

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

Under the Resource Management Act 1991 (Act)
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)

**Legal submissions on behalf of Young Supermarkets Limited and Modern
Merchants Limited**

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INTRODUCTION

- 1 These legal submissions are presented on behalf of Young Supermarkets Limited (**YSL**) and Modern Merchants Limited (**MML**) in relation to Kāpiti Retail Holdings Limited's (**KRHL**) application for resource consent in respect of the construction and operation of a Countdown supermarket and two trade retail tenancies (**Proposal**) at 160 Kāpiti Road, Paraparaumu (**Site**).

- 2 Both YSL and MML are involved in the operation of New World Kāpiti at 159 Kāpiti Road, Paraparaumu (**New World Kāpiti**). New World Kāpiti is located within Kāpiti Landing, a business park comprising a variety of retail activities. New World Kāpiti is on the opposite side of Kāpiti Road from the Site, and is served by the same road network. It is imperative for both YSL and MML that the proposal does not compromise the efficient operation of this road network.

- 3 The Proposal will generate adverse transport effects, particularly on the operation of Kāpiti Road and the Kāpiti Road / Friendship Place roundabout (**Roundabout**).

- 4 The central concern for YSL and MML is that these effects have not been adequately addressed by the application and proposed conditions of consent. There is insufficient certainty that potential adverse transport and traffic effects have been appropriately mitigated. Consequently, consent should be declined.

Evidence on behalf of YSL and MML

- 5 In support of their submissions, YSL and MML have lodged a statement of evidence from Michael Nixon, a transport engineer at Commute Transport Consultants. A statement of evidence has also been lodged by Clayton Young, the director of YSL, which gives context and practical experience of the operations on the ground.

TRANSPORT AND TRAFFIC EFFECTS

6 There are four transport experts that have prepared statements of evidence for this hearing, representing KRHL (Tim Kelly),¹ Kāpiti Coast District Council (**KCDC**) (Neil Trotter),² Templeton Kāpiti Limited (**TKL**) (Andy Carr),³ and YSL and MML (Michael Nixon).⁴

Unresolved issues

7 As set out in Mr Nixon's statement of evidence, the outstanding issues raised by YSL's and MML's submissions relate to:⁵

7.1 The mitigation works required on the Friendship Place approach to the Roundabout; and

7.2 The mitigation works potentially required on the north-western approach to the Roundabout, on Kāpiti Road.

8 Based on Mr Carr's evidence there are also unresolved issues relating to the assumptions behind KRHL's traffic modelling,⁶ and the adequacy/certainty of the proposed mitigation works.⁷

9 Overall, it appears that Mr Kelly for the applicant expresses unqualified support for the Proposal from a transportation perspective. Mr Trotter for the KCDC officer's report takes a similar view.

10 In contrast, Mr Nixon has some outstanding concerns about the appropriateness and adequacy of the proposed mitigation works, and Mr Carr does not support the Proposal from a transportation perspective.

11 It is acknowledged that expert caucusing has been foreshadowed in the Commissioner's Minute.

¹ Statement of evidence of Tim Kelly dated 24 February 2022.

² Statement of evidence of Neil Trotter dated 10 February 2022.

³ Statement of evidence of Andy Carr dated 15 March 2022.

⁴ Statement of evidence of Michael Nixon dated 15 March 2022.

⁵ Statement of evidence of Michael Nixon dated 15 March 2022 at [11].

⁶ Statement of evidence of Andy Carr dated 15 March 2022 at [18]-[32].

⁷ Statement of evidence of Andy Carr dated 15 March 2022 at [33]-[50].

