**BEFORE INDEPENDENT HEARING COMMISSIONERS**
**APPOINTED BY HAMILTON CITY COUNCIL**

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| **IN THE MATTER** | of the Resource Management Act 1991 (Act) |
| **AND** | |
| **IN THE MATTER** | of an application for resource consent for the construction and operation of new supermarket including associated fuel facility, at 980 Te Rapa Road, Pukete ("Application") |
| **BETWEEN** | |
| **Applicant** | **FOODSTUFFS NORTH ISLAND LIMITED** |
| **AND** | |
| **Consent Authority** | **HAMILTON CITY COUNCIL** |

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# LEGAL SUBMISSIONS OF COUNSEL FOR HAMILTON CITY COUNCIL (AS REGULATORY AUTHORITY) IN SUPPORT OF SECTION 42A REPORT

**Dated: 8 October 2019**

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**MAY IT PLEASE THE COMMISSIONER HEARING PANEL:**

1. These submissions are made on behalf of Hamilton City Council ("Council") as the regulatory authority responsible for preparing the section 42A report which makes a recommendation to the independent commissioner hearing panel ("Hearing Panel") on the application for resource consent by Foodstuffs North Island Limited ("Applicant") for resource consents pursuant to the Resource Management Act 1991 ("RMA") in respect of the construction and operation of a new supermarket ("Pak'nSave"). The purpose of these legal submissions is to:

    (a) Address specific legal issues arising during the hearing; and

    (b) Where relevant to the above, provide brief comment on the proposed draft conditions, noting where there remain outstanding issues as between Council's s42A author, the Applicant, and submitters.

**Legal Issues Arising**

2. These submissions address four topics in response to issues that arose during day 1 of the hearing on 7 October 2019:

    (a) The traffic effects associated with the Application and proposed mitigation of these effects by way of consent conditions;

    (b) The activity status of the Application under the Operative District Plan;

    (c) Other matters raised in submissions; and

    (d) Section 42A author recommendation, including proposed draft conditions.

**TRAFFIC EFFECTS AND PROPOSED MITIGATION CONDITIONS**

3. By way of background, the s42A Report dated 7 October 2019 ("Addendum Report") sets out a set of draft suite conditions, which includes the additional mitigation measures to address adverse traffic safety effects and states at paragraphs 24 and 25:

> "…in the absence of additional measures to address the adverse traffic safety effects, at this point my recommendation that the application by Foodstuffs…be declined has not changed.
>
> If additional mitigation measures, for example as outlined in this s42A Addendum Report and Appendix D, were to be incorporated into the proposal and addressed during the hearing, I will consider these and whether they address the safety concerns that are currently identified."

4. The Applicant has effectively agreed to these additional mitigation measures, as detailed by Mr Allan and the relevant witnesses for the Applicant who gave evidence on 7 October 2019.

5. Counsel for the submitters has questioned the validity of the proposed "conditions precedent" on the basis that the conditions:

   (a) Rely on the completion of a process which is dependent on a third party; and

   (b) Securing the outcome of that third-party process is uncertain.

6. With respect, I disagree with the proposition that there must be complete certainty that the requirements of the proposed conditions precedent will be satisfied for resource consent to be granted. Rather, the outcome should be capable of being achieved. That is the basic approach to conditions precedent. Fundamentally, the risk of whether the "pre-conditions" can be satisfied falls on the Applicant and the commercial risks of that are not a matter for the commissioners to evaluate.

7. In my submission, the proposed conditions precedents are certain and enforceable. It is a straightforward question of whether the required mitigation is in place prior to certain activities commencing.

8. I anticipate that Mr Allan will address this further in his right of reply. However, in my submission the risk of there being a fully constructed and "ready to open" Pak'n Save in the absence of those conditions precedent being satisfied is extremely low. I address these issues further in the following submission points.

**Conditions Precedent**

9. Ms Arthur-Young, Mr Briggs and Ms Panther Knight have raised questions as to whether a condition requiring works to be completed which are dependent on a process of a third party is sufficiently certain to be valid at law and that the proposed conditions precedent could nullify the consent.

