

**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.

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

Dated: 22 March 2022

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INTRODUCTION

1. These opening legal submissions are presented on behalf of the applicant, Kapiti Retail Holdings Limited (**KRHL**).
2. KRHL operates alongside other companies under the brand Gibbons Co. Gibbons Co has developed or is in the process of developing 400 houses in Wellington with 78 of those in Kāpiti.¹ It is involved with the development of medical centres, supermarkets and student accommodation.² Gibbons Co has strong a working relationship with Woolworths, being the second largest property owner by number of Countdown supermarkets in New Zealand.³
3. KRHL has worked with the Council experts who are in full support of the Proposal and proposed conditions of consent. The only opposition is from three trade competitors to the Applicant. The only effects the Commissioner can have regard to in respect of these submitters are direct effects on them not related to trade competition. Therefore, the only potentially relevant effect on the submitters for the Commissioner's consideration are transport network effects, and these have been robustly responded to in evidence and are considered by experts for Council and KRLH to be less than minor.
4. KRHL seeks resource consent from Kāpiti Coast District Council (**Council**) under the Kāpiti Coast Operative District Plan (**Operative District Plan**) to construct and operate a Countdown Supermarket and two trade retail tenancies (**Proposal**) at 160 Kāpiti Road, Paraparaumu (**Site**).
5. The Kāpiti Coast District (**District**) has demand for an additional full-service supermarket to meet the current and projected future demands of its growing population. The District is a quickly growing area in New Zealand, the District's recent and projected future high rates of population growth translate into strong demand.⁴ The evidence of Mr Colegrave demonstrates the growing retailing demand which concludes that the District will need roughly three additional full-service supermarkets over the next 25 years.⁵

¹ Statement of Evidence of Kurt Gibbons, 7 March 2022 at [4].

² At [4].

³ At [5].

⁴ Statement of Evidence of Fraser Colegrave, 7 March 2022 at [23].

⁵ At [27].

This demand is important to your assessment of the Proposal against the relevant business activity policy framework of the Operative District Plan.

6. KRHL has worked with Woolworths NZ Limited (**Woolworths**) to consider a range of sites for the development of a second Countdown site in the District. The Site is considered to be the most suitably located opportunity of the required size and configuration for a full-service supermarket.⁶
7. The Site has the following characteristics which make it ideal for the Proposal:⁷
 - (a) Kāpiti Road is a key collector road servicing the public from Paraparaumu and Paraparaumu Beach;
 - (b) the Site is close to other retail and service activities like Kāpiti Landing business park on the land to the south-west and residential land and retirement living. Customers are expected to combine trips to the surrounding retail offerings with trips to the Site;
 - (c) the Site will be well connected to public transport being serviced by the a bus route, the Paraparaumu train station is also in close proximity;
 - (d) the Site's size means that it will be able to accommodate the necessary car parking needed to meet demand.
8. Overall, the Proposal will generate a range of positive effects, the potential adverse effects will be no more than minor. Further, the Proposal is consistent with the relevant objectives and policies of the Operative District Plan when considered as a whole. In terms of the key issues for the Commissioner's consideration:
 - (a) The proposed upgrade and monitoring of the surrounding traffic network means the Proposal will be accommodated without adverse traffic effects or the requirement for third party land. Furthermore, the proposed bus stops and a travel plan for staff to travel to and from the Site (**Travel Plan**) promotes the use of both public and private

⁶ Statement of Evidence of Katherine Marshall, 7 March 2022 at [21].

⁷ Statement of Evidence of Kurt Gibbons, 7 March 2022 at [9].

modes of transport. The design of the Proposal promotes safe, efficient access to the Site.

- (b) The Proposal has been carefully designed to be consistent with the existing and anticipated built form for the Site and surrounding area. The proposed landscaping will ensure that any outstanding minor adverse visual effects will be appropriately mitigated and softened.
 - (c) The Proposal will contribute to the vitality and function of the District in light of current and projected growth. The Proposal will not have adverse retail distribution impacts on the District's centres or material adverse impacts on the supply of industrial land in the District.
9. In our submission the Proposal meets the threshold tests under section 104D of the Resource Management Act 1991 (**RMA**) and should be granted with regard to the factors set out in section 104(1) of the RMA.

OUTLINE OF THE PROPOSAL

10. The Site is approximately 2.6 ha in area and is legally described as Lots 1 and 2 DP 63027 and Lot 3 DP 63992 at 160 Kāpiti Road, Paraparaumu.
11. A detailed description of the Proposal is provided in the Assessment of Environmental Effects (**AEE**). KRHL proposes to replace the existing, vacant building and construct a Countdown supermarket and two trade retail tenancies on the Site comprising of the following key elements and mitigation:
- (a) A 3,800m² gross floor area (**GFA**) supermarket building, including 200m² of office and 200m² for online (Pick up) activities;
 - (b) Two permitted trade retail tenancies comprising 400m² each in GFA;⁸
 - (c) 211 parking spaces on-site;
 - (d) all vehicular access from Kāpiti Road via two crossings – one via the existing roundabout intersection with Friendship Place for all vehicles, and the second, southern access for left-turn out only;

⁸ The proposed trade retail activities form part of the permitted baseline. As outlined at section 7 of the AEE trade retail tenancies up to 500m² GFA is enabled as a permitted activity under the Operative District Plan.

- (e) an additional left-turn lane approach on the western arm of the roundabout to be provided if post construction monitoring demonstrates adverse effects on the north west intersection (condition 28). The proposed additional lane is able to be provided wholly within road reserve and if necessary KRHL's land;
- (f) provision for a second lane on the southern arm (Friendship Place) of the roundabout, within the road reserve, to enable left turns out of Kāpiti Landing – as off-site mitigation of the proposed works but forming part of the Application; and
- (g) provision of on-site and boundary landscape planting, including replacement street tree planting within the road reserve on Kāpiti Road.