Mitigation works required on the Friendship Place approach to the Roundabout

- 12 There is agreement between the four transport experts that mitigation works are required on the Friendship Place approach to the Roundabout, in the form of the addition of a left turning lane.
- 13 Mr Nixon explains in his evidence that this additional left turning lane is 'very short' and its design is not consistent with good design practice.⁸ Mr Carr's statement of evidence provides additional analysis that casts further doubt on the appropriateness of the design.⁹ While the modelling may show that the proposed design is effective, Mr Nixon's view is that the modelling should not be used to justify what he considers to be non-standard geometry,¹⁰ and there is potential for a safety audit (required by the proposed consent conditions) to require lengthening of the proposed left turning lane.¹¹
- 14 Mr Nixon would like to see a more conventional left turning lane treatment, while also acknowledging that this may not be possible within the road reserve, and would require works to be completed on TKL land.¹² Mr Carr simply considers that what is proposed by KRHL in the form of mitigation on Friendship Place may not be sufficient.¹³
- 15 Without a more conventional left turning lane there is considerable doubt about the effectiveness and adequacy of the proposed mitigation. As far as counsel is aware, TKL has not confirmed any willingness for road widening works to accommodate an extended or different turning lane design to be undertaken on its land (and the opening legal submissions for the applicant contain no proposal in this regard).
- 16 It is submitted that the careful analysis of the proposed Friendship Place mitigation works in Mr Nixon's and Mr Carr's statements of evidence should be preferred over the 'nothing to see here' approach of Mr Kelly. For example, Mr Kelly simply asserts in his statement of evidence that

⁸ Statement of evidence of Michael Nixon dated 15 March 2022 [18].

⁹ Statement of evidence of Andy Carr dated 15 March 2022 at [38]-[42].

¹⁰ Statement of evidence of Michael Nixon dated 15 March 2022 [19].

¹¹ Statement of evidence of Michael Nixon dated 15 March 2022 [20].

¹² Statement of evidence of Michael Nixon dated 15 March 2022 [21].

¹³ Statement of evidence of Andy Carr dated 15 March 2022 at [42].

the proposed mitigation is adequate and appropriately based on the modelling results.¹⁴ Mr Trotter appears to have adopted a similar approach.¹⁵

Mitigation works potentially required on the north-western approach to the Roundabout, on Kāpiti Road

17 There appears to be general agreement between the transport experts that mitigation works may be required on the north-western approach to the Roundabout, on Kāpiti Road. This would take the form of an additional traffic lane on the north-western approach to the Roundabout.

18 Whether the mitigation works are required will be determined by traffic volumes on Kāpiti Road. However, there is uncertainty about whether or not traffic volumes on Kāpiti Road will increase, remain static or decline. If the traffic volumes do not decline, the modelling indicates that adding the additional traffic generated by the Proposal will make the north-western approach to the Roundabout heavily congested (and therefore necessitate the additional traffic lane). In the context of there being uncertainty, a monitoring condition is proposed with triggers for the implementation of the mitigation works if certain effects eventuate.

19 Unlike the mitigation works on Friendship Place previously discussed, there is no design (indicative or otherwise) that shows the proposed additional traffic lane on the north-western approach of Kāpiti Road. Despite this, Mr Kelly asserts in his statement of evidence that he has assessed the feasibility of the proposed additional traffic lane and 'can confirm that all works can comfortably take place without requiring third party land'.¹⁶ This is the extent of Mr Kelly's assessment in his statement of evidence. Opening legal submissions likewise simply assert that the works can take place on the legal road or the applicant's land, if required. No further details are proposed, which then raises a number of legal issues with the application and conditions proposed.

20 Mr Carr explains in his statement of evidence that he is unable to be so definitive, and expresses various concerns about what is proposed in

¹⁴ Statement of evidence of Tim Kelly dated 24 February 2022 at [58].

¹⁵ Statement of evidence of Neil Trotter dated 10 February 2022 at [13.2(h)].

¹⁶ Statement of evidence of Tim Kelly dated 24 February 2022 at [49].

principle, noting his inability to undertake an actual assessment without KRHL providing a design.¹⁷

21 Putting those matters of detail to one side, Mr Kelly's position appears to be that there is sufficient uncertainty to justify a monitoring condition rather than requiring the mitigation works to be completed immediately.¹⁸

22 Mr Carr and Mr Nixon have adopted somewhat different approaches on this issue:

22.1 Mr Carr sees two significant risks from Mr Kelly's proposed approach - firstly, that third party land might be needed for the proposed mitigation, and secondly, that it may not be possible to improve the capacity of the Roundabout while meeting all relevant standards/guides.¹⁹

22.2 Mr Nixon considers that the modelled reduction in traffic volumes on Kāpiti Road is unlikely, and even assuming traffic growth remains static, this will require the mitigation works to be done immediately.²⁰ Despite this, if the monitoring condition approach is to be adopted, Mr Nixon would like to see the proposed condition strengthened to avoid a situation where there could be delays of more than two years to implement the mitigation works (which could be a consequence of the current drafting of the proposed monitoring condition).²¹ It is acknowledged that the condition has been proposed to be altered through legal submissions and further evidence presented today. Those changes need to be considered and responded to, however the legal concerns with the proposed approach remain.

