation on its own land in future if required.

INTERPRETATION OF RULE TR-R2

26. The controlled activity regime discussed above is supplemented by Rules TR-R2 and TR-R10, which require a restricted discretionary consent and an associated transport assessment for any activity in the Working Zones for activities that generate over 200 vpd, or 100 vpd where public access is onto a major community connector route. Kāpiti Road is defined as a major community connector route.
27. Traffic would have to travel on about 40 metres of Friendship Place or onto Lodestar Place before entering Kāpiti Road. However, Ms Panther Knight and Ms Rydon consider that traffic from the Airport Zone would meet the definition of having public vehicle access *onto* a major community connector route, given the purpose of TR-R2.¹⁴ Ms Edgley disagrees.¹⁵
28. The issue turns on the meaning of the word '*onto*' in rule TR-R2 and whether the word requires development to have direct access onto a major community connector route or whether it includes a situation where all traffic is directed onto a major community connector where another road creates a link between the activity and the major community connector route.
29. The general principles of plan interpretation are that the plain meaning of the words of a plan should be applied and, when uncertainty arises, guidance should be taken from the surrounding objectives and policies of the plan itself.¹⁶ We submit that the plain meaning of the words contained in Rule TR-R2 lead to some uncertainty. However, the surrounding policies support the interpretation of Ms Panther Knight and Ms Rydon.

¹¹ *Richmond v Kapiti Coast District Council* [2016] NZEnvC 1 at [8] citing *Lyttleton Port Company Limited v Canterbury Regional Council* Decision No. C 8/2001 at [11]

¹² Joint Witness Statement: Transportation dated 29 April 2022 at Annexure A.

¹³ Templeton Retail Limited shares the same ultimate holding company as Templeton Kāpiti Limited.

¹⁴ Joint Witness Statement Planning, dated 14 April 2022, at [31] – [35].

¹⁵ Joint Witness Statement Planning, dated 14 April 2022, at [33].

¹⁶ *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA).

30. In particular, Policy TR-P6 seeks that: *The potential adverse effects on the transport network from development and subdivision will be avoided, remedied or mitigated by identifying both the key existing transport routes and proposed transport routes likely to be required long term as part of the District's transport network and having regard to these when considering applications for subdivision or development.*
31. In our submission Rule TR-R2 is for the purpose of giving effect to Policy TR-P6. It does so by requiring transport assessments to be provided for high traffic generating activities to allow the Council to assess the effects of such activities on the transport network. Rule TR-R2 contains a lower threshold (100 vpd) where an activity is likely to impact key transport routes. In doing so it gives effect to Policy TR-P6 by allowing regard to be had to effects on key transport routes as part of proposals for subdivision and development.
32. In terms of the factual situation, traffic from activities in the Airport Zone will not be dispersed and all traffic from the Airport Zone will access Kāpiti Road despite having to link onto Friendship Place or Lodestar Place to do so. We submit that to interpret Rule TR-R2 to exclude such activities from the 100 vpd limit would be contrary to the purpose of TR-P6. Such an interpretation would prevent the consideration, and remediation or mitigation of the effects of such activities on Kāpiti Road as envisaged by Policy TR-P6. Accordingly, we submit that the interpretation of Ms Panther Knight and Ms Rydon is correct in light of the wider policy purpose set out in the Transport Chapter.
33. Regardless of the above, we submit that there is little material difference between 100 and 200 vpd in the context of potential future activities at the Airport Mixed Use Precinct. In accordance with orthodox trip generation calculations, it is likely that the majority of development of the Airport Mixed Use Precinct commercial development would exceed 200 vpd regardless of the interpretation of Rule TR-R2. For example, the 2001 Transfund NZ Research Report estimates standard trip rates to be 160 vpd for every 100m² GFA for shopping centres below a total of 10,000m² GFA and 130 vpd for every 100m² of GFA for supermarkets. Accordingly, we submit that it is likely that the thresholds in TR-R2 will be exceeded in future controlled development within the Airport Mixed Use Precinct regardless of the interpretation applied.

ASSUMPTIONS TO BE MADE REGARDING TRAFFIC GROWTH AND VOLUMES

34. The Commissioner has directed the parties to provide legal submissions on the assumptions to be made regarding traffic growth and volumes following the joint witness conferencing of traffic experts.