THE RECEIVING ENVIRONMENT

12. The receiving environment is described in the AEE and evidence of Ms Panther Knight.⁹
13. The Site is relatively flat on the south-western boundary of the Site it sits approximately 1m below Kāpiti Road. To the north-east the Site slopes up and adjacent properties on that boundary vary from being flush with, to approximately 1m above the Site.
14. The Site is currently vacant having been previously occupied by Placemakers. The Site sits within an area characterised by a mix of industrial, heavy commercial and retail and service activity situated on the busy corridor of Kāpiti Road. The land to the south-west of the Site is occupied by Kāpiti Landing, a business park comprising a variety of retail activities including a supermarket, Mitre 10 Mega and other smaller retail outlets.
15. The Site is zoned General Industrial, and the land to the north (beyond the industrial environment) is zoned residential and comprises low density suburban housing, alongside some pockets of retirement living.

⁹ AEE, 8 July 2021 at 3 and Statement of Evidence of Kay Panther Knight, 7 March 2022 at [28]-[29].

16. The evidence of Tim Kelly summarises the surrounding transport network:¹⁰
- (a) the Site is located on the north-east side of Kāpiti Road with an established access from the Friendship Place roundabout;
 - (b) the Kāpiti Road / Friendship Place roundabout is a four-arm intersection providing access to the application site, adjoining commercial activities (Capital City Ford dealership and Carpet Court) and Friendship Place (the main entry/exit for the Kāpiti Landing business park);
 - (c) the typical passing traffic volumes are 16 – 18,000 vehicles/day. Periods of maximum traffic activity occur during the weekday evening peak period and Saturday late morning / early afternoon period. Modelling of the Kāpiti Road / Friendship Place roundabout indicates that the current highest delays (equivalent to Level of Service (**LOS**) C) are experienced on the Friendship Place approach; and
 - (d) the adjacent section of Kāpiti Road provides for pedestrian and cycle routes is serviced by a bus route.

STAUTORY FRAMEWORK

Section 104D of the RMA

17. The Proposal is a non-complying activity under the Operative District Plan.
18. Section 104D of the RMA provides the threshold test for non-complying activities. You may grant resource consent only if you are satisfied that one of the following gateway tests is met:
- (a) the adverse effects on the environment will be minor (**Minor Effects Test**); or
 - (b) the proposal will not be contrary to the objectives and policies of the operative and proposed plans (**Policy Test**).
19. If an application can satisfy one of the above gateway tests, the matters in section 104(1) of the RMA must be had regard to in determining whether to grant or refuse consent under s 104B of the RMA.

¹⁰ Statement of Evidence of Tim Kelly, 24 February 2022 at [19]-[22].

20. The Minor Effect Test is confined to adverse effects only, positive effects cannot be taken into account when making a consideration under section 104D(1)(a).¹¹ Whether effects are minor is to be determined after having regard to any mitigation of effects that might be achieved by imposing conditions.¹² As outlined by the evidence of the expert witnesses called by KRHL the effects of the Proposal are anticipated to be less than minor. The Council Officer's Section 42A Report (**Section 42A Report**) agrees with that position assessing each relevant effect as less than minor and concluding the adverse effects of the Proposal are minor subject to mitigation.¹³
21. The Policy Test requires an application to not be 'contrary' to the objectives and policies of the relevant planning documents. The High Court¹⁴ recently found 'contrary' to objectives and policies to mean "...opposed in nature, different to or opposite... repugnant or antagonistic." Whether an activity is contrary with policy is to be considered on a fair appraisal of the objectives as a whole.¹⁵ A consent authority must consider all of the relevant plan provisions comprehensively and so far as possible reconcile them where they appear to be pulling in different directions.¹⁶
22. Overall, in my submission the Proposal is consistent with the relevant objectives and policies of the Operative District Plan when considered as a whole.
23. KRHL submits that the Proposal passes through both gateway tests and consent is able to be assessed for consent against the factors set out in section 104 of the RMA.

Section 104 of the RMA

24. Section 104 of the RMA outlines the matters you must, subject to Part 2, have regard to when considering the Proposal. These matters include:

¹¹ *Logan Limited v Auckland City Council* A124/2008 at [77].

¹² *Stokes v Christchurch City Council* [1999] NZRMA 409 (EnvC); *Living Earth Limited v Auckland Regional Council & Manukau City Council* 126/2006 dated 4/10/2006 at [524].

¹³ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [91]-[93].

¹⁴ *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency* [2021] NZHC 390 at [24] citing *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at [11].

¹⁵ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25]. As recently endorsed by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [73].

¹⁶ *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency* [2021] NZHC 390 at [30].

- (a) the environmental effects of the proposed activities;
 - (b) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment; and
 - (c) the relevant provisions of the regional and district plans and higher order planning documents.
25. KRHL submits that the Proposal should be granted considering the factors set out in section 104(1) of the RMA.

Permitted Baseline and Existing Environment

26. The permitted baseline and existing environment are central concepts to the assessment of this Proposal.

Permitted baseline

27. The concept of the permitted baseline was codified in section 104(2) and section 104D(2) of the RMA. Section 104(2) reads as follows:

When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

28. The permitted baseline allows a comparison of the effects of what is proposed as against what is permitted under the relevant plan.¹⁷ However, the permitted activities must not be fanciful.¹⁸ The permitted baseline applies only to permitted activities as expressed in section 104(2) of the RMA. It does not apply to activities that require resource consent (for example as a controlled or restricted discretionary activity).

Existing Environment

29. Prior to considering the effects of the activity on the environment, it must first be established what the existing environment is. A consent authority is required to define the existing environment as including any permitted and consented activities already being conducted, and any permitted activities

¹⁷ *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009.

