

BEFORE THE KĀPITI COAST DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

And

IN THE MATTER of an application for construction and operation of a Countdown supermarket at 160 Kāpiti Road, Paraparaumu (RM210151)

LEGAL SUBMISSIONS

ON BEHALF OF TEMPLETON KĀPITI LIMITED

IN RESPONSE TO MINUTE 5

5 MAY 2022

Counsel:

Warwick Goldsmith
Barrister
PO Box 2366, Wakatipu 9349
m + 64 021 220 8824
warwickgoldsmith@gmail.com

Introduction

- 1 These Legal Submissions are presented on behalf of the Submitter Templeton Kāpiti Limited (**TKL**) in response to paragraph 2.3(c) of Minute 5 which reads:

“(c) legal counsel from all parties – as to the assumptions to be made regarding traffic growth, volumes and whether the development potential assessed for the Airport Zone is appropriately limited to permitted activities or should also include controlled activities.”

- 2 In these Submissions counsel considers it more logical to address the two issues identified in the above quotation in reverse order.

- 3 TKL submits that the Commission needs to be careful about relying on general statements of principle in a very fact-specific case. This consent situation involves an unusual combination of factual circumstances which must be taken into account. Those circumstances are:

- a. the significance of Kāpiti Road and the surrounding transportation environment;
- b. the fact that Friendship Place is a cul-de-sac which constitutes a single access to/exit from a large area of land zoned for development;
- c. the extent to which that land zoned for development has yet to be developed, and can be developed at least to its controlled activity limit;
- d. the fact that Council cannot refuse consent to a controlled activity and cannot impose conditions which could prevent such consent from being implemented;
- e. the fact that the proposed activity (**Proposal**) is a non-complying activity not anticipated by the relevant zoning;
- f. the high traffic generating potential of the Proposal.

- 4 While this is an issue for further elaboration in closing submissions once all the information is to hand, the Commission is respectfully reminded that it is not just s104(1)(a) and (b) which are at play. There is also s104(1)(c) which reads:

“(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.”

- 5 Before addressing the specific issues raised by Minute 5, it may be of assistance to clearly restate TKL’s position. All TKL seeks to ensure is that, when TKL seeks to develop its land within the Airport Zone (**AZ**) to the extent enabled by permitted

or controlled activity status, and accepting and assuming that such development may require some modifications to the Kāpiti Road/Friendship Place intersection (**Intersection**), those modifications will be able to be implemented within legal road reserve and TKL's land; ie: such development will not be stymied by a need to use any part of the Applicant's land which may or may not be available. Another way of putting this might be to say that TKL seeks that the Intersection be 'future-proofed' to the extent of enabling future development of TKL's land to the extent enabled by permitted or controlled activity status.

Relevance of controlled activities

- 6 The Joint Witness Statement (Planning) and the Joint Witness Statement (Transportation) have usefully simplified, or appropriately addressed by agreement, a number of issues raised during the hearing. Counsel believes that the remaining issues can be further simplified.
- 7 As a result of the two JWS's, the situation has been simplified in (at least) the following respects:
 - a. There are no relevant permitted activities within the AZ. Any proposed development would require at least controlled activity consent because all subdivision requires at least controlled activity consent and because, in this zone, all new buildings require controlled activity consent.
 - b. Because of (a) above, the question of the status of residential development within the AZ, addressed in paragraphs 13-21 of the JWS (Planning) and recorded as a matter in dispute, does not need to be resolved.
 - c. Because of (a) and (b) above, any party contending that the traffic generated by future controlled activity status development in the AZ is not relevant to this hearing is effectively contending that no account should be taken of any additional traffic generated from future development within the AZ and that this hearing must be determined upon the basis of existing traffic generated by the AZ.
 - d. The controlled activity status applicable to new buildings within the AZ includes, as Matters of Control, the expected traffic generation from the AZ and the effects on the transport network within the District and the timing of any improvement works on the transport network.
 - e. There appears to be no further need to address 'planned or known changes' to the road network.

- 8 Counsel submits that the conclusion reached in subparagraph 7(c) above is clearly nonsensical. It is also inconsistent with the approach being taken in respect of traffic on Kāpiti Road. While the appropriate rate of growth of traffic on Kāpiti Road has been under debate (now resolved in the JWS (Transportation) as 2% per annum) there has been no question about whether or not that growth is a relevant consideration, without any reference to the status of future development which generates that increase in traffic. On that basis it is clearly appropriate to take into account traffic growth on Friendship Place. The only question is how much growth to take into account.
- 9 By way of further simplification of outstanding issues I submit that there is no need to address potential consent triggers for development up to the controlled activity limit of 102,900m² GFA within the AZ, for the following reasons:
- a. there is no certainty that additional consent triggers which result in restricted discretionary activity consent status would actually be triggered by a careful developer;
 - b. there is no doubt that future controlled activity status development can and might result in requirements to modify the Intersection;
 - c. TKL accepts the need to make any such future modifications to the Intersection if required;
 - d. TKL's concern relates only to the legal ability to implement any such modifications.
- 10 This is not a 'permitted baseline' case. Section 104(2) is not relevant because TKL does not seek to persuade the consent authority to disregard any adverse effect on the environment. What TKL seeks is that an identified potential adverse effect arising from the Proposal, being the ability to modify the Intersection, is properly taken into account.
- 11 Some assistance in relation to this issue might be found in the following extract from the recent High Court decision in *Frost*¹. This case involved a notification challenge to consent granted for a house under a rule regime where there was no permitted activity status, a dwelling up to 7m in height required controlled activity consent and a dwelling in excess of 7m in height required non-complying activity consent. There was a debate about whether the Council could, or did, treat the controlled activity 7m limit as a permitted baseline. At paragraph 68 the Court stated:

¹ *Frost v Queenstown Lakes District Council*, CIV-2021-425-0005 [2021] NZHC 1474.

