

**thosBefore the Independent Hearings Panel  
For Wellington City Council  
SR471670**

**Under** the Resource Management Act 1991

**In the matter** an application for resource consent for an extension to  
the existing car parking area of the Khandallah New  
World supermarket at 26 Ganges Road, 3 Dekka  
Street, 31-33 Nicholson Road, Khandallah

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**Closing submissions on behalf of Foodstuffs North Island Limited**

**Date:** 10 May 2024

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## INTRODUCTION

- 1 These closing submissions provide a summary of the key points made on behalf of Foodstuffs North Island Limited (**FSNI**) verbally at the conclusion of the hearing, in relation to the proposal to expand the New World Khandallah car park (**Proposal**), in response to the matters raised by the Wellington City Council (**Council**) and submitters during the hearing.
  
- 2 FSNI acknowledges the positions and views expressed by the submitters. It does not seek to challenge or question the genuineness and validity of those subjective views. Instead, FSNI simply relies on the planning framework and the independent expert evidence presented on its behalf, which it considers objectively and conclusively demonstrates that consent should be granted for the Proposal.
  
- 3 These submissions address the following key points:
  - 3.1 the updated proposed conditions of consent;
  - 3.2 the relevance of need for the Proposal;
  - 3.3 impact on residential amenity;
  - 3.4 key district plan provisions; and
  - 3.5 underlying residential zoning.

## Conditions

- 4 A set of proposed consent conditions (based on the copy attached to the section 42A report) that incorporates the recommendations of FSNI's expert team was submitted at the hearing. Further revisions were made to the conditions by the Council through filing a further proposed condition set on 3 May 2024.

5 Attached to these submissions is a revised condition set. Other than in respect of water sensitive urban design (discussed further below) this addresses all the issues raised by the Council and submitters at the hearing, including:

5.1 Condition 2 reflects an express commitment for the provision of an increased number of covered cycle parks, replacing two car parks. The Council and some submitters suggested that this improved facility may result in greater use of the cycle parks than currently experienced. This number of cycle parks exceeds the requirements of the current District Plan (which has no minimum cycle parks) and the Wellington District Plan: Council Decisions Version (**WDP:CDV**), which indicates the minimum parks required for commercial activities will be 3 cycle parks.<sup>1</sup>

5.2 Conditions 19 and 20 respond to some of the noise issues raised by submitters, through a requirement for the use of plastic trolleys instead of metal trolleys, as has been implemented at other FSNI supermarkets, and a requirement to ensure all shopping trolleys are retrieved from trolley bay car parks prior to 10pm. The use of plastic trolleys is calculated to be a reduction of approximately 5dBA when compared to metal trolleys. Ensuring trolley retrieval prior to 10pm means there will be no trolley noise after this time.

5.3 Conditions 25 and 26 respond to the lighting concerns raised by submitters, specifying the times that the lights will be switched off, and setting lighting limits at windows of habitable rooms of dwellings adjacent to the site at 2 Lux. This is significantly lower than the permitted activity limits in the Plan to protect residential

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<sup>1</sup> WDP:CDV, TR-S2, and Table TR-7. Note that this chapter is not yet subject to Council decisions and do not have legal effect.

amenity after dark, before the supermarket closes and the lights are switched off.

- 5.4 In condition 33, FSNI has now amended the conditions to include the new recommendation made by Mr Arampamoorthy by changing the design of the Nicholson Road accessway, to ensure the accessway is as pedestrian friendly as possible to respond to the safety concerns raised by submitters.