¹⁸ *Rodney DC v Eyres Eco-Park Limited* [2007] NZRMA 1 (HC).

and unimplemented resource consents that are likely to be implemented. The decision maker must consider the environment against which a consent application is assessed as already containing the effects of any such consented or permitted activity. The existing environment includes only consented and permitted activities. It does not include activities that would require controlled or restricted discretionary consent.¹⁹

EFFECTS ON THE ENVIRONMENT

30. The experts called by KRHL and the Section 42A Report author agree that any adverse effects of the Proposal on the environment will be no more than minor. The assessment of effects has been covered in significant detail in the AEE and Section 42A Report. These submissions do not repeat the effects assessment. Rather, the following submissions address the key points in terms of environmental effects.

Positive Effects

31. The Proposal will result in a range of positive effects, including:²⁰
- (a) community benefit resulting from the provision of an additional full-service supermarket within the Paraparaumu community;
 - (b) reduction in travel time for residents to fulfil their grocery needs and a sustainable travel pattern for customers given the Proposal's close location to the catchment it serves;
 - (c) access to alternative modes of transport promoted to and from the Site given the accessibility of public transport links;
 - (d) generation of employment opportunities across the life of the Proposal during construction and operation. Supermarkets of this size typically employ 80-100 staff, both full and part-time, further employment opportunities are generated by the two trade supply tenancies;²¹
 - (e) an efficient use of an existing but vacant physical resource, being a well-serviced, urban site with convenient access to transport routes,

¹⁹ *Queenstown Lakes District Council v Hawthorn Estate limited* [2006] NZRMA 424 at [84].

²⁰ Statement of Evidence of Kay Panther Knight, 7 March 2022 at [41].

²¹ At [41](c).

Paraparaumu Town Centre and residential catchment. A corresponding improvement in the amenity afforded to the surrounding area by redeveloping an under-utilised site visible from Kāpiti Road as a key corridor; and

- (f) additional indirect economic effects arising from the Proposal as a catalyst for further investment within the local community.

Transport Effects

32. The Traffic effects of the Proposal have been assessed by Mr Kelly. Mr Kelly provided a robust assessment in his Integrated Transport Assessment (**Transport Assessment**) appended to the AEE and also provided detailed responses to Council's further information requests.²² Mr Kelly makes a further assessment of traffic effects and responds to concerns of submitters in his statement of evidence. The original assessments identified a trend for Saturday peak period traffic volumes to decline. However, on the request of the Council, the basis of this modelling was adjusted to a zero-growth model.²³
33. In terms of the transport aspects of the Proposal:²⁴
- (a) The Proposal includes mitigation for traffic congestion by way of construction of an additional approach lane from Friendship Place. This proposed mitigation will appropriately manage congestion though allowing cars turning north-west to sit beside cars driving through the roundabout through the site reducing queuing.
 - (b) the Proposal also includes general upgrades to the wider traffic network, namely the provision of crossing points, secure cycle parking and new bus stops. The proposed upgrades will contribute to safe access to the Site as well as promote non-car methods of transport to and from the Site. The Travel Plan to assist and support travel to the Site by non-car modes of transport is also fully supported by Council's Section 42A Report author.²⁵

²² Request for Further Information received 27 July 2021 with responses given on the 6 August 2021, 12 August 2021, 20 August 2021, 9 December 2021.

²³ Statement of Evidence of Tim Kelly, 24 February 2022 at [41].

²⁴ At [27]-[35].

²⁵ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [50].

- (c) Off-street parking is anticipated to meet the demands generated by the Proposal.²⁶
- (d) Proposed condition of consent 28 requires an additional left-turn lane approach on the north-western arm of the roundabout to be provided if post construction monitoring demonstrates adverse effects on this approach to the intersection beyond a prescribed level. The proposed additional lane is able to be provided wholly within road reserve and if necessary KRHL's land.
34. Mr Trotter for the Council and the Section 42A Report both concur that the Proposal can be satisfactorily accommodated at the proposed modified Kāpiti Road / Friendship Place roundabout and left in/left out Kāpiti Road access without compromising the safe and efficient operation of Kāpiti Road.²⁷
35. The sole outstanding potential traffic related issue has been addressed by adaptive management through future monitoring. This relates to the reliability of the forecast turning count used as the basis to possible assess effects on traffic flow at the Kāpiti Road / Friendship Place roundabout for the modelled Saturday peak period.²⁸ Given potential uncertainty in the data there is some risk of congestion at the north west approach to the intersection caused by the Proposal which would require mitigation in the future. This issue has been addressed by way of proposed condition 28, which requires monitoring to ascertain whether additional mitigation of transport effects is required. If mitigation is required, then this is able to be provided within KRHL's land and the road reserve in the form of an additional left-turn lane approach on the north-western arm of the roundabout to enable dedicated access into the Site. The proposed wording of condition 28 has been agreed with Mr Trotter and is addressed at paragraph 92 below.
36. I submit that the proposed condition is legally valid and appropriate. It is well established that conditions of consent require specificity, clarity and accuracy of expression leading to a measure of certainty before they can be

²⁶ Evidence of Mr Tim Kelly dated 24 February 2022 at [16].

²⁷ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [50].

²⁸ Statement of Evidence of Tim Kelly, 24 February 2022 at [40].

enforceable.²⁹ In order to be enforceable conditions must contain environmental clear environmental outcomes and or standards to meet.³⁰

37. Further, the Supreme Court has held that consent conditions that provide for adaptive management of effects are lawful subject to the below requirements:
- (a) there must be good baseline information about the receiving environment;
 - (a) the conditions must set clear environmental standards to be met;
 - (b) the conditions must provide for effective monitoring of adverse effects using appropriate indicators;
 - (c) thresholds must be set to trigger remedial action before the effects become overly damaging; and
 - (d) effects that might arise must be able to be remedied before they become irreversible.³¹
38. In this case, there is baseline information about the existing transport situation. However, there is some uncertainty in the data. The proposed condition sets a clear standard to be met being a defined level of service that must be met (with more specificity than usual) after the supermarket is operational. Proposed condition 28 provides a clear process for monitoring and a clear trigger for mitigation. The mitigation to be provided is certain and can be delivered by KRHL without reliance on any third-party land. This mitigation will be delivered without causing damaging effects on the transport network. For these reasons KRHL submits that the proposed condition is both lawful and sufficiently certain to the point that the Council can rely on it to ensure that environmental effects are appropriately managed.
39. Overall, transport effects have been robustly assessed by Mr Kelly and Council experts. Both agree that the traffic effects of the Proposal will be

²⁹ *Ferguson v Far North District Council* [1999] NZRMA 238 at 9.