23 It should be noted that Mr Nixon and Mr Carr share a large degree of scepticism about the proposition that traffic volumes on Kāpiti Road

¹⁷ Statement of evidence of Andy Carr dated 15 March 2022 at [43]-[45].

¹⁸ Statement of evidence of Tim Kelly dated 24 February 2022 at [49].

¹⁹ Statement of evidence of Andy Carr dated 15 March 2022 at [46]-[50].

²⁰ Statement of evidence of Michael Nixon dated 15 March 2022 [22]-[23].

²¹ Statement of evidence of Michael Nixon dated 15 March 2022 [24].

will decline - both experts consider a reduction in traffic volumes to be unlikely.²² Mr Trotter appears to be sceptical too.²³

24 Put simply, a significant amount more work needs to be done by KRHL. If the evidence of Mr Nixon is accepted by the Commissioner, the mitigation works required on the north-western approach to the Roundabout need to be conditioned, and implemented immediately rather than at an unknown future time. But as Mr Carr points out, inadequate detail has been provided by KRHL as to the appropriateness of what is proposed.

25 It is submitted that based on the evidence of Mr Nixon and Mr Carr, the Commissioner should not be as willing as KRHL to kick the can down the road through a monitoring condition, without any certainty about what the future mitigation works are, whether they can be done and whether they will be effective.

26 If despite the evidence of Mr Nixon and Mr Carr, the Commissioner is willing to impose the monitoring condition, at a minimum the conditions will need to be carefully drafted to ensure that there is a trigger for mitigating effects as soon as they are identified. In Mr Nixon's opinion, the potential for delays of more than two years to implement Kāpiti Road mitigation works would be inappropriate from a transportation effects perspective.²⁴

CONDITIONS

27 When considering the actual and potential effects of an activity, it is permissible to consider any mitigation of effects that might be achieved by the imposition of conditions.²⁵

28 However, in order to determine that potential effects are appropriately mitigated by proposed consent conditions there must be certainty that

²² Statement of evidence of Andy Carr dated 15 March 2022 at [26]; Statement of evidence of Michael Nixon dated 15 March 2022 [22].

²³ Statement of evidence of Neil Trotter dated 10 February 2022 at [7.8]-[7.9].

²⁴ Statement of evidence of Michael Nixon dated 15 March 2022 [24].

²⁵ *Guardians of Paku Bay Assn Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [129].

proposed mitigation measures can be implemented, and if they are, they will be effective.²⁶

29 It is submitted in respect of both sets of mitigation works:

29.1 There is insufficient certainty that the proposed mitigation measures can be implemented; and

29.2 There is insufficient certainty that the proposed mitigation measures will be effective.

30 In terms of the mitigation works required on the Friendship Place approach to the Roundabout, there might be a way through if KRHL can secure landowner approval to undertake mitigation works with a standard geometry partially outside the road reserve. However, as far as counsel is aware, KRHL has not obtained this approval, and a consent condition cannot be imposed that requires third-party approval. Any such mitigation proposal may fall outside of the application site, and therefore is beyond the scope of this consent application (and is not a matter that can simply be conditioned). In essence, the mitigation proposed in the application is currently inadequate, and the application should accordingly be declined.

31 In terms of the mitigation works potentially required on the north-western approach to the Roundabout, the Commissioner must consider whether it is appropriate for this resource consent to be granted without necessary assurances around the operation of what may be an essential mitigation measure.

32 In this regard, it appears that KRHL is attempting to adopt something akin to an adaptive management approach (and adaptive management is referred to in opening legal submissions). In *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd*, the Supreme Court held that for an adaptive management approach to even be considered under the Resource Management Act 1991 (**RMA**):²⁷

²⁶ *Laidlaw College Inc v Auckland Council* [2011] NZEnvC 248 at [45]-[52].

²⁷ *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [125].

... there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk.