35. The traffic experts did not agree on the realistic growth that may occur to the transport network as Kāpiti grows. However, the range of disagreement is now limited. In particular, the traffic experts agreed that the 2% growth modelled by Mr Kelly would be the outer bound for growth rates.¹⁷
36. As part of the joint witness conferencing, Mr Kelly provided a memo containing KRHL's proposed mitigation design and modelling demonstrating the impact of a 2% growth rate on Kāpiti Road and a doubling of development on the Airport Zone accessing the Friendship Place roundabout.¹⁸
37. The plans and modelling provided by Mr Kelly demonstrate that:¹⁹
- (a) there is room available within the road reserve to accommodate the proposed additional north west approach lane to the roundabout;
 - (b) at a 2% growth rate on the peak Saturday period without any mitigation associated with the proposal, both the Friendship Place and supermarket approaches would operate at LOS F. However, importantly the extent of the delays would be significantly reduced as result of the Proposal and mitigation;
 - (c) at a 2% growth rate without any mitigation associated with the proposal, on the peak weekday period both the Friendship Place and supermarket approaches would operate at LOS D. However, the extent of the delays would be significantly reduced as result of the Proposal and mitigation; and
 - (d) if the traffic from the Airport Zone to Friendship Place is doubled on the peak weekday or peak Saturday period, the Friendship Place approach would operate at LOS F but the extent of the delays would be significantly reduced as result of the Proposal and mitigation now proposed.
38. In summary, even with 2% growth (as an outer bound), the combined effect of the Proposal with mitigation measures would be to reduce overall levels of delay. KRHL submits the outcome of Mr Kelly's modelling and demonstrates that the Proposal entirely mitigates the potential traffic effects that it creates regardless of the extent of growth on the wider network. For this reason, the extent of realistic growth impacting the roundabout becomes a moot point, given the Proposal (with the proposed mitigation) adds capacity to the network.

¹⁷ At [23].

¹⁸ At Annexure A.

¹⁹ At Annexure A, page 3.

RESPONSE TO MEMORANDUM OF YOUNG SUPERMARKETS LIMITED AND MODERN MERCHANTS LIMITED

39. The 5 May 2022 memorandum filed by Young Supermarkets Limited (**YSL**) and Modern Merchants Limited (**MML**) states that KRHL accepts that accounting for growth forms part of the assessments of effects.²⁰ To clarify this statement, it is KRHL's position that the growth rates adopted by Mr Tim Kelly and Mr Trotter, including Nil growth for Saturday peak period, are the realistic and correct growth rates against which the effects of the Proposal are to be assessed. The 2% growth rate was simply adopted by Mr Kelly for the purposes of stress testing the Friendship Place/Kāpiti Road roundabout.
40. YSL and MML further state that it is not clear why the 2% growth rate modelled for Kāpiti Road was not adopted by Mr Kelly for the stress testing of the roundabout in terms of growth from the Airport Zone. As noted at paragraph 37(d) above, Mr Kelly stress tested effects of future growth in the Airport Mixed Use Precinct by doubling the traffic volumes during the peak weekday and peak Saturday period.
41. YSL and MML go on to assert that: *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.*²¹ We do not agree with the above assertion.
- (a) As we have discussed above, the stress testing carried out by Mr Kelly demonstrates that the proposed mitigation more than offsets the effects of the Proposal regardless of growth on Kāpiti Road or in the Airport Zone. This outcome would not change if variations were made to the growth forecasts applied to either Kāpiti Road or the Airport Zone because the proposed mitigation increases the capacity of the network.
- (b) The roundabout is already in place and, the mitigation proposed is simply the provision of two additional lanes. This mitigation will not prevent a future developer at the Airport Zone from developing a signalised intersection later if required to do so by Council in accordance with the conditions of a controlled activity consent. Such a condition would be to offset the effects of that developer's own activities. Such mitigation is not required to address the effects of the Proposal.

²⁰ At paragraph 11.

²¹ At paragraph 12.

NEXT STEPS

42. We submit that the appropriate next steps are for the Commissioner to issue the following directions.
- (a) In accordance with paragraph 6 of Minute 4, Mr Kelly to provide a statement of supplementary evidence setting out the results of his modelling as appended to the JWS and containing the details of KRHL's proposed mitigation within 10 working days of the Commissioner's directions;
 - (b) Within 10 working days of the filing of Mr Kelly's evidence, the traffic experts called by the parties are to conference on the following matters:
 - (i) the appropriateness of the proposed design of the north west approach lane; and
 - (ii) the results of Mr Kelly's modelling and whether they demonstrate that the proposed mitigation mitigates the traffic generated by the Proposal regardless of the growth on Kāpiti Road or within the Airport Zone.
 - (c) Following this further directions will be made for KRHL to file its closing legal submissions.

Dated this 5th day of May 2022



Joshua Leckie/Kathrine Hockly
Counsel for Kapiti Retail Holdings Limited