³⁰ *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 336.

³¹ *Sustain Our Sounds Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 40 at [88]–[95], [100]–[103], [135], [140] and [158].

appropriately managed through the implementation of the proposed conditions. Proposed upgrades to the wider traffic network will contribute to safe access to the Site while promoting the use of non-car modes of transport.

Economic Effects

40. Section 104(3)(a)(i) provides that a consent authority must not have regard to trade competition or the effects of trade competition when considering an application. Section 104(3)(a)(i) was included in the RMA with the intention to deter trade competitors from using resource management processes to prevent rivals from competing in the same market.³² In testing these provisions the Supreme Court has confirmed that, while consent authorities may not have regard to the direct effects of trade competition, it is appropriate to take into account flow-on 'retail distribution effects' when considering a request for resource consent. For example: a downturn in business in an existing shopping centre or dilution of a retail centre.³³ This is commonly known as the tumbleweed scene.
41. Mr Colegrave assesses the economic impacts of the Proposal in his evidence and Economic Assessment for a Proposed New Countdown Supermarket in Paraparaumu (**Economic Assessment**) appended to the AEE. Overall, the Proposal's adverse economic impacts have been assessed by KRHL to be minor, with Council concurring with that assessment.³⁴
42. Mr Colegrave's assessment, as supported by Council, concludes:
- (a) That the economic benefits of the Proposal are three-fold:³⁵
- (i) customer net benefit from reduced travel time and access to wider range of produce;
 - (ii) benefits of increased competition to help contain prices to make groceries more affordable; and

³² Ministry for the Environment "Departmental Report on the Resource Management (Simplifying and Streamlining) Amendment Bill" (June 2009) at 82-87.

³³ *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597 at [119]-[120].

³⁴ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [71].

³⁵ Statement of Evidence of Fraser Colegrave, 7 March 2022 at [68].

- (iii) general economic stimulus by virtue of the construction and operation of the new store both in the short and long term. Generating local employment and better enabling the community to provide for their social and economic needs.
43. Mr Colegrave describes the Paraparaumu Town Centre as vital, healthy, and importantly, accommodates two existing full-service supermarkets, neither of which are expected to close as a result of the Proposal.³⁶
- (a) Mr Colegrave has carefully assessed the risk of adverse distributional effects on the Paraparaumu town centre. Mr Colegrave has concluded that whilst having some spatial overlap with the Paraparaumu Town Centre, the Proposal will 'have minimal functional overlap'.³⁷ Overall, Mr Colegrave finds that there will be very limited risk to the vitality of the Paraparaumu Town Centre as trade impacts will be spread over a strong and diverse network of existing retailers in an area of high projected growth.³⁸ The evidence of Katherine Marshall outlines Woolworths NZ's commitment to ensuring Countdown's Paraparaumu Town Centre store.³⁹
 - (b) Mr Colegrave has also assessed that the use of industrial land for a retail activity will have minimal impact on the District's supply of industrial land, given the surplus in current supply that will be able to meet the predicted future need.⁴⁰
44. Overall, the Proposal generates a range of economic benefits with minor adverse economic impacts. Mr Colegrave's evidence demonstrates that retail distribution impacts will be dispersed over a wide catchment and will be no more than minor. Overall, the Proposal provides significant economic benefit through job creation with minor economic effects.

Urban Design Effects

45. Urban design effects have been assessed in Mr Knott's Proposed Supermarket and Trade Retail Development 160 Kāpiti Road, Paraparaumu Urban Design Assessment (**Urban Design Assessment**) appended to the

³⁶ Statement of Evidence of Fraser Colgrave, 7 March 2022 at [53(d)].

³⁷ Statement of Evidence of Fraser Colgrave, 7 March 2022 at [52].

³⁸ At [53].

³⁹ Statement of Evidence of Katherine Marshall, 7 March 2022 at [27(a)].

⁴⁰ Statement of Evidence of Fraser Colegrave, 7 March 2022 At [61].

AEE and evidence. Mr Knott considers the Site to have considerable merit for a supermarket from an urban design perspective, meeting the functional requirements for supermarket design.⁴¹

46. The Proposal will achieve and enhance the pedestrian amenity of the public realm through the provision of an attractively landscaped edge, providing clear and legible pathways through the Site. The Proposal has been carefully designed to appropriately balance the requirements for supermarket design and the opportunities the Site affords. The Proposal will provide a high-quality landscaped edge to the benefit of the streetscape.⁴²
47. The Section 42A Report is generally supportive of the urban design outcomes. The Section 42A Report does, however, raise urban design matters with reference to Council's urban design peer review prepared by Jamie Devereux of Urban Edge Planning Limited (**Peer Review**). The Peer Review and Section 42A Report initially recommend the use of varied surface materials to break up the impact they perceive the design to have on the general streetscape.
48. Mr Knott in his evidence addresses the suggestion of the provision of varied surface materials.⁴³
- (a) Mr Knott notes that the Site is adjacent to a busy collector road. The design is in keeping with the character of existing and anticipated development in the General Industrial Zone.
- (b) Mr Knott further refers to the robust landscaping plan that is incorporated into the proposed conditions of consent. This plan provides a layering of landscaping from the berm at the Site frontage with larger areas of planting are proposed around the vehicular accesses to the Site, to 'green' the frontage and break views of the buildings.⁴⁴
49. The Council Response to Applicant Evidence circulated 15 March 2022 identifies that the Council experts are in agreement with Mr Knott that condition 12 can be removed.⁴⁵

⁴¹ Statement of Evidence of Richard Knott, 7 March 2022 at [19] and [20].