- 33 Adaptive management is not a 'suck it and see' approach. Whether an adaptive management approach is available will depend on an assessment of a combination of factors:²⁸
- 33.1 The extent of environmental risk (including the gravity of the consequences if the risk is realised);
 - 33.2 The importance of the activity;
 - 33.3 The degree of uncertainty; and
 - 33.4 The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.
- 34 Crucially, having regard to the above four factors, there can be no certainty based on the evidence currently before the Commissioner that kicking the can down the road will sufficiently diminish the risks of the Proposal adversely affecting the operation of Kāpiti Road and the Roundabout. There is no certainty about whether future (and as yet unknown) mitigation on the north-western approach to the Roundabout can and will be effective. It is submitted that the Commissioner should not accept the suck it and see approach, which KRHL appears to be advocating for.
- 35 It is acknowledged that the adaptive management approach is generally applied in a regional consenting context, which this is not. The applicant has not addressed the commissioner on how this approach can and should be adopted in a land use consent context.
- 36 Other concerns with this approach also arise. Firstly, in the management plan context, there is also an expectation that an applicant will provide evidence demonstrating how management plan conditions are appropriate in mitigating the effects of an activity in order for the consent authority to be satisfied that the proposed conditions are appropriate.²⁹ The key point in this context being that there must always

²⁸ *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [129].

²⁹ *Re Canterbury Cricket Assn Inc* [2013] NZEnvC 184 at [127]-[130].

be evidence to support a conclusion that adverse effects of a proposal will be appropriately mitigated.

- 37 Secondly, and most relevantly, in the road design context it is accepted that it is better practice to impose traffic management measures in the consent itself, rather than leave them to later management.³⁰
- 38 It is submitted that the mitigation measures discussed in these submissions are fundamental to this Proposal, and their effectiveness critical to the operation of the traffic network. It is further submitted that the Commissioner should refuse to grant consent to the Proposal unless the critical shortcomings identified in these submissions can be resolved. Without certainty that the mitigation measures will be effective, it is submitted that the Commissioner must decline consent to the Proposal.

A FURTHER LEGAL ISSUE RELATING TO CONDITIONS RAISED DIRECTLY BY THE COMMISSIONER

- 39 The broadly expressed power to impose conditions under s 108 of the RMA is subject to general administrative law requirements that control the exercise of public powers.
- 40 Conditions must be imposed for a planning purpose, must fairly and reasonably relate (that is, have a logical connection) to the proposed activities, and may not be so unreasonable that no reasonable consent authority could have imposed them.³¹ If a condition meets those tests it can be validly imposed.
- 41 In the roading context, the Environment Court in *Laidlaw College v Auckland Council* has helpfully observed the following in relation to the area for assessment of adverse traffic effects to the public road network arising from an application for resource consent:³²

[38] The extent of the area that needs to be considered as being potentially affected by adverse traffic effects is a matter which needs to be decided in the context of each particular case. Whilst we agree with the general

³⁰ For example, see *Beadle v Queenstown Lakes District Council* [2019] NZEnvC 92 at [90] and [174].

³¹ See *Cable Bay Wine Ltd v Auckland Council* [2021] NZHC 2596 at [36].

³² *Laidlaw College v Auckland Council* [2011] NZEnvC 248 at [38].

principle that an applicant is not required to resolve existing infrastructure problems, neither should it add significantly to them. The question is always one of degree depending on the facts of each case. The focus must be on the effects which arise from a particular proposal in the context of the particular environment into which it is sought to be transposed. Clearly, the roading network immediately around a proposed site will need to be considered, but equally, depending on the nature of the roading network and the potential for flow-on effects, a wider consideration of the network may be appropriate depending on the case.

42 It is submitted that the above principles provide the essential legal framework to address the issues raised by the Commissioner at paragraph [10] of his first Minute issued on 18 March 2022. While KRHL is not required to resolve all existing and future issues with the public road network, it must address the effects that arise from its proposal in the context of the receiving environment. Clearly this includes the potential impacts already discussed in these submissions on the operation of Kāpiti Road and the Roundabout.

CONCLUSION

43 Overall, it is submitted that there is a large degree of uncertainty about whether the proposed mitigation measures discussed in these submissions can be implemented, and if they are, whether they will be effective.

44 As the issue is not, and cannot be validly addressed, through proposed consent conditions, YSL's and MML's position is that the resource consent should be declined.

Date: 22 March 2022



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