10. Ms Panther Knight has challenged the appropriateness of some of the proposed conditions, particularly proposed condition 47[1] (deceleration lane on Te Rapa Road) and 50 (reduction in speed limit from 80km/hr on Wairere Drive to 60km/hr), for reasons that they do not achieve best planning practice as they contain a degree of uncertainty.[2]

11. Ms Arthur-Young submits that the Commissioners must consider whether it is appropriate for the resource consent to be granted without the necessary assurances around the operation of essential mitigation measures.[3] Ms Arthur-Young has referred to *Richmond v Kapiti Coast District Council* where the Environment Court rejected the use of a condition precedent in a resource consent which required third party approval.[4]

12. I note at this juncture, in response to verbal submissions, and with respect, there is nothing in the Resource Management Act 1991 ("RMA")

[1] As per the s42A addendum, now condition 46 in updated version circulated by Mr Allan, 7 October 2019.
[2] Statement of Evidence of Ms Panther Knight at para 4.24.
[3] Legal submissions on behalf of Woolworths NZ Limited dated 7 October 2019, at 3.7- 3.8.
[4] *Richmond v Kapiti Coast District Council* [2016] NZEnvC 1.

(i.e., s108 and s108AA) that sates that consent cannot be granted if a condition might lead to the consent being "nullified". That is a matter of case law principle. Furthermore, taking a "real world" view is not the test in the RMA.

13. Having said that, it is understood that the submitters represented by Ms Arthur-Young would be satisfied with an amendment to the timing trigger for when the conditions precedent must be complied with. That is, the trigger would be amended from prior to the operation of the supermarket to prior to the commencement of preliminary works. This does not appear to align with the arguments regarding certainty of the conditions. The concern seems to be based on the potential influence that works that have been commenced could have on the Local Government Act 2002 process for reducing the speed limit. That is not an RMA matter to be considered by the Commissioners.

14. Mr Le Heron will discuss this question of timing of the trigger further in his updated/supplementary s42A report. Mr Le Heron will also provide a high-level summary of the process to be followed by Hamilton City Council under the Local Government Act 2002 to implement the necessary 60km/hour speed environment to enable the proposed condition precedent to be satisfied.

15. I anticipate that Mr Allan will further address the issue of commercial realities for a build of a Pak 'n Save and the potential risk that it might be completed before the speed limit is able to be reduced. I also anticipate that Mr Allan may address, to the extent that he is able to in the context of confidential commercial discussion, the discussions the Applicant has had with the landowner on Te Rapa Road.

16. Regardless of the question of timing, in my submission the proposed conditions precedents are valid and enforceable and do not raise the potential for the consent being nullified if consent is granted. The basis for that submission is discussed further below.

**Conditions precedent**

17. In the High Court decision in *Westfield (New Zealand) Ltd v Hamilton City Council*[5] the argument was raised by the appellant that any condition requiring roading works to be undertaken to address associated traffic effects, would or might be legally invalid since the Applicants would be powerless to bring about the requisite changes in roads on property beyond their own control. It was argued that this lack of power could "negate the consent". While the decision related to plan change appeals, the principles are valid for the purposes of a resource consent application which may follow.

18. The High Court held that the general principle was that conditions imposed on a resource consent must be for a resource management purpose[6] and considered that conditions attached to a consent will usually be regarded as unreasonable if they are incapable of performance.[7]

19. Considering the conditions proposed, the High Court stated:

> [56] On the other hand, a condition precedent which defers the opportunity for the Applicant to embark upon the activity until a third party carries out some independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer: Grampian Regional Council v City of Aberdeen [1983] P&CR 633, 636 (HL).

20. The High Court accepted that a condition requiring changes to the roading network is not invalid:

> [59] But I can see no reason for assuming that, faced with the need for changes to roads which lay beyond the immediate ownership and control of the Applicant, it would be impossible for the Hamilton City

[5] *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556.
[6] At [54]
[7] At [55].

> Council to frame valid conditions in order to meet the need. In principle, for example, it would be possible to impose a condition similar to that imposed in Grampian, namely that until a nearby arterial route were increased in size from two lanes to four a proposed retail development could not proceed. Further, pursuant to rule 6.4.5 such condition precedent could be coupled with a levy requiring the Applicant to contribute to the off-site roading development.
>
> [60] Technically, it has been held that there is a critical distinction between two ways in which a condition is framed. One requires an applicant to bring about a result which is not within the applicant's power, for example that the applicant construct a new roundabout on a nearby roadway when the roadway is controlled by Transit New Zealand. The other stipulates that a development should not proceed until an event has occurred, in this example that the roundabout has been constructed – see Grampian at 636. While I have no respect for English formalism of this type, it seems clear that at least by wording the condition in appropriate terms the Council will have the power to impose valid conditions of the kind in question in this case.

21. Considering the Court's commentary in *Westfield (New Zealand) Ltd v Hamilton City Council* (above), Counsel submits that Conditions 47 (now 46) and 50 (now 49) are valid at law and do not frustrate the consent. It is submitted that it is open for this Hearings Panel to impose conditions that defer the opening of the Pak'nSave until certain roading network and speed reductions have occurred in the surrounding transport routes. Case law has confirmed that there is nothing objectionable in granting planning permission subject to a condition that the development is not to proceed until specific roading works are completed.