⁴² At [20(f)].

⁴³ Statement of Evidence of Richard Knott, 7 March 2022 At [31].

⁴⁴ At [20(l)].

⁴⁵ Council Response to Applicant Evidence, 15 March 2022.

Other Environmental Effects

50. With respect to servicing and infrastructure, the Infrastructure Report provided by Maven Associates appended to the AEE confirms there is sufficient capacity to provide for the Proposal in infrastructure networks.⁴⁶ This conclusion is supported by the section 42A report author and no servicing or infrastructure concerns have been raised.⁴⁷
51. Construction effects will be appropriately mitigated through the provision of a Construction Management Plan. The Section 42A Report considers that with the provision of the Construction Management Plan that the adverse construction effects will be less than minor.⁴⁸
52. Cultural matters were raised in the Section 42A Report. Ātiawa ki Whakarongotai Charitable Trust (**Trust**) provided a report raising concerns with respect to impacts on the nearby Wharekaukū Stream and flora selection for berm planting. Council's Request for Further Information required these concerns to be addressed. The section 42A report records that the Trust was subsequently satisfied by the response by KRHL which provided an Erosion and Sediment Control plan and a requirement for berm trees to be native species.⁴⁹
53. The Proposal includes non-compliances with respect to proposed signage. Given the setback of the buildings from Kāpiti Road, the Section 42A Report author does not consider that this signage will dominate the streetscape and therefore considers that the effects will be less than minor.⁵⁰

DISTRICT PLAN ASSESSMENT

54. The AEE and expert evidence called by KRHL carefully assesses the Proposal against the relevant objectives, policies and assessment criteria in the District Plan.
55. That evidence of Ms Panther Knight concludes that the Proposal is generally consistent with all of the relevant Operative District Plan objectives and

⁴⁶ Infrastructure Report Kāpiti Countdown Site, 160 Kāpiti Road, produced by Maven Associates dated 2 July 2021 at 9.

⁴⁷ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [58]-[61].

⁴⁸ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [75].

⁴⁹ At [109].

⁵⁰ At [89].

policies. Certain objectives and policies enable the proposed land use, despite it not being specifically enabled by the underlying General Industrial Zone (**GIZ**).⁵¹ The Section 42A Report author appears to be agreement with this conclusion.⁵²

56. These legal submissions specifically address the relevant business activity and General Industrial Zone polices.

Business Activities

57. In my submission the Proposal is consistent with the key Business Activity policies for the following reasons.

58. Policies BA-P1- BA-P3 identify that retail activity will be managed within identified areas or otherwise managed to avoid the dispersal of business activity, which would be detrimental to the efficient operation, function, viability and sustainability of the District's centres. The proposal is consistent with these outcomes for the following reasons, as it:

- (a) provides the community with convenient access to goods and services and generates employment opportunities;
- (b) represents an efficient use of existing infrastructure. The Proposal will integrate into existing infrastructure;⁵³
- (c) has been carefully designed and situated to ensure access to safe and efficient transport connections.⁵⁴ The Proposal is also readily accessible by both public and private forms of transport in proximity to the community it serves;⁵⁵
- (d) provides a modern, attractive development. The location, scale and intensity of the Proposal is in keeping with the surrounding mixed service and heavy commercial environment. Mr Knott's evidence demonstrates the Proposal reflects the character and standards of amenity in the surrounding General Industrial Zone and is fully

⁵¹ Statement of Evidence of Kay Panther Knight, 7 March 2022 at [82].

⁵² Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [137].

⁵³ Statement of Evidence of Glen Bellingham, 7 March 2022 at [9].

⁵⁴ Statement of Evidence of Tim Kelly, 7 March 2022 at [18].

⁵⁵ Statement of Evidence of Katherine Marshall, 7 March at [22(b)].

compatible with its surroundings. The Proposal is also expected to generate positive effects on the streetscape;⁵⁶

- (e) is highly unlikely to generate adverse reverse sensitivity effects. As outlined by Ms Panther Knight, the Proposal is a “*useful buffer activity at the interface of industrial and residential land in the vicinity*”;⁵⁷
- (f) will not have material impacts on the supply of industrial land;⁵⁸ and
- (g) will not adversely impact upon the Operative District Plan centres framework or the vitality and function of the Paraparaumu Town Centre.⁵⁹ Rather the Proposal will contribute to the vitality of the Paraparaumu Town Centre and furthermore, generate long-term sustainable employment opportunities for approximately 80-100 full and part time staff.⁶⁰

59. Limb (1)(b) of Policy BA-P2 provides that retail activities located outside of the centres are to be *avoided* where they serve a market beyond the daily convenience needs of the immediate local residential neighbourhood. Ms Panther Knight has identified that the Proposal has the potential to be considered inconsistent with limb (1)(b) as it serves a catchment of approximately 8 kilometres. However, she considers that the Proposal is not contrary to Policy BA-P2 when read as a whole.⁶¹

60. In my submission when considered in the context of the relevant Operative District Plan framework, the Proposal is consistent with Policy BA-P2.

61. The proposed supermarket will operate as a stand-alone supermarket activity designed to meet the convenience needs of locals and visitors. The predominate market served by the Proposal will be the immediate catchment it sits within and serves. In this respect that Proposal differs from other more destination focussed retail activity that the policy framework seeks to avoid such as centres-based big box-retail which draw customers from further afield. For this reason, I submit that the Proposal is largely consistent with

⁵⁶ Statement of Evidence of Richard Knott, 7 March 2022 at [25].

⁵⁷ Statement of Evidence of Kay Panther Knight, 7 March 2022 At [81(c)].

⁵⁸ Statement of Evidence of Fraser Colegrave at [62].