### ***Water sensitive design***

- 6 The Council's expert, Ms Bryden raised concerns at the conclusion of the hearing that there was a lack of water sensitive design (**WSD**) features in the Proposal as presented (e.g., permeable paving, a rain garden). Conditions 46 and 47 as sought by the Council appear to seek a redesign of the carpark to reflect that approach. In response, FSNI submits that this is the first time such a redesign was raised. It was frustratingly not raised through the section 92 process or written evidence. The significance of the inclusion of WSD features at this late stage is that it has the potential to substantially impact on the design and effects of the Proposal assessed to date. Such a significant change should not have been presented in this manner.
- 7 More fundamentally, FSNI considers that such a redesign is not warranted. This is a position consistent with the Council's written evidence and the evidence of FSNI's witnesses.
- 8 For example, Ms Bryden's written evidence dismissed a submission concerning water sensitive urban design, stating:<sup>2</sup>

That submission by L Cadenhead stating that the application has not implemented Water Sensitive Urban Design is somewhat correct in that low impact / water sensitive devices have not be incorporated

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<sup>2</sup> Evidence of Ms Bryden at [43.3].

but the applicant in providing management for peak flow and treatment for stormwater quality the applicant has met the minimum requirements applicable at the time the application was submitted.

- 9 Ms Bryden also seemed to consider through her presentation to the Panel that it was not clear that the Kaiwharawhara Stream would not be impacted in relation to scour and erosion. Again, this position is contrary to her written evidence which concludes that:<sup>3</sup>

The devices will collect and treat stormwater from the car park so that the effect on the Kaiwharawhara Stream is less than minor.

- 10 Given the Council's own evidence did not outline these issues, FSNI was of the understanding that the stormwater experts were in agreement until these issues were raised at the conclusion of the hearing.
- 11 The reference to WSD guidelines in conditions 46 and 47 (as proposed by the Council) in relation to stormwater and servicing are inappropriate and unnecessary. Given the inconsistency outlined above, they appear to have been raised as an afterthought as opposed to for robust reasons. Most importantly they are contrary to the conclusions of both experts that servicing effects were acceptable. The proposed reference to WSD guidelines in the conditions are not directly connected to an adverse effect of the Proposal on the environment or an applicable rule or standard. The Council has also given no consideration as to how this change of design may affect any other effects or aspects of the Proposal. For the above reasons, FSNI does not agree to those parts of the conditions, and they have accordingly been excluded from the conditions set submitted with these closing submissions.

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<sup>3</sup> Evidence of Ms Bryden at [43.1].

### ***Traffic safety***

- 12 Another new issue raised at the hearing by the Council was in respect of the traffic safety features at the Nicholson Road accessway.
- 13 Mr Arampamoorthy stated during the hearing that the raised platform (previously suggested by Mr Arampamoorthy and consequently incorporated into the design) was not suitable due to its location. Mr Arampamoorthy instead made a new recommendation by suggested a traffic island to enforce left in/left out turns.
- 14 In response, FSNI considers that while again this recommendation would have been useful to receive earlier to enable it to adapt the plans accordingly (and avoid the previous revision to incorporate Mr Arampamoorthy's previously recommended treatment) FSNI has now amended the conditions to include this recommendation. FSNI is committed to making the Nicholson Road accessway as pedestrian friendly as possible to respond to the safety concerns raised by submitters.

### **The functional need for the car park expansion**

- 15 Throughout the hearing, questions from the Commissioners, and some submitters, raised whether there is a functional need for the proposed car park expansion, or to justify the proposed degree of expansion to 100 car parks.
- 16 Whilst is acknowledged that it is not unusual for submitters to question the need or purpose behind a consent, as opposed to focussing on the effects arising from the Proposal on them, FSNI submits this is not a test or consideration within the applicable legal and planning framework for assessing the Proposal.
- 17 While it is accepted that the effects of the Proposal as a whole must be assessed under section 104 of the RMA, there is no

statutory basis to consider and determine *need* (unlike designations that consider alternatives or discharge consents that require consideration of alternative methods of discharge under section 105).

18 Further, unlike some policy requirements, i.e., in respect of activities in wetlands or where there is a loss of river extent (clauses 3.22 and 3.24 of the NPS-FM) where there is a requirement that there is a functional need for that activity in that location, having a functional need is not a general RMA requirement, or a requirement of the planning framework for a land use consent that applies to the Proposal.

19 Although some submitters such as Mr O'Brien described the proposal as 'arrogant', FSNI considers its application is one it is entitled to make under the applicable framework without any obligation to justify need. In that respect, case law has established that the applicant's motivation or justification for seeking a resource consent is a commercial matter for it to determine. For example, in *New Zealand Rail Ltd v Marlborough District Council* the Planning Tribunal stated:<sup>4</sup>

The financial viability of a development, as distinct from its wider economic effects, is more properly a matter for the boardroom than the courtroom.

20 Whilst *NZ Rail* is a case from the early 1990s, it remains good law, as was recently confirmed by the Environment Court in April this year. In *Crafar v Taupo District Council*, the Court stated in light of a challenge to the financial viability of the solar farm proposal being pursued in that matter:<sup>5</sup>

Regarding the economic and financial effects of the Project, we agree with TGL and Council that the Court is not able to decide whether TGL should take on the risk of establishing a solar farm. The Court's

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<sup>4</sup> *New Zealand Rail Ltd v Marlborough District Council* PT Wellington C36/93, 11 June 1993, at page 173.

<sup>5</sup> *Crafar v Taupo District Council* [2024] NZEnvC 091 at [108].

role is to assess whether there are adverse effects associated with the Project that cannot be mitigated or otherwise addressed.

21 Despite that statutory context and case law guidance, questions were raised comparing Mr Boersen's evidence regarding the supermarket's demand for car parking and the traffic survey evidence presented by Mr Nixon. In response, FSNI submits that:

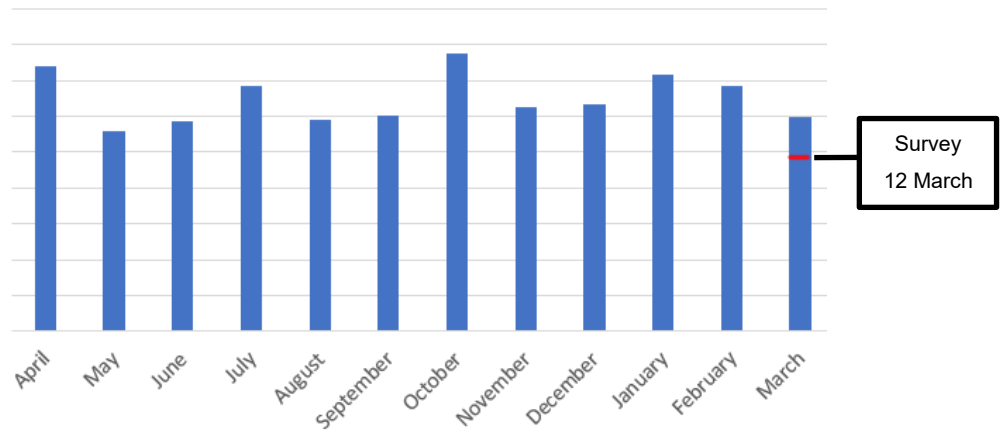
21.1 Across all evidence provided, the evidence does establish that the need for additional car parking is a long-standing issue for this supermarket. This has been supported by Mr Boersen's corporate evidence, a number of submitters, and evidence from a number of expert witnesses as to their personal experiences (together with the Commissioners' own observations of waiting vehicles during the site visit).

21.2 Whilst Mr Nixon provided survey information from one Tuesday in March, numbers of customers and car park experience will vary between days and times, and across the year. FSNI's experience is that use of the car park peaks after work most days (i.e., after 5pm) and on Saturday and Sunday afternoons.

21.3 Whilst specific customer numbers are commercially sensitive, the below table shows the variation in store customer levels between the months of the year, and the comparative demand on the day of Mr Nixon's survey:



Table 1 – Customer demand at Khandallah New World throughout 2023/2024



22 Logically, FSNI would not incur the costs of the property purchases, this consent process and the proposed construction costs for this proposal without an established and compelling commercial need for a car park of this size and nature. Based on existing need (rather than anticipated future need) and to address the existing problems for customers circling the car park, parking elsewhere, or deciding not to shop entirely, this Proposal seeks consent to resolve those current constraints. That need includes moving existing staff occupying parks outside of the site back onto site and into parks allocated to them – thereby significantly benefiting others seeking car parks for business outside of the supermarket.