**Examples of conditions precedent**

22. While not expressed in definitive "condition precedent" terms, the conditions of the Waikeria Prison designation (as altered) imposed by the Environment Court in its final decision illustrate a situation where traffic mitigation in the form of road works which were outside the direct control of the Department of Corrections and, indeed, outside the territorial authority jurisdiction in which the designation is located, could be the subject of valid conditions. Relevantly, the ability to implement the mitigation also required obtaining land from a neighbouring landowner. In short, specific mitigation must be in place (including

upgrades of state highway 3 and local roads within Waipa District), prior to a specified number of prisoners being able to be accommodated at the prison.[8]

23. A further example concerning roads is a condition requiring the re-opening of a road:

> […] The consent holder must not commence any construction works associated with this consent until the temporary road closure notice dated 7 May 2015 has been revoked and Pukemiro Mine Road has re-opened.[9]

**Case law cited in legal submissions**

24. Ms Arthur-Young cited two decisions in support of her submissions that the proposed conditions lack certainty and enforceability. With respect, I do not agree with those submissions as the decisions cited may be distinguished for the following reasons:

(a) In *Richmond v Kapiti Coast District Council*[10] the condition at issue was not a condition precedent. Furthermore, the Applicant's agreement in that case was conditional on "a preliminary indication from the Ministry of Education" regarding its preparedness to grant an operating licence for the childcare centre based on the proposed conditions of consent and noise management plan;[11] and

(b) In *Laidlaw College Inc. & Ors v Auckland Council*[12] the Court considered the High Court decision in *Westfield* and distinguished this decision particularly on the basis that "*the traffic experts for the Council and Transit NZ had agreed with the proposed*

[8] *Minister of Corrections v Otorohanga District Council* [2018] NZEnvC 25.
[9] *Puke Coal Limited & Ors v Waikato District Council and Waikato Regional Council* [2016] NZEnvC 083 (Final decision of the Environment Court on final conditions), condition 2.6.
[10] [2016] NZEnvC 1
[11] *Ibid*, at paragraph [4].
[12] [2011] NZEnvC248.

*mitigation".*[13] Clearly that is not the situation in the current context where the experts all agree on what mitigation is necessary.

25. In summary, proposed conditions 47 (now 46) and 50 (now 49) are valid, certain and enforceable. Furthermore, the Applicant agrees to the conditions. Finally, such a condition is valid under section 108AA as it is directly connected to mitigating the traffic effects that will be generated from the Application.

**TRAFFIC CONDITIONS**

**Mr Briggs' proposed additional text to condition 48 (now 47)**

26. This condition addresses the signalisation of the intersection of Wairere Drive and Karewa Place and is discussed in paragraph 46 of Mr Allan's opening legal submissions. Mr Briggs considers it necessary to add "explanatory text" to the substance of the condition. Counsel disagrees with this assertion.

27. There is no need to include such explanation. That is a matter which will be addressed in the decision of the commissioners, should you be minded that it is appropriate to grant consent. Furthermore, the "mischief" behind the proposal from Mr Briggs is apparently the possibility that a section 127 application is made at a later point which seeks to remove the requirement to provide the signalisation prior to operation of the supermarket.

28. With respect, this is misguided. Any section 127 application will necessarily have to confront the effects of the proposed change to the condition. That will require a consideration of the purpose of the condition. Given that all the traffic engineers agree that the signalisation of that intersection is critical to the ability for the supermarket to operate,

[13] *Ibid,* paragraph [52].

it is extremely unlikely that such an application would satisfactorily address the requisite effects assessment as a discretionary activity under section 127. In short, there is no need for the additional explanation to be included in the substantive decision.

**ACTIVITY STATUS OF PROPOSED SUPERMARKET AND SUFFICIENCY OF THE CENTRE ASSESSMENT REPORT**

29. Both Foodstuffs' consultants and Council experts have concluded that the Application is to be assessed as a Restricted Discretionary Status under the Hamilton District Plan. Mr Allan, counsel for the Applicant has acknowledged that the activity status of the Application is unusually complex[14] given the current drafting Rule 9.5.4 which requires a Centre Assessment Report to determine the activity status.[15] Mr Briggs on behalf of The Base Te Awa Limited has noted that, subject to the analysis required by the District Plan under Rule 9.5.4, the Application (for a new supermarket) could be classified as a Non-complying activity. Mr Allan has rejected Mr Briggs assertions.[16] As such, Counsel feels it is appropriate to address Rule 9.5.4.