⁵⁹ Objective DO-O16; see Statement of Evidence of Fraser Colegrave, 7 March 2022 at [63]-[66].

⁶⁰ Objective DO-015; See Statement of Evidence of Ms Panther Knight, 7 March 2022 at [81(c)].

⁶¹ At [81(g)(vi)].

limb 1(b) of Policy BA-P2 and is not the type of activity that limb 1(b) or Policy BA-P2 is directed at excluding.

62. The key District Wide objectives are DO-O15 and DO-O16 which seek to promote sustainable and on-going economic development of the local economy through encouraging business activities in appropriate locations within the District and ensuring vibrant, safe and economically sustainable centres.
63. Policy BA-P2 seeks to implement DO-O15 and DO-O16 through controlling the location of certain business activities by way of their function and effects. Limb (1) of Policy BA-P2 focuses on the function of the particular business activity in reference to particular zones. Limb (2) focuses on effects and provides assessment criteria for determining when out of zone activity is appropriate.
64. In my submission Policy BA-P2 sets a two-step assessment whereby limb (1) must be read in the context of the assessment criteria in limb (2). Because of this, limb (1) in isolation does not set it is a strict avoidance bottom line of the nature described *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors*.⁶² To the contrary, if an activity appears inconsistent with an element of limb (1), the decision maker must go to limb (2) and consider whether the effects of the activity are appropriate based on the assessment criteria. If the effects of the activity are considered appropriate against the assessment criteria in limb (2) the activity can be consistent with the policy as a whole despite appearing inconsistent with an element of limb (1). If limb (1) did set an avoidance bottom line then there would be no purpose for the assessment criteria in limb (2).
65. With respect to the Proposal, in my submission the requirement in limb 1(b) for a retail activity to serve the daily convenience needs of the immediate local residential neighbourhood must be read in the context of the assessment criteria in limb (2). As outlined in these legal submissions, the effects of the proposal are appropriate when considered against the matters outlined in the limb (2) assessment criteria. Of specific importance with respect to objectives DO-O15 and DO-O16 is that:

⁶² *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38 at [38].

- (a) the Proposal will serve an important need for the community in which it sits and where it's customers live;
 - (b) it will not have adverse amenity or reverse sensitivity effects;
 - (c) it will have a less than minor effect on the efficient operation, function, viability and sustainability of the District centres; and
 - (d) it will result in economic benefits contributing to the vitality of the business zones overall.
66. The Proposal achieves the key intent of objectives DO-O15 and DO-O16 and Policy BA-P2 through promoting the sustainable and on-going economic development of the local economy and ensuring protection of vibrant, safe and economically sustainable centres in the District. For this reason, KRHL submits that the Proposal is able to be considered consistent with Policy BA-P2.

General Industrial Zone Objectives and Policies

67. The AEE and evidence of Ms Panther Knight concludes that the Proposal will be consistent with the objectives and policies of the General Industrial Zone. when considered as a whole.⁶³ The Section 42A Report agrees that the Proposal can be favourably considered against these provisions and concludes the Proposal will not be contrary to the desired outcomes of policies GIZ-P1 -P4 of the General Industrial Zone.⁶⁴
68. The Proposal provides some industrial activity in the form of trade retail but is otherwise a non-industrial land use in the General Industrial Zone. While the Proposal is not specifically enabled by General Industrial Zone it is not the sort of retail activity that the policy framework seeks to discourage in that the Proposal:
- (a) does not adversely affect adjoining sensitive activities or areas;⁶⁵
 - (b) is in keeping with the existing and anticipated character of the General Industrial zone;⁶⁶ and

⁶³ Statement of Evidence of Kay Panther Knight, 7 March 2022 at [83].

⁶⁴ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [129]-[132].

⁶⁵ Statement of Evidence of Kay Panther Knight, 7 March 2022 at [82(a)].

⁶⁶ Statement of Evidence of Richard Knott, 7 March 2022 At [19].

(c) will have less than minor effects on the vitality, function and amenity of the Paraparaumu Town Centre.⁶⁷

69. The Section 42A Report agrees that that while the Proposal includes retail activities that are not ancillary to an industrial activity, *'the Site is considered appropriate for the proposed use, given the proximity to residentially zoned areas resulting in less time spent travelling for vital amenities'*.⁶⁸ It further notes that Site is located within the industrial fringe and the *"operation of a retail activity on the site is considered more appropriate in close proximity to residentially zoned areas than heavy industrial activities."*⁶⁹
70. I submit that while not directly enabled, activities of the nature of the Proposal are generally anticipated by the policy framework of the General Industrial Zone. The Proposal does not have the characteristics/impacts that GIZP2.2 seeks to avoid.
71. For the reasons stated above, KRHL submits the Proposal is consistent with outcomes of the General Industrial Zone policies.

HIGHER ORDER PLANNING DOCUMENTS

72. The higher order planning documents of relevance include the National Policy Statement on Urban Development 2020 (**NPS UD**), the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (**NES**) and the Regional Policy Statement for the Wellington Region 2013 (**RPS**).

NPS UD

73. The AEE comprehensively assesses the Proposal against the NPSUD and Ms Panther Knight's evidence.⁷⁰ Overall, it is my submission that the Proposal is consistent with the NPSUD. I submit that the Proposal will enable the Council to fulfil its obligations under the NPSUD. The proposed non-industrial use of General Industrial Zone land is not inconsistent with the NPSUD as the Proposal delivers a feasible commercial use that meets anticipated demand without detriment to the ongoing efficiency of

⁶⁷ Statement of Evidence of Fraser Colegrave, 7 March 2022 at [66].

⁶⁸ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [130].

⁶⁹ At [131].