*“[68] I do not consider the Council treated the site standard as a permitted baseline and ignored its effects. What it has done is used the Zone objectives, and the site standards to give some context to the assessment of effects. In my view, this is sensible. Effects must be assessed in context, and in light of what exists, and is anticipated in the zone. For example, leaving aside any permitted baseline considerations, the erection of a concrete tilt slab building would have different effects in a commercial zone from what it would have in a low density residential area, or in an outstanding natural landscape. **It would be entirely artificial to assess effects without considering what exists and what is anticipated in the zone. In my view, that is all the Council has done here.**”*

12 I also refer the attention of the Commission to the extract from the *Laidlaw College* case referred to in paragraph 41 on page 9 of the legal submissions on behalf of Young Supermarkets Limited and Modern Merchants Limited (Mr Quinn’s Legal Submissions dated 22 March 2022). I submit that extract is relevant to this issue.

13 TKL seeks that the required traffic modelling include the modelling of traffic growth generated by the AZ as a consequence of development within the AZ up to the controlled activity status limit of 102,900m² GFA. The Applicant’s transportation witness Mr Kelly considers that this would be an overly complex exercise. TKL’s transportation witness Mr Carr disagrees. This issue is addressed in paragraphs 39-48 of the JWS (Transportation).

14 Mr Carr’s position is appropriately summarised in the final sentence of paragraph 40 which reads:

“... AC considers that this approach is no different to the standard approach for assessing the transportation effects of proposed private plan changes.”

15 I submit that the sentence quoted above is self-evidently correct. The preparation or variation of a District Plan frequently involves a change in zoning. There are well-established methods for transportation experts to assess the traffic growth effects of a proposed change in zoning. There is no basis for suggesting that such an exercise (in relation to existing zoning) should be overly complex or difficult in this case.

16 Mr Kelly produced and circulated (to the transportation witnesses only) a Memo dated 21 April 2022 (annexed to the JWS (Transportation)). Mr Carr considered that that Memo exceeded the Directions of the Commission and should not be taken into account. I submit that Mr Carr’s approach was correct under the circumstances. However I consider it to be directly relevant to these submissions to draw the Commission’s attention to the section of that Memo commencing on page 4 under the heading ‘*Kāpiti Landing Growth Testing*’, because the information

contained in that section (although not tested by any other party) is both startling and directly relevant.

- 17 In summary, the analysis referenced above involves a modelled doubling of traffic movements to/from Friendship Place and concludes that:
- a. without the Proposal or associated mitigation, the Intersection will have substantial delays and LOS F;
 - b. with the Proposal and associated mitigation, the Intersection will still have substantial delays and LOS F, but not to the same extent.
- 18 It is important to note that the above analysis is based upon a doubling of traffic in Friendship Place. However, assuming an increase from the (agreed for the purposes of the JWS (Transportation)) current 22,000m² GFA within Kāpiti Landing and the controlled activity status limit of 102,900m² GFA, it must be assumed that an increase from 22,000m² GFA to 102,900m² GFA will involve more than a doubling of traffic movements.
- 19 This analysis significantly substantiates TKL's two primary concerns:
- a. If modelling of traffic growth on Friendship Place does not include controlled activity development within the AZ and is effectively limited to the current level of traffic (due to there being no permitted activity status development) then a potentially very significant adverse effect arising from the Proposal will be entirely overlooked.
 - b. A grant of consent to the Proposal may effectively preclude any opportunity for TKL to carry out any modifications to the Intersection required to enable implementation of TKL's zoned 102,900m² GFA controlled activity development potential.
- 20 I submit that the issues addressed in the previous four paragraphs underpin and substantiate TKL's preferred approach to traffic growth modelling.

Traffic growth assumptions

- 21 TKL accepts the notional growth rate on Kāpiti Road of 2% per annum agreed in the JWS (Transportation).
- 22 As far as Friendship Place is concerned, for the reasons addressed above TKL's position is that:
- a. To ignore traffic growth arising from controlled activity status development within the AZ, thereby modelling just on the basis of existing traffic levels, would

be both inappropriate and inconsistent to the approach being taken to traffic growth on Kāpiti Road.

- b. Because of the particular factual circumstances applicable to Friendship Place (and as detailed in paragraph 3 above) the application of an annual growth rate to Friendship Place is not appropriate.
- c. Traffic growth on Friendship Place should be modelled on the basis of 102,900m² GFA developed within the AZ.

Summary

- 23 TKL submits that it should be made clear that the purpose of the modelling is:
- a. generally to establish the effects of the Proposal on the Intersection, taking into account the growth calculations detailed above;
 - b. specifically to ascertain the nature of the modifications to the Intersection which would be required to accommodate the growth identified under (a) above plus the Proposal;
 - c. more specifically, to identify whether the Applicant should, if this consent is granted, be now required to vest in Council, as legal road, any land required to achieve the modified Intersection described in (b) above (including all aspects associated with such an Intersection, such as cycle lanes, footpaths, etc), and if necessary including consideration of alternative forms of traffic control such as traffic lights.

Dated 5 May 2022



**Warwick Goldsmith
Counsel for Templeton Kāpiti Limited**