

Before an Independent Commissioner appointed by Tasman District Council

In the Matter of the Resource Management Act 1991

And

In the Matter of Tasman Resource Management Plan

And

In the Matter of Proposed Private Plan Change 62 – Richmond North Commercial Zone

**Closing legal submissions on behalf of
Progressive Enterprises Limited**

Dated: 13 February 2016

Lane Neave
141 Cambridge Terrace
PO Box 2331
Christchurch
Solicitor Acting: Amanda Dewar / Joshua Leckie
Email: amanda.dewar@laneneave.co.nz /
 joshua.leckie@laneneave.co.nz
Phone: 03 379 3720

lane neave.

Table of Contents

| | |
|---|-----------|
| INTRODUCTION | 3 |
| SECTION 32 AND SECTION 32AA | 4 |
| UPGRADING THE TDC ROUNDABOUT | 7 |
| ECONOMIC EFFECTS ON RICHMOND AND STOKE CENTRES | 14 |
| OTHER TRANSPORTATION EFFECTS | 26 |
| LANDSCAPE | 27 |
| CROSS BOUNDARY ISSUES | 27 |
| NATURE OF RETAIL ENABLED | 29 |
| NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT | 30 |
| RESPONSE TO REMAINING SUBMISSIONS | 31 |
| PROGRESSIVE VERSION OF PROVISIONS | 32 |
| OVERALL CONSIDERATIONS | 34 |

INTRODUCTION

1. In the introductory comments on day one of the hearing Commissioner McMahon identified the two key issues to be address in his consideration of Proposed Private Plan Change 62 (**PC62**) to the Tasman Resource Management Plan (**TRMP**).
2. The Commissioner identified these as:
 - (a) Whether PC62 achieves the purpose of the Resource Management Act 1991 (**Act**) as contained in Part 2. This includes:
 - (i) Whether PC62 is the appropriate manner to achieve the settled provisions of the TRMP.
 - (ii) What is the suitability of the site for rezoning including the consideration of any fundamental physical impediments or constraints to the zoning (such as servicing and transport).
 - (b) Subject to satisfaction of the questions above, are there any effects that the proposed planning framework is not able to probably consider at resource consent stage and should be considered now as matters of activity status, control or discretion.
3. Progressive Enterprises Limited (**Progressive**) agrees with these key issues for determination and they provide a road map to our closing submissions.
4. Our closing submissions also respond to matters raised through and subsequent to the hearing including the matters outlined in the Commissioner's subsequent minutes.
5. These outstanding issues fall within the following topics:
 - (a) Section 32 and Section 32AA assessment;
 - (b) Upgrading the Tasman District Council (**TDC**) roundabout;
 - (c) Economic effects on Richmond and Stoke centres;
 - (d) Other transportation effects;

- (e) Landscape effects;
- (f) Cross boundary issues;
- (g) The nature of activities enabled;
- (h) National Policy Statement on Urban Development;
- (i) Response to remaining submissions;
- (j) Closing Submission Version of provisions; and
- (k) Overall considerations.

SECTION 32 AND SECTION 32AA

Section 32

6. We set out the legal tests for PC62 in our opening legal submissions.
7. In response to questioning from Commission McMahon regarding the section 32 road map in relation to the purpose of PC62, below we set out our roadmap of section 32.
8. As PC62 does not amend any existing objectives of the TRMP the PC62 provisions must be examined to address the following questions¹:
 - (a) Are the PC62 provisions the most appropriate way to achieve the **purpose**² of the proposal (see paragraph 11 below) by:
 - (i) Identifying other reasonably practicable options; and
 - (ii) Assessing the efficiency and effectiveness of the provisions (including benefits and costs and the risk of acting or not acting).
 - (b) Are the provisions the most appropriate way to achieve the settled broader plan objectives by:
 - (i) Identifying other reasonably practicable options; and

¹ Section 32(1)(b)

² As section 32(6) clarifies that “objectives” means the purpose of the proposal where a proposal doesn’t contain or state objectives

- (ii) Assessing the efficiency and effectiveness of the provisions (including benefits and costs and the risk of acting or not acting).
- 9. In the absence of invalidity, incomplete coverage or uncertainty of meaning in the statutory planning documents, there is no need to look to Part 2 in carrying out this evaluation.³ Applying the *King Salmon* reasoning, this is because it is the TRMP itself that gives substance to the provisions of Part 2 and there is no need to refer back to Part 2 itself (other than in the situations outlined above).
- 10. As we are not submitting that there is invalidity, incomplete coverage or uncertainty on meaning within the relevant provisions of the TRMP, if the answer to the two questions above is in the affirmative, then applying *King Salmon*, the PC62 provisions are the most appropriate way to achieve the purpose of the Act (section 32(1)(a)).
- 11. The *purpose* of PC62 is summarised in sections 1.5 and 1.6 of the PC62 application documents. The purpose is to:
 - (a) Provide site specific rezoning of residentially zoned land to enable efficient development for a Countdown supermarket, other small scale retail and a community facility;
 - (b) Provide certainty on the development outcome of the land subject to the rezoning (**Site**) (including the nature, scale and character of effects anticipated);
 - (c) Provide an opportunity to service the food and grocery needs of existing local residents of the immediate area and provide for future residential growth; and
 - (d) Utilise a site appropriate for rezoning due to its strategic location, locality, size and historical and current use for a mix of non residential activities.