⁷⁰ AEE at 10.1; see Statement of Evidence of Kay Panther Knight, 7 March 2022 at [87].

surrounding industrial land.⁷¹ The Section 42A Report concurs with this assessment, noting that the Proposal aids Council in meeting the requirements of the NPS UD.⁷²

RPS

74. In my submission the Proposal is generally consistent with the RPS.⁷³ The Section 42A Report does not outline any aspect of the Proposal that is contrary to the RPS and overall is not specifically contrary to the range of applicable objectives and policies.⁷⁴

Commerce Commission Market Study into the Grocery Sector

75. As a relevant matter under section 104(1)(c) of the RMA I draw the Commissioner's attention to the Commerce Commission's Market Study into the Grocery Sector (**Market Study**) which was released this month.
76. The purpose of the Market Study was to consider high level of concentration in the sector, potential competition concerns and the prices consumers pay for their groceries.
77. The Market Study found that there is a lack of suitable sites for development of retail grocery stores in New Zealand. The best way to improve competition is through measures that are likely to improve the conditions for entry and expansion.⁷⁵ The Market Study considers that to improve of the availability of sites for retail grocery stores under the RMA is a key means to improving competition.⁷⁶
78. The Market Study concluded that businesses attempting to use planning laws to hinder their competitors' access to or ability to develop suitable development sites was raising the costs of expansion in the market.
79. Contrary to the view of the submitters who are all trade competitors of the Applicant, I submit that granting of consent for the Proposal will assist to meet these recommendations by providing for an additional full-service supermarket to the local market. This is not only an outcome sought by the

⁷¹ Statement of Evidence of Kay Panther Knight, 7 March 2022 At [87].

⁷² Statement of Evidence of Kay Panther Knight, 7 March 2022 At [101].

⁷³ AEE at 10.9; see Statement of Evidence of Kay Panther Knight, 7 March 2022 at [89].

⁷⁴ Section 42A Officers Report of Marnie Rydon, 1 March 2022 at [137].

⁷⁵ Commerce Commission Market Study into the Grocery Sector at 9.9.

⁷⁶ Recommendation 1.

Market Study but also one directed by the NPSUD in particular Policy 1 hat requires urban environments with a variety of sites enabled for business activities.

PART 2 OF THE RMA

80. The Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* has clarified that,⁷⁷ when considering resource consent applications, decision-makers must have regard to Part 2 “when it is appropriate to do so”.⁷⁸ If the relevant planning document has been competently prepared under the Act, a decision-maker can feel assured not to refer to Part 2. Without such assurance, or if in doubt, it will be “appropriate and necessary” to refer to Part 2.⁷⁹
81. Given that the Operative District Plan has recently become operative it is reasonable to expect that it gives effect to Part 2. However, out of caution, a Part 2 assessment has been undertaken by Mr Panther Knight.⁸⁰ As concluded by Ms Panther Knight, KRHL submits that the Proposal is consistent with Part 2 of the RMA.

SUBMISSIONS

82. As discussed at paragraph 40 consent authorities may not have regard to the effects of trade competition when considering an application for resource consent.⁸¹ Further, submitters who are trade competitors are limited in the matters that they can submit on. A trade competitor may only make a submission on the Application if directly affected by an environmental effect of the activity.⁸² The purpose of this limitation is to stop trade competitors from using resource management processes to prevent rivals from competing in the same market.⁸³

⁷⁷ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

⁷⁸ At [47].

⁷⁹ At [75].

⁸⁰ Statement of Evidence of Kay Panther Knight, 7 March 2022 at [92]-[94].

⁸¹ *Westfield (New Zealand) Limited v North Short City Council* [2005] NZSC 17, [2005] 2 NZLR 597 at [119]-[120].

⁸² Section 308B of the Resource Management Act 1991.

⁸³ Ministry for the Environment “Departmental Report on the Resource Management (Simplifying and Streamlining) Amendment Bill” (June 2009) at 82-87.

83. It is well established that land and building owners and lessees can be trade competitors.⁸⁴ Locally, the Environment Court has more recently confirmed that property developers can also be trade competitors.⁸⁵
84. Three submissions were received on the Proposal, all of which were from trade competitors in opposition citing adverse traffic effects as the reason for opposing the Proposal. In this instance the relevant effect on the environment cited by submitters in trade competition is traffic effects. I submit that the Commissioner must exercise caution when considering these submissions to ensure that that the relevant concerns raised relate to genuine direct environmental effects.⁸⁶
85. As noted above, three submissions sought further information relating to effects on the transport network. Mr Kelly's evidence carefully addresses the concerns raised by submitters.⁸⁷ Overall, both Mr Kelly and Council's traffic expert Mr Trotter are in agreement that the effects on the transportation network can be appropriately mitigated to be less than minor.⁸⁸
86. A matter raised by Templeton Kāpiti Limited and Mr Carr is whether transport analysis included all of Kāpiti Landing's permitted and consented activities in traffic generation modelling. It does. This is dealt with by Mr Kelly's evidence and the evidence of Ms Panther Knight.⁸⁹ Ms Panther Knight identifies that based on the relevant rules of the Airport Zone (Mixed Use Precinct) and the Transport Chapter of the Operative District Plan, there is very limited opportunity for permitted activities of any significant scale such that they would affect the existing environment in the modelling analysis of this Proposal.⁹⁰ As discussed at paragraphs 26-29 of my submissions it is only permitted activities that fall within the existing environment. Activities that require resource consent including controlled and restricted discretionary activities do not. For this reason, the effects of the potential further development of the Kāpiti Landing (beyond that which is permitted) is not relevant to the Commissioners consideration of the current consent

⁸⁴ *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433.

⁸⁵ *Kapiti Coast Airport Holdings Limited v Alpha Coroporation Limited* [2016] NZRMA 505.

⁸⁶ Section 308B(2)(a) of the Resource Management 1991.

⁸⁷ Statement of Evidence of Tim Kelly, 24 February 2022 at [50]-[72].

⁸⁸ Statement of Evidence of Tim Kelly, 24 February 2022 at [78] and Statement of Evidence of Neil Trotter, 10 February 2022 at [14.4].