30. The basis for Mr Briggs' assertions appears to be the suggestion that the economic analysis and CAR should have considered, but did not consider, the "Porters" resource consents – the status of which is has not been resolved due to the objection process which is currently on foot. However, Mr Heath gave evidence on 7 October 2019 that he did consider those consents for the purpose of assessing likely impacts on centres. Ms Fairgray reviewed Mr Heath's report.

31. Counsel notes that it is not clear which of the Porters' resource consents – and which retail activities within those – Mr Briggs considers should

[14] Legal submissions on behalf of Foodstuffs North Island Limited dated 7 October 2019 at para 12.
[15] Refer Rule 9.5.4, Assessment Criterion H2, Clause 1.2.2.17 of the Hamilton District Plan.
[16] Legal submissions on behalf of Foodstuffs North Island Limited dated 7 October 2019 at para 12-13.

form part of that assessment, given that a significant area of the overall Porters consented sites are being superseded by this Application.

32. In any event, Ms Fairgray will address the question of what should relevantly form the basis of a CAR for the purposes of this assessment. In that regard, the focus is on the impacts of a supermarket – which is a unique form of retail and the focus of this proposal. If the point of Mr Briggs' concerns is that the activity status is incorrect, I reiterate the point that there is no expert evidence to dispute the findings of the three expert witnesses on behalf of the applicant and Council. Furthermore, I note the point made by Mr Allan that Mr Norwell, in the original AEE, provided an assessment of the proposal as a non-complying activity which demonstrates that it is capable of being assessed under section 104 of the RMA.

33. In my submission, Council's section 42A author has correctly assessed the activity status of the proposed supermarket as a restricted discretionary activity as the standards of Rule 9.5.4 have been complied with. On that point, the Commissioners queried the impact of Plan Change 6 which amends criterion H2 of the operative District Plan to delete the words:

> […] To demonstrate the above criteria can be satisfied an applicant must supply a Centre Assessment Report. The content of the Centre Assessment Report shall be prepared in accordance with clause 1.2.2.17.

34. This amendment to the operative District Plan is effectively deemed operative under section 86F of the RMA as no submissions were received on the proposed amendment. For the purpose of this Application, the amendment has not material impact as a full Centre Assessment Report, in accordance with clause 1.2.2.17 was provided by the Applicant in its original application. In all other respects, criteria H2 has been satisfied through the application.

35. In short, I concur with Mr Allan's submissions at paragraph 36,c,ii.

**OTHER MATTERS**

**Iwi submitters**

36. Counsel concurs with Mr Allan's submission that there is no statutory requirement for consultation on a resource consent application. Whether an applicant chooses to discuss or consult on an application with another party is discretionary. Relevantly, in his s42A report, Mr Le Heron considered the submission of Te Ha O to Whenua O Kirikiriroa Trust and recorded that the specific concerns of that party could be explained in evidence or otherwise prior to or during the hearing. For reasons which were alluded to yesterday, that further information was not provided by the submitter. As it stands, the Commissioners do not have jurisdiction to direct consultation. It follows that you may proceed to determine the application based on the evidence you have heard.

**UPDATED/SUPPLEMENTARY SECTION 42A REPORT**

37. Mr Le Heron has prepared an updated report, following the hearing of evidence on 7 October 2019. His report attaches a suite of proposed conditions of consent which, in the majority, are agreed with the Applicant (noting that this incorporates some proposed amendments as outlined in the evidence of the submitters). In summary, the disagreement concerns the proposed stormwater condition (i.e., on-site detention to account for climate change effects which is disputed by the Applicant's expert witness). Mr Brookes is available to answer any questions the Commissioners may have on this issue.

38. As alluded to above, with respect to traffic effects, Mr Le Heron will discuss the process for the reduction of the speed limit on Wairere Drive to 60km/hour. Based on the acceptance of the proposed additional mitigation measures to address traffic safety considerations and conditions to address the same (which were signalled in the addendum to Mr Le Heron's report dated 16 September 2019), Mr Le Heron has revised his recommendation to decline consent. Mr Le Heron will explain

his reasons in his presentation of his updated/supplementary section 42A report. He will also discuss the proposed conditions.

**CONCLUSION**

39. If the Commissioners are minded to, there is nothing precluding the grant of resource consent subject to the proposed suite of conditions as attached to Mr Le Heron's supplementary/updated section 42A report.

40. Subject to any questions from the commissioners, counsel will now hand over to the Council team who will present the relevant technical evidence (traffic, economic and, if required, engineering (3-waters)), followed by Mr Le Heron's presentation of his supplementary evidence.

**Dated** this 8th day of October 2019

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M Mackintosh
**Counsel for Hamilton City Council**