³ *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited* [2014] NZSC 38 and applied in a plan change context in *Appealing Wanaka Inc v Queenstown Lakes District Council and Northland Investments Limited* [2015] NZEnvC139

12. Importantly, when assessing other practicable options, the “do nothing” assessment should not just assess solely residential development of the Site.
13. The Site is owned by Progressive and is currently occupied by a funeral home. Progressive is not a residential property developer and have instructed us that they will not develop housing. To “do nothing” therefore results in the currently inefficient commercial activities continuing, or more likely, those existing commercial activities closing down leaving both vacant buildings and a vacant Site.
14. In our submission the “do nothing” option is not the most appropriate way to give effect to Part 2 of the Act and is certainly not an efficient or effective way to achieve either the purpose of the proposal (section 32(1)(a) and 32(6)) or the settled broader plan objectives (section 32(3)(b)) which are summarised at section 1.3 of Mr Rae’s Section 32 Report.
15. We apply section 32 to the key issues for your consideration of these closing legal submissions. In particular, the risk of acting or not acting in relation to trade competition effects.

So called commercial policy gap

16. During questioning of planners the lack of any current policy direction within the TRMP regarding out of centre commercial activity was raised. During questioning, Mr Lile agreed that there were no policies in the TRMP regarding managing or avoiding the impact of out of centre activities. In our submission this does not impact on your ability to carry out the section 32 assessment.
17. Ms Deans has indicated in her s42A Annexure that PC62 may be consistent with the TRMP’s Richmond related policies.⁴ Mr Rae considers that PC62 is consistent with those policies.
18. As there are no relevant objectives in the commercial chapter of the TRMP, in our submission the enabling nature of PC62 is consistent with the relevant objectives in 6.6.2 relating to effective accommodation of a wide range of commercial activities on appropriately zoned sites and a high quality, high amenity business environment.

⁴ Ms Deans, Annexure, paragraph 58

Section 32AA

19. A further evaluation under section 32AA is required due to amendments made to the PC62 provisions since the section 32 evaluations in both the application documents and Mr Rae's evidence in chief. These amendments have included both physical mitigation (such as amendments to the acoustic wall on the southern boundary) and also changes to the methods proposed to manage potential effects (in particular the TDC roundabout).
20. This section 32AA evaluation is contained within both Mr Rae's supplementary evidence dated 18 December 2016 and also the section 32AA evaluation table Mr Rae prepared with Ms Deans dated 9 December 2016.
21. Read together, these documents contain the section 32AA evaluation which has been undertaken at a level of detail corresponding to the scale of the changes compared to the as notified version.⁵
22. In our submission the latest version of the PC62 provisions attached to these submissions (**Closing Submissions Version**):
 - (a) are the most appropriate way to enable the purpose of retail and community activity;
 - (b) are the most appropriate way to achieve the settled provisions of the TRMP; and
 - (c) as such, are the most appropriate way to achieve sustainable management of natural and physical resources;

UPGRADING THE TDC ROUNDABOUT

The "Condition Precedent" background

23. All the transportation experts agree that with expected five year growth the TDC roundabout will not perform to the level expected of an arterial intersection even without the development of the Site.⁶ The transportation

⁵ As required by section 32AA(1)(c)

⁶ Transportation JWS dated 4 August

experts all consider there is therefore a reasonable expectation that physical works could improve the performance of the intersection.⁷

24. The as-notified version of PC62 contained a controlled activity provision requiring maintenance of a level of service of at least Level D on all approaches to the TDC roundabout.
25. At the transport expert conferencing all transportation experts agreed that acceptable levels of safety and performance would be achieved by a Level of Service D or better. The key live issue is therefore what is the appropriate method to achieve that control.
26. In Minute 8 Commissioner McMahon directed further conferencing and consideration of the most appropriate way to address the TDC roundabout upgrade. This included consideration of a deferred zoning approach preferred by Ms Deans (however not raised by TDC during the pre application phase⁸), and a permitted activity condition preferred by Ms Jenkins for the New Zealand Transport Agency (**NZTA**).
27. Mr Rae provided a supplementary statement of evidence dated 18 November where he assesses the various planning options to ensure the TDC roundabout upgrade. This process resulted in the development of the proposed permitted activity condition that expressly requires the TDC upgrade (rather than just referring to the required LOS).
28. This background is detailed in Mr Rae's supplementary statement and included input from Mr Georgeson regarding the reference to the appropriate transportation documents. A consequence of that amendment was a further restricted discretionary rule enabling the Council to assess any application for resource consent that did not meet the permitted activity condition regarding the upgrade. This approach is essentially that sought and supported by Ms Jenkin for NZTA in evidence.⁹ Due to that, and the more restrictive nature of the amendments compared to the as-notified version, in our submission no issues of scope arise.