⁸⁹ Statement of Evidence of Tim Kelly, 24 February 2022 at [55]; Statement of Evidence of Kay Panther Knight, 7 March 2022 at [104].

⁹⁰ Statement of Evidence of Kay Panther Knight, 7 March 2022 at [101] - [104].

application. Rather, the effects of such future development will be required to be managed through the consent process for that development.

87. In relation to consented activities, Mr Kelly confirmed that the only relevant consented development was an extension to the Mitre 10 Mega trade retail store at Kāpiti Landing. This extension was small in scale and did not require additional modelling.⁹¹ Further, Mr Kelly points out there is a very limited opportunity for permitted activities of any significant scale such that they would affect the existing environment to the extent that further modelling is required.⁹² This is due to a number of activity thresholds concerning GFA at Kāpiti Landing having already been exceeded, therefore, even within the remaining overall permitted GFA under the Mixed Use Precinct, consent would still likely be required for new activities under the Transport chapter of the Operative District Plan.⁹³

CONDITIONS OF CONSENT

88. A proposed revised set of conditions of consent are attached as Appendix 1 to the evidence of Ms Panther Knight.⁹⁴ Council have provided a response to these conditions supporting the proposed revisions.⁹⁵ Subject to some additional amendments to condition 28 below, that version of the conditions is agreed to by the Applicant.
89. It is well established in case law that conditions of consent require specificity, clarity and accuracy of expression leading to a measure of certainty before they can be enforceable.⁹⁶ In order to be enforceable conditions must contain environmental clear environmental outcomes and or standards to meet.⁹⁷
90. A second core principle of condition development is that decision-makers are not entitled not delegate the making of substantive decisions through conditions.⁹⁸ The Environment Court has held that while consenting authorities can leave the certifying of a detail to a delegate, using that

⁹¹ Statement of Evidence of Tim Kelly, 24 February 2022 at [55].

⁹² Statement of Evidence of Kay Panther Knight, 7 March 2022 at [104].

⁹³ At [103].

⁹⁴ At Appendix 1.

⁹⁵ Council Response to Applicant Evidence, 15 March 2022.

⁹⁶ *Ferguson v Far North District Council* [1999] NZRMA 238 at 9.

⁹⁷ *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 336.

⁹⁸ *Royal Forest and Bird Protection Society v Gisborne District Council* [2010] NZEnvC 128.

person's skill and experience, they cannot delegate the making of substantive decisions. Therefore, conditions must set clear objectives against which certification can occur⁹⁹

91. The above legal principles are central to KRHL's proposed condition amendments.

Condition 28 - Monitoring and trigger for further transport mitigation

92. Proposed condition 28 provides for a monitoring and review approach to potentially trigger further mitigation of transport effects on Kāpiti Road. As discussed at paragraph 36 and 38 above in my submission the condition as proposed by Mr Kelly contains a clear environmental bottom line and a measurable trigger point which provides certainty as to when adverse traffic effects on Kāpiti Road reach a point at which mitigation is required. This approach accords with the principles outlined at paragraph 37 above in terms of conditions providing for adaptive management.

- (a) Mr Kelly has recommended amendments to the proposed condition, which have been discussed with and accepted by Mr Trotter for the Council and are detailed in Ms Panther Knight's summary statement being:¹⁰⁰
- (i) To require a single survey of all movements post-opening and when trading levels have settled down. The movements to and from the Proposal then be can be readily identified and removed to give both 'with' and 'without Proposal' scenarios, on which a SIDRA assessment can be undertaken;
 - (ii) The survey and assessment to be undertaken within 12 months of the commencement of operation of the Proposal to provide for certainty in the provision of mitigation measures as soon as practically possible;
 - (iii) An update to a LOS D (with a maximum delay of 40 seconds/ vehicle trigger) to set a clear and appropriate trigger for mitigation.

⁹⁹ *Royal Forest and Bird Protection Society Incorporated v Gisborne District Council* [2013] NZRMA 336 at [89].

¹⁰⁰ Summary of evidence of Timothy Kelly dated, 22 March 2022 at [19]-[22]; Summary of evidence of Kay Panther Knight, 22 March 2022 at [17].

93. Overall, in my submission, with the proposed amendments to condition 28, the proposed conditions (as attached to the Council Response to Applicant Evidence, 15 March 2022) will ensure that the conditions are clear, enforceable and set appropriate objectives for future certification. Further, the proposed conditions of consent adequately mitigate all outstanding potential adverse environmental effects and assist to deliver the positive effects proposed.

CONCLUSION

94. The Proposal responds to a growing District wide need in order to address the impending demand for additional full-service supermarkets in the District. The expert witnesses called by KRHL will demonstrate that the Proposal will generate quality, and positive effects by virtue of its job creation and convenient to access location.
95. The Proposal will not generate any adverse effects that are more than minor and the conditions of consent provide for appropriate mitigation of any adverse traffic and visual effects. The Proposal is consistent with the Operative District Plan. Ms Panther Knight and the Section 42A Report author agree that no aspect of the Proposal makes it contrary to the Operative District Plan when assessed as a whole.
96. Overall, the Proposal is able to pass through the section 104D gateway tests and following a favourable assessment under all relevant matters listed in section 104, should be granted consent as recommended by the Section 42A Report. The Proposal can be granted subject to the conditions proposed by the section 42A report author as revised by way of the evidence of Ms Panther Knight.
97. KRHL will call the following experts;
- (a) Kurt Gibbons (Applicant);
 - (b) Katherine Marshall (Woolworths - Operations);
 - (c) Fraser Colegrave (Economics);
 - (d) Tim Kelly (Transport); and
 - (e) Kay Panther Knight (Planning).

DATED 22nd day of March 2022

A handwritten signature in blue ink, appearing to read 'Joshua Leckie', is written above a horizontal line.

Joshua Leckie/Katharine Hockly
Counsel for Kapiti Retail Holdings Limited