### Impact on residential amenity

23 Significant hearing time and evidence was spent addressing potential adverse effects on residential amenity. FSNI accepts that residential amenity is an effect of the Proposal required to be assessed under section 104 of the RMA. However, that assessment must take place in the context of:

23.1 the mitigation measures proposed, including lighting, noise (e.g., the acoustic barrier and plastic trolleys), landscaping, traffic controls, and stormwater filtering and detainment infrastructure;

- 23.2 consideration of compliance with the District Plan standards which set the community's expectations (e.g., the calculated noise and light is compliant, and as a result of conditions proposed will be well below permitted levels);
- 23.3 understanding the significantly different permitted baseline following the intensification provisions becoming operative. Residential amenity as it presently exists has limited protection going forward. The Commissioners must assess the Proposal against the amenity effects from what activities could be permitted rather than what currently exists. This is consistent with the established principle of the existing environment, which sets the frame within which actual and potential effects must be assessed.<sup>6</sup> Under the operative provisions in the WDP:CDV this is potentially a 6 to 7 floor building (up to 22m high) with associated dominance, shading, noise, lighting and privacy effects. Ultimately, several submitters (e.g., Mr O'Brien) acknowledged that the permitted baseline of a 6-storey residential building would have a worse impact on their residential amenity (including dominance and shading) than the Proposal. This is supported by the evidence presented by Mr Halstead, who noted that from a noise perspective, a supermarket car park is a good neighbour; and
- 23.4 the physical location of the surrounding properties, which border an established supermarket and a suburban centre, which, as spoken to in evidence by Mr Wallace at the hearing, naturally develop over time as communities develop and grow.

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<sup>6</sup> *Queenstown Lakes District Council v Hathorn Estate Limited (No 2)* 12 ELRNZ 321 (CA), at [84].

- 24 The other aspect of the permitted baseline is that the existing houses on site could be removed tomorrow as of right. Therefore the screening provided by these existing houses should not be considered given their removal is also part of the permitted baseline.
- 25 Overall, based on the evidence provided, it is submitted that any adverse effects on neighbourhood amenity arising from the Proposal will not adversely detract from the neighbourhood's amenity and can be appropriately managed by conditions of consent.

### **Key District Plan provisions**

- 26 Policies HRZ-P12 (and MRZ-P13) in the WDP:CDV have been highlighted by the Commissioners as the key provisions to consider for this Proposal. To confirm the applicant's planning evidence, a subpoint-by-subpoint assessment of the 7 parts of that provision was provided and circulated by Ms Key at the hearing. Ms Key concludes that overall, the Proposal is not inconsistent with HRZ-P12 and MRZ-P13.<sup>7</sup>
- 27 HRZ-P12 subpoint 4, 'reduce reliance on travel by private motor vehicle,' (and similar provisions discussing alternative modes of transport) was a key focus throughout the hearing. It has been suggested that this Proposal instead promotes private vehicle use. FSNI refutes this as:
- 27.1 the vehicles are already in use and in circulation in the transport network;
- 27.2 FSNI does not discourage or prohibit the uptake of any other form of transport, and would be happy to welcome customers using these transport forms; and

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<sup>7</sup> Supplementary Statement of Evidence of Ms Key at [15].

27.3 the provision of further car parking provides for already existing parking demand to customers who already own and use vehicles for supermarket shopping.

28 There has been evidence provided relating to the convenience and need for vehicles when conducting grocery shopping, with public transport, bikes and walking often not suitable for a full weekly shop when there are many bags and heavy groceries to transport. The Environment Court has commented on this in the decision *Progressive Enterprises Ltd v North Shore City Council*:<sup>8</sup>

[...] the short point is, as the witnesses all agree, that supermarket shopping and public transport simply do not interface in any meaningful way. A bus and a trolleyfull of groceries is not a viable combination for any but the strongest and most resolute shopper. The surveys indicate that about 96% of all supermarket shopping trips are done in a private car, for just that reason. It also appears to be generally accepted that society needs supermarkets as an efficient means of distribution of food and groceries to an intensely settled urban population. Taking as a given that supermarkets in more or less their present form will continue into the foreseeable future, whether a supermarket is in a centre, or out of a centre, will make no difference to its level of contribution to public transport use, which is effectively nil. Put another way, any supermarket, wherever located, could arguably be out of sympathy with, if not actually contrary to, those sorts of Plan provisions.

Our emphasis.

29 Accessibility, convenience or timing are factors FSNI has no control over. As addressed in evidence, customers who own vehicles and are time-poor, live further away, shop as a family, or face difficulties in carrying groceries will be more likely to turn to private vehicle use for shopping than other modes of transport.

30 When asked by the Panel, the majority of submitters who spoke at the hearing (even those speaking against the Proposal)

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<sup>8</sup> *Progressive Enterprises Ltd v North Shore City Council*, EnvC Wellington W075/08, 31 October 2008, at [38].

confirmed that even though they live within walking distance to a supermarket, they use a private vehicle when undertaking a larger shop.

31 No private consent applicant can control the transport choices made by individual members of the public, or what other modes of transport are available and convenient in the wider transport network through Council decision-making (e.g., frequent and convenient bus routes or safe cycle and pedestrian pathways and crossings).

32 A bus stop directly outside of the New World already provides access to customers travelling by bus. Additional cycle parks (far beyond what is required by current demand and required by the Plan) have been added through the revised conditions. A new pedestrian accessway from Nicholson Road has been proposed. FSNI considers these transport options are accessible and encourage the use of these facilities to customers of the Khandallah New World.

33 Ultimately, FSNI encourages all customers to come to the Khandallah New World. This includes those who wish, or need, to use private vehicles to shop, just as much as customers who choose to travel by bus, cycle or walking, or other active forms of transport. FSNI's willingness to adapt its plans during the hearing to replace car parks with further bicycle parking should showcase this openness to adapt to the needs of customers and how they wish to travel to shop.

34 The provisions in the planning framework must be interpreted in the context of the activity under consideration. Here FSNI has indicated through evidence that:

34.1 the Proposal is not designed or expected to increase traffic volumes;

34.2 pedestrian accessibility in this area will be enhanced;

- 34.3 specific provision has been made to increase and improve the provision of cycle parking;
- 34.4 EV charging stations will be provided; and
- 34.5 FSNI has expressly sought to maintain the connection onsite to the existing public transport (bus stop) in front of the supermarket.

### **Underlying residential zoning**

- 35 Details have been sought as to the Council's decision to retain residential zoning in the proposed plan on the sites affected by this application, and the likely appeal by FSNI against that decision. As the appeal is yet to be filed and determined, it is not something that FSNI places weight on for this application. On 8 May 2024, the Minister made and announced decisions on the Council's alternative recommendations for the WDP:CDV, which has confirmed the zoning now applying to the site is High Density Residential. That is the zoning against which the Proposal must be assessed.
- 36 However, for transparency, the appeal is likely to set out that FSNI supports the Local Centre zoning of 26 Ganges Road and opposes the residential zoning of the site (3 Dekka Street and 31-33 Nicholson Road). Through its submissions, FSNI had sought that the site be re-zoned Local Centre which is a position it will pursue through any appeal lodged on the basis that:
  - 36.1 the provisions of the proposed plan, including the planning maps, should be consistent in their approach in recognising the need for businesses growth to occur, especially alongside residential growth, and recognising the ownership, development reflected in consent applications and commercial realities.

- 36.2 this rezoning request will result in an effective and efficient zoning which better aligns with the objectives and policies of the proposed plan; and
- 36.3 will ensure that the Council gives effect to its functions under section 31 of the RMA, including ensuring that there is sufficient development capacity in respect of business land to meet the expected demands of the district.

**CONCLUSION**

37 For the above reasons, FSNI submits the consent should be granted subject to the *attached* set of draft conditions.

**Date** 10 May 2024



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**Stephen Quinn / Mhairi Mackenzie Everitt**  
Counsel for Foodstuffs North Island Limited