⁷ *ibid*

⁸ Mr Rae, supplementary evidence dated 18 November 2016 at paragraph 4

⁹ EIC, Ms Jenkins, 30 September 2016

29. Mr Rae's s32AA assessment of this approach and the deferred zoning approach is contained in his supplementary statement.¹⁰ Mr Rae does not consider deferred zoning to be the most appropriate approach as the deferred zoning mechanism in the TRMP would require the deferred zone to in time be replaced with an existing Commercial Zone.
30. Progressive has not sought either a deferred or existing commercial zone in the notified version but rather a specially developed set of zoning provisions individually crafted to this site, and so the suggestion of a deferred zone late in the plan change process has the potential to create scope issues. Further a deferred zone approach will provide less investor certainty for Progressive which in our submission is not justified given equivalent certainty can be provided to the Council and road users through the condition precedent mechanism sought.
31. The wider group of planners have also gone through this s32AA analysis resulting in a further planning JWS.¹¹ Mr Rae and Ms Jenkins (for NZTA) agreed that the condition precedent approach would ensure that development would not commence until LOS D was achieved. Ms Deans and Ms Gibellini remained of the view that the condition precedent approach (and associated rule) did not provide sufficient certainty regarding the TDC round about upgrade however. However, this is an explicit requirement of the control¹² and if not complied with will trigger RD consent with a discretion reserved for traffic effects on the transport network¹³. Ms Gibellini also expressed concern regarding the requirement to "liaise" with road controlling authorities. Mr Rae has considered these aspects and made amendments to the provisions to address the concerns (discussed below).
32. All the planners don't agree on the approach. For the reasons summarised below, in our submission the evidence of Mr Rae and Ms Jenkins should be preferred as the condition precedent approach proposed is the most appropriate way to achieve the purpose of PC62 (including signalling the appropriateness of commercial use of the Site) while providing absolute

¹⁰ Dated 18 November

¹¹ Dated 16 December 2016

¹² 17.2.2.1(q)

¹³ 17.2.2.1A(l)

certainty to the TDC that they can require the upgrade of the TDC roundabout.

The Law

33. With the amendments proposed, the condition precedent approach sought sits squarely within the legal framework for a district plan control.
34. Case law has established the relevant principles applying to permitted activity rules relevant to PC62:
- (a) A permitted activity rule must be clearly capable of objective obtainment;¹⁴
 - (b) A permitted activity rule will be ultra vires if it reserves undue subjective discretion to the Council to approve activities on a case by case;¹⁵ and
 - (c) To ensure they are not ultra vires for uncertainty, district plan rules need to avoid uncertain or ambiguous meaning.¹⁶
35. For example, a rule requiring both the identification of affected parties and obtaining their approval to a proposal was found to be inappropriate as the permitted activity depended on both identifying an affected party and their subjective response.¹⁷ However, at the other end of the scale the need for the exercise of judgement can be contained within a permitted activity rule and the Court has concluded that each rule should be assessed on its own degree of certainty (or lack of it).¹⁸
36. Recently Judge Hasson¹⁹ referenced a 2008 Environment Court decision²⁰ that a permitted activity rule that left some scope of discretion by use of the words “significant” and “best practicable option” was not ultra vires and was therefore appropriate.
37. The need for the TDC roundabout upgrade within a permitted activity rule is also very different to that faced by the Environment Court in testing the

¹⁴ *Maclean v Thames-Coromandel District Council* A046/03

¹⁵ *Leslie Raymond Rawlings (and others) v Timaru District Council* [2014] NZEnvC 49

¹⁶ *New Plymouth District Council v Baker* W101/94

¹⁷ *Maclean v Thames-Coromandel District Council* A046/03

¹⁸ *Twisted World Limited v Wellington City Council* W024/02

¹⁹ In *Leslie Raymond Rawlings (and others) v Timaru District Council* [2014] NZEnvC 49

²⁰ *Friends of Pelorus Estuary Inc v Marlborough District Council* EnvC C004/08

appropriateness of permitted activity rules requiring the grant of resource consent for an Outline Development Plan.²¹ In those cases the Court has found that such an approach did not convey in clear and unambiguous terms the use to which the land could be put. This was because a resource consent for a yet to be determined ODP (including its suite of conditions) is not a clear standard specified in the plan change.

38. This is contrasted to the requirement for a transport upgrade that has a clear objective, methodology and objective nature not requiring subjective formulation.²²

Applying the Law

39. Mr Rae has provided his section 32AA planning assessment of the proposed permitted activity condition in his supplementary statement.²³
40. Applying the legal principles summarised above, in our submission the condition sought is a valid and intra vires way to manage traffic effects of PC62 for the following reasons.
- (a) The condition prescribes a clear objective of obtaining LOS D on all approaches to the intersection. The transportation experts all agreed to its appropriateness in conferencing;
 - (b) The methodology and inputs for determining the LOS trigger is both well tested and defined in the industry including the *Austrroads Guide to Traffic Management Part 3 – Traffic Studies and Analysis (2013)* that is referenced in the condition;
 - (c) The time period for obtaining the LOS trigger is stated as weekday PM level of service;
 - (d) The condition specifies the particular role of the officer within Council who must approve the works and reference to other parties that may have added an element of uncertainty have been removed;

²¹ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnv93

²² As discussed in cases such as *Power v Whakatane District Council* CIV-2008-470-456

²³ Dated 18 November 2016

- (e) A time period between approval and construction has been added to most appropriately link assessment and effects;
- (f) An additional condition has been added to the permitted activity conditions to make explicit that the updated roundabout must be *constructed* to the TDC's satisfaction, this most appropriately links the effects of relevant effect of development (traffic) with the activity triggering that effect (store trading).
- (g) What the condition requires and how that is to be achieved is clear and doesn't require subjective assessment.

41. In Commissioner McMahon's 11 October 2016 minute prepared during the hearing considerations were raised for drafting the TDC roundabout standard. Below we set out how those comments have been responded to:

| 11 October 2016 Minute considerations | Response |
|--|---|
| Any reference to specific NZ or international standard | Reference to <i>Austrroads Guide to Traffic Management Part 3 – Traffic Studies and Analysis (2013)</i> added ²⁴ . |
| Whether detail in methodology needs to be specified | What is required is now explicitly listed (approved design and engineering plans, program for funding and construction, timing added ("typical weekday PM"), inclusion of expected retail, commercial or community activities added, timing of construction added (no more than 3 years after approval and prior to activities commencing on the site). |
| Whether an independent certification | Certification of Tasman District |

²⁴ See s32AA assessment by Mr Rae and Mr Georgeson in Mr Rae's 18 November supplementary statement

| | |
|--|---|
| process is necessary or appropriate | Council's Resource Consent Manager added. |
| Defining with clarity the area affected by the standard | More detail on location added, "intersection of Salisbury Road and Champion Road". |
| Any consequential amendments to wording of matters of control/discretion | Yes, amendments made to controlled and RDA provisions (see description below). |
| Whether any parties (i.e. NZTA, NCC) should be expressly identified as affected where RDA triggered for compliance | Yes, NZTA added as an affected party to RDA rule. NCC not added as involvement not relevant given TDC are the relevant territorial authority under section 31. Any NCC approval will be as landowner. |

42. With the methodology and inputs specified, we consider you can have full confidence that the TDC roundabout upgrade will be in place before retail activities commence trading.
43. The NCC requested that the provisions require the TDC roundabout capacity to be increased prior to any *development occurring* on the Site. In our submission the trigger of retail, commercial or community *activities commencing* on the site is more appropriate as knowing what activities are proposed (through the resource consent process) means the trip generation of the Site can be more accurately assessed in designing the upgrade.
44. A similar objective and clear approach has been applied to the TDC roundabout related provisions where a resource consent application on the Site has the potential to be assessed as a controlled and RD activity. The matters of control are in 17.2.4.1B, and the matters of discretion in 17.2.4.2.
45. Other amendments to the TDC roundabout rule made following the hearing have been assessed in Mr Rae's supplementary evidence and the Planners' JWS include:

- (a) An advice note has been proposed for the restricted discretionary activity rule that the New Zealand Transport Agency is an affected person in relation to effects on the transport network if a resource consent triggers RD assessment; and
 - (b) To address concerns raised by Ms Gibellini regarding the use of the word “maintain” and the associated uncertainty that caused, Mr Rae has amended the wording to clarify that the assessment for LOS D is undertaken prior to trading (anticipating trading) as an ongoing obligation regarding LOS is not proposed or appropriate.
46. As PC62 is a plan change, detailed design of the roundabout upgrade is not appropriate or necessary. In his evidence in chief Mr Georgeson provided in Figure 1 an indicative design showing the feasibility of an upgrade that would achieve LOS D. As such there is no RMA impediment to the achievability of the upgrade.
47. Amendments made to the proposed controls in relation to achieving LOS D ensure a clear, objective control that will provide TDC with certainty that either the upgrading of the TDC roundabout will occur prior to any supermarket on the Site trading, or the resource consent will be processed as a RD activity with Council having discretion to ensure a LOS D is achieved. The permitted activity condition sits squarely within the Court’s requirements for an intra vires permitted activity rule.

ECONOMIC EFFECTS ON RICHMOND AND STOKE CENTRES

48. The focus of the economic impacts of PC62 has been potential impacts on the Stoke and Richmond Centres.

Richmond: Tinline Properties Limited – trade competitor

49. In our opening legal submissions we outlined why we considered Tinline Properties Limited (Tinline) were a trade competitor of Progressive which limited the ability for Tinline to submit on PC62.
50. In legal submissions Tinline claimed to not be a trade competitor of Progressive, distinguishing investors competing for a limited resource (land) with parties competing in trade.

51. In taking this view, Tinline argued that they had concern that there was already land appropriately zoned for the purpose of Progressive's development.²⁵
52. Despite this, evidence for Tinline did not relate to the amount and quantum of alternative land available, but rather the trade competition and flow on indirect effects of PC62 on Richmond Centre.
53. Tinline's case therefore related to trade competition, not land owners trying to get their land zoned for the highest value use (as was the case in the *Queenstown Central*²⁶ case that Tinline rely on. Tinline's submissions fit squarely within the trade competitor classification identified in *Kapiti Coast Airport*²⁷ of a partying seeking to restrict the commercial activities another party can do on their land.
54. There is no need to pursue the point further as the robust evidence before you, as agreed by Mr Foy, Mr Tansley and Mr Heath, is that PC62 will not cause significant adverse retail effects on the Richmond Centre that go beyond those associated with trade competition. Although Mr Copeland considers that Richmond Fresh Choice would be the most vulnerable to the cumulative effects identified in the agreed economist's range²⁸ his evidence does not go on to assess or justify how that will result in flow on retail distributional effects on amenity and what those would be.
55. As such, in our submission you should accept the evidence of Mr Foy and Mr Tansley that the functional amenity and social amenity of Richmond would be unchanged by PC62²⁹ and of Mr Heath that significant adverse retail effects beyond trade competition effects will not be caused.³⁰

Stoke: Health of Stoke Centre

56. Mr Heath, Ms Gibellini and Ms Deans all share a view that Stoke is a vulnerable centre not performing well which forms the basis for their assessment of the potential impacts of PC62 on that centre.

²⁵ Tinline Opening Legal Submissions, at page 19

²⁶ *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [161]

²⁷ *Kapiti Coast Airport Holdings Ltd v Alpha Corporation Limited* [2016] NZEnv 137

²⁸ JWS, 21 July matter 3

²⁹ EIC, Mr Foy, paragraph 108 and EIC, Mr Tansley paragraph 37

³⁰ Summary Statement dated 12 October 2016

57. In particular, Ms Deans has expressed concern³¹ regarding Mr Foy's evidence of "continued, successful operation of non-supermarket business in Stoke" and states she is unclear as to how he has concluded they are currently successful. Ms Gibellini expresses similar concerns.
58. The evidence by Mr Heath, Ms Gibellini and Ms Deans appears to be more of an observation that PC62 may not achieve what they see as desirable outcomes for Stoke, rather than assessing the predicted implications of PC62 on Stoke. That is not the test before you, and is not relevant to whether PC62 will have significant flow on economic effects on Stoke relevant to your RMA assessment.
59. In giving their opinion regarding the wellbeing of the Stoke Centre Ms Deans, Ms Gibellini and Mr Heath rely on two Property Economic reports prepared by Tim Heath and Phil Osborne:
- (a) Economic Business Land Demand Forecasting; and
 - (b) Stoke Centre Future Growth Assessment.
60. In our submission these reports have been given inappropriate weight. The introduction to the first report states "*this research and analysis is designed to assist TDC and NCC in the formulation of the most appropriate strategic direction for commercial activity...*". It is aspirational and does not anticipate or assess PC62 or any other commercial development outside Stoke centre. Similarly, the introduction to the second report states "*...undertake a retail economic assessment of the Stoke Centre with a specific focus on identifying the future economic commercial requirements of the centre...*". It is also aspirational and does not anticipate or assess PC62.
61. Mr Heath's statement in evidence that he considers Stoke a "vulnerable" centre (relied on by Ms Deans)³² appears contrary to the assessment in the above two reports that anticipate a much more positive outlook for Stoke. For example from the Land Demand Forecasting Report:
- (a) Stoke is a "high growth cell",³³

³¹ Addendum, paragraph 21

³² At page 10

³³ At page 11

- (b) Stoke can be seen as having continued a steady growth path over the assessed period with stable levels of retail and commercial consents;³⁴
- (c) 33% of all Nelson/Tasman growth to occur in Stoke in 2038;³⁵
- (d) There is a need to an *additional* 9,700 sq/m of retail and 4,850 sq/m of commercial service space by 2038;³⁶
- (e) These areas [including Stoke] will continue to flourish with business activity leveraging off the economic benefits of clustering;³⁷ and
- (f) Richmond, North and Stoke are the primary areas of population growth and forecast to experience the highest levels of growth “pressure points”.³⁸

62. For example from the Future Growth Assessment Report:

- (a) Sustainable floorspace in Stoke will increase by 61% between 2015 and 2045;³⁹
- (b) That will require an additional 7,400 – 9,200 sq/m of floorspace.

63. You have evidence from Mr Harris⁴⁰ that the Stoke Centre has not traditionally had vacancy problems. This is consistent with the evidence of Mr Foy⁴¹ that there are very low vacancy rates in Stoke with very low established businesses. The recently consented Greenmeadows complex shows further confidence in the area.

64. These two reports prepared by Property Economics and the assessment by Mr Harris and Mr Foy do not appear to paint as bleak a picture on the state of Stoke as Mr Heath’s, Ms Dean’s and Ms Gilbellini’s assertions in evidence that it is struggling or vulnerable to a new supermarket in Richmond North enabled by PC62.

³⁴ At page 59

³⁵ At page 85

³⁶ At table 22

³⁷ At page 58

³⁸ At page 85

³⁹ At page 23, table 3

⁴⁰ EIC, Mr Harris, paragraph 31

⁴¹ EIC, Mr Foy, paragraph 23 and 92

Evidence – direct effects

65. In our opening legal submissions we summarised the evidential basis for our submission that the potential adverse trade effects of PC62 fall within effects ordinarily associated with trade competition which cannot be considered in your RMA assessment.
66. Mr Foy has carried out extensive modelling and assessment and considers that under any scenario Stoke Centre would continue to play the same role for its community as it does today. In the unlikely event that one supermarket closed it would have a very limited effect on the Stoke Centre.⁴²
67. Since the hearing further conferencing of the economists has taken place and supplementary statements of evidence filed. This has largely related to the flow on effects on the Richmond and Stoke Centres.
68. Mr Cullen, Mr Copeland, Mr Foy and Mr Tansley all agree that of any supermarket, Richmond Fresh Choice would be the most vulnerable to the cumulative effects identified in the range agreed by the economic experts.⁴³ At this juncture Mr Foy wishes to make a minor correction to his evidence in chief for the record. The first sentence in his paragraph 79 should be worded:
- From data provided to me by Progressive for the Stoke Countdown and from my own assessment for the Richmond Fresh Choice, both stores are performing well.*⁴⁴
69. The change does not impact on the remainder of Mr Foy's evidence or his conclusions. Mr Heath⁴⁵ for TDC, Mr Tansley and Mr Foy do not consider that PC62 will cause any supermarket to close.
70. Despite that, Mr Heath's evidence is that there is potential for PC62 to have adverse effects on the performance, function and quality of the Stoke Centre. However an evidential link has not been made by Mr Heath linking

⁴² Supplementary statement of evidence of Mr Foy dated 20 December, paragraph 19

⁴³ JWS, 21 July, matter 3

⁴⁴ Previously the sentence read: *"From data provided to me by Progressive, both the Stoke Countdown and the Richmond Fresh Choice are performing well."*

⁴⁵ Property Economics Assessment at 4.2.4

those potential direct effects with flow on effects such as the closure or serious decline of the centre (part of the RMA test before you).

Evidence – indirect effects

71. To the contrary, subsequent to the hearing Mr Foy has undertaken an assessment of cross shopping data in the Stoke Centre to assess the potential economic flow on effects on the Stoke Centre. The methodology and result of this assessment is detailed in his supplementary statement of evidence.⁴⁶ Using this retail based approach to cross-visitation is necessary as no experts are aware of any data available relating to a broader assessment of cross-visitation within Stoke.⁴⁷
72. Mr Foy's additional assessment of cross shopping confirmed his conclusions presented at the hearing regarding the relationship between supermarket and non-supermarket business. In summary, Mr Foy found that 83% of sales made in the Stoke Centre take place when only a supermarket is visited, 15% of sales are made when no supermarket is visited, and 3% of sales are made when both a supermarket and some other business is visited.
73. The key evidential point from that additional assessment is Mr Foy has shown that cross shopping trips are not an important part of how the Stoke Centre is used by customers.⁴⁸ This means that even in a worse case scenario of one of the Stoke supermarkets closing (which the evidence show is highly unlikely), non supermarket business in Stoke would be effectively insulated by the lack of cross shopping undertaken.⁴⁹
74. Mr Tansley has peer reviewed Mr Foy's additional assessment and considers that the results are reliable.⁵⁰ He agrees that the data shows most Stoke Centre retail traders are not directly or at all reliant on the sustained patronage levels of its supermarkets.⁵¹

⁴⁶ Dated 18 November 2016

⁴⁷ Mr Foy, supplementary statement of evidence dated 20 December 2016, paragraph 8

⁴⁸ Mr Foy supplementary statement of evidence dated 18 November 2016

⁴⁹ Mr Foy supplementary statement of evidence dated 18 November 2016 at paragraph 23

⁵⁰ Mr Tansley, supplementary statement of evidenced dated 18 November 2016 at paragraph 7

⁵¹ Mr Tansley, supplementary statement of evidence dated 20 December 2016, at paragraph 8

75. Mr Copeland raises concerns with the cross-shopping analysis undertaken by Mr Foy and does not agree that even if one supermarket closed there would be limited effect on the Stoke town centre.⁵² However, Mr Copeland has not provided evidence as to what the indirect impacts on Stoke would be or how they would be caused.
76. With the cross shopping assessment undertaken, all economic experts were given the opportunity to predict both the direct and indirect effects of PC62 on the Stoke and Richmond Centres as a whole.⁵³ Mr Foy assessed the flow on impacts on the Stoke Centre as a whole between 0% and 5% and Mr Tansley considered that there would be no percentage flow on effects as market growth would offset any effect of PC62.
77. Mr Heath did not provide an assessment of the effects on the Stoke Centre as a whole (for reasons outlined in the JWS), but assessed the flow on impacts on all other retail activities at 15%. At the time of the preparation of the direct and indirect effects table Mr Cullen confirmed⁵⁴ that he was not in a position to provide any numerical input. Mr Copeland also confirmed that as he did not produce separate evidence regarding direct and indirect impacts there would be little utility in him providing numerical input into that table.⁵⁵
78. There is no disagreement that although cross shopping is an important aspect of multi visit trips it is only part of the picture⁵⁶. The other aspect, non retail activities, were a particular focus of Mr Cullen and Mr Heath's supplementary evidence.⁵⁷
79. Importantly in relation to this the flow on impacts of between 0% - 5% predicted by Mr Foy and Mr Tansley, the existence of non-retail activities further insulates the wider Centre from direct retail effects and therefore effects on retail represent a conservative scenario of effects on the wider centre for the following reasons:

⁵² Supplementary statement of evidence of Mr Copeland dated 20 December 2016

⁵³ JWS dated 5 December 2016

⁵⁴ Email from Counsel for NCC to Pam Meadows dated 30 November 2016

⁵⁵ Memorandum of Counsel on behalf of Tinline Properties Limited dated 29 November 2016

⁵⁶ JWS dated 8 December 2016

⁵⁷ Mr Cullen supplementary Statement of evidence dated 16 December and Mr Heath supplementary statement of evidence dated 20 December 2016

- (a) The existence of non-retail in Stoke effectively isolates Stoke against the loss of supermarket patronage more than if only retail businesses existed.⁵⁸
 - (b) There is a significant presence of non-retail activity at Stoke that provides this insulation. Mr Foy notes that of the 530 employees at Stoke around 60% are retail and 40% non retail.⁵⁹
 - (c) Many non-retail activities are destination activities and attractive independent of the supermarket. As an example, people visiting an accountant, vet or hairdresser are unlikely to be affected by the loss of a supermarket.⁶⁰
 - (d) People who transfer their supermarket visit are unlikely to transfer their non-retail visits as Stoke is used by locals because it is convenient and assessable.⁶¹
 - (e) Supermarket shoppers are unlikely to transfer all of their spending to a new Countdown in Richmond and it is a likely outcome that they would make some trips to a Stoke supermarket for convenience.⁶²
 - (f) Commercial and social functions of non retail activities such as libraries will not be measurably influenced in their patronage or a function by a decline in supermarket only visits to Stoke as visitation to those establishments is deliberate and purposeful.⁶³
 - (g) Other employment groups such as service providers (as shown in Mr Heath's Employment Base by Industry Type table presented at conferencing) are also destinations in their own category not threatened by trade competition impacts,⁶⁴
80. The evidence before you from Mr Foy and Mr Tansley regarding flow on impacts confirms that there will not be significant flow on effects at the Stoke Centre. In our submission therefore the only effects of PC62 on the

⁵⁸ Mr Foy Supplementary Statement of evidence dated 20 December, at paragraph 13

⁵⁹ Mr Foy Supplementary Statement of evidence dated 20 December, at paragraph 13

⁶⁰ Ibid at paragraph 14

⁶¹ Ibid, at paragraph 15

⁶² Ibid, at paragraph 16

⁶³ Mr Tansley, supplementary Statement of evidence dated 20 December, at paragraph 15

⁶⁴ Mr Tansley, supplementary Statement of evidence dated 20 December, at paragraph 17

Stoke Centre relate to trade competition which the RMA prevents you from considering.

81. That evidential position must therefore be considered against the position of Mr Heath, Mr Copeland and Mr Cullen regarding potential flow on impacts.

Evidential burden⁶⁵

82. There is an obligation on a party who asserts a fact, to present evidence in support of it, and the standard of proof required.⁶⁶ On that question the Court has described the “standard of proof” as:

*On the question of standard of proof as such, we adopt the submission of counsel for the respondent, Mr Taylor, that in these proceedings there is no burden of proof on any party, only an obligation on a party who asserts a fact to present evidence in support of it, and that the standard of proof required is on the balance of probabilities, and should reflect the gravity of the situation.*⁶⁷

83. More recently in the context of a resource consent application⁶⁸ the Environment Court set out the relevant legal principles regarding evidentiary burden and its foundation before making a decision in the context of a resource consent application:

*“Traditionally the Environment Court adopts a civil burden of proof, but in a slightly different way than might be applied in the civil courts. It has been said that there is no burden on any party, but an evidentiary burden rests on a party who makes an allegation to present evidence tending to support that allegation. We agree that how the Environment Court should approach the burden and standard of proof was best expressed by Judge Jackson in **Shirley***

⁶⁵ We are aware of the recent High Court decision of *Davidson v Marlborough District Council and others* [2017] NZHC 52 which considers the standard of proof for future effects however in our submission that case does not materially alter the case law relied on in this section.

⁶⁶ *Geotherm Group Limited & Others v Waikato Regional Council* A047/2006

⁶⁷ *Contact Energy Limited v Waikato Regional Council and Taupo District Council* (2000) 6 ELRNZ 1 paragraph [42]

⁶⁸ *Re Meridian Energy Limited* [2013] NZEnvC 59

Primary School v Christchurch City Council,⁶⁹ where he said at paragraph [136]:

To summarise the issues of onus and burden of proof under the Act:

- (A) *In all applications for a resource consent there is necessarily a legal persuasive burden of proof on the applicant. The weight of the burden depends on what aspects of Part 2 of the Act apply.*
- (B) *There is a swinging evidential burden on each issue that needs to be determined by the Court as a matter of evaluation.*
- (C) *There is no one standard of proof: if that phrase is of any use under the Act. The Court can simply evaluate all the matters to be taken into account under section 104 on the evidence before it in a rational way, based on the evidence and its experience; and give its reasons for exercising its judgment the way it does.*
- (D) *The ultimate issue under section 105(1) is a question of evaluation, to which the concept of a standard of proof does not apply.⁷⁰*

84. Prior, during and following the PC62 hearing economists for TDC, NCC and Tinline have asserted allegations regarding direct and indirect impacts on the Stoke and Richmond centres. Mr Foy and Mr Tansley have responded to those assertions through further analysis and assessment which has confirmed their initial assessments of the potential flow on impacts on those centres.
85. To the contrary, other than assertions, no assessments, modelling or even a potential impact percentage has been provided through evidence on behalf of TDC, NCC or Tinline relating to how PC62 will cause an indirect flow on effect on the Stoke or Richmond Centres.

⁶⁹ [1999] NZRMA 66

⁷⁰ s105 was substituted on 1 August 2003 by s44 RMA. The relevant section now is s104B RMA.

86. In our submission the evidence of Mr Foy and Mr Tansley is robust. Read together, their various statements of evidence and JWS provide compelling evidence regarding potential flow on effects on those centres and as such should be given considerable weight.

Risk of acting or not acting

87. Ms Dean's has concluded in the section 42A addendum⁷¹ that:

Due to a lack of evidence, I am unable to conclude that significant economic and social effects for Stoke Centre in particular will not flow from Plan Change 62 and therefore I am still unable to make an overall recommendation.

88. In our submission there is not a lack of such evidence. As set out in this section, considerable evidence has been filed in relation to both direct and indirect economic effects on the Stoke Centre. In particular Mr Foy has provided evidence regarding linking the anticipated direct effects that originated from the economist conferencing with his assessment on why indirect flow on effects are predicted to be between 0-5%.
89. Despite that, Ms Dean's concern needs to be considered against section 32(2)(c) that requires assessment of the risk of acting or not acting if there uncertain or insufficient information about the subject matter of the provisions.
90. In our submission, this risk of acting is low as shown by the following step by step summary analysis of the effect on supermarkets, non supermarket retail, and lastly the wider centre:

Supermarkets: Mr Heath⁷² for TDC, Mr Tansley and Mr Foy all agree that PC62 will not cause any supermarket to close. You can place considerable weight on that agreement.



Non supermarket retail: Widening the assessment, in terms of retail effects the range of anticipated trade competition by the

⁷¹ At paragraph 65

⁷² Property Economics Assessment at 4.2.4

relevant experts on other retail in Stoke⁷³ is between 0%-15%, which is our submission falls well below effects that could be described as significant. Importantly, Mr Tansley has not encountered any RMA case where there have been flow on retail distribution effects relevant to the RMA unless the underlying trade competition effects were found to be significant.⁷⁴



The wider centre: Widening the assessment further to the Stoke Centre as a whole (retail and non-retail) the aspect that economists disagree largely relates to the non-retail components of the Stoke Centre. For the reasons set out in Mr Foy's evidence and summarised in paragraph 79 of these legal submissions, direct retail impacts represent "worse case" impacts on the wider centre due to the insulation that the non-retail activities have from impacts of retail activities.

The low predicted flow on impacts on the wider Centre of 0-5% by Mr Foy and Mr Tansley means that there is a significant "buffer" between the predicted impacts and any impact where significant flow on effects may eventuate. This further lowers the risk of triggering significant flow on effects on amenity even in the event that higher direct effects eventuate.

91. The bar set by the Courts for when a social or economic effect is "significant" (and therefore relevant to your consideration) is high and includes loss of investment, loss of employment and loss of amenity resulting from the closure or serious decline of the centre as a whole.⁷⁵
92. The evidence from Mr Foy and Mr Tansley is that flow on effects will not be significant, and will only be between 0-5%. The only other figure provided by an economist is Mr Heath who predicts a 15% effect on other retail activities at Stoke. Mr Heath has agreed that the Stoke Centre will not disappear as a result of PC62, nor will the effect be ruinous.⁷⁶

⁷³ From the summary of Scheduled Impact Potentials filed with the 5 December economist JWS

⁷⁴ Mr Tansley, supplementary statement of evidence dated 20 December 2016, para18

⁷⁵ As summarised in paragraphs 31-42 of our Opening Legal Submissions

⁷⁶ Mr Heath summary statement 12 October at page 5

93. Given Mr Foy's evidence that the destination nature of the non-retail component insulates the wider centre from retail effects provides you with comfort that impacts will not be any worse than predicted, and in our submission certainly no higher than Mr Heath's 15% prediction on retail activities as a worse case scenario.
94. To the contrary, the risk of not acting is that the Site remains underutilised without the economic benefits of the development enabled by PC62 without evidential justification.

OTHER TRANSPORTATION EFFECTS

95. In Minute 8 Commissioner McMahon requested further information from Mr Clark (transportation expert for the TDC) relating to a question by Mr Wareing about the use of the Salisbury Road access for both entry and exit. The Commissioner sought assurance regarding the impact that would have on the function of the roading network and internal site circulation.
96. The response provided Mr Clark for the TDC⁷⁷ confirmed that:
- (a) If there was no access on Salsbury Road all traffic would enter and exit off Champion Road which would extend queue lengths in the site and flows entering the TDC roundabout. Mr Clark considers that this would have flow on effects increasing queue lengths on Salisbury Road to the south.
 - (b) Multiple access points are required to manage the safety and efficiency effects caused by the traffic loadings.
 - (c) The safety and efficiency effects by vehicle access points are managed by the PC62 provisions and these provisions provide the framework for safety and efficiency points to be considered as part of the subsequent resource consent process.
97. Mr Clark's additional assessment has confirmed the view of Mr Georgeson that appropriate matters of detailed design will be developed in accordance with the PC62 provisions through a subsequent application for resource consent.

⁷⁷ Dated 28 October 2017

LANDSCAPE

98. During and subsequent to the hearing Ms Gavin for Progressive and Ms Riley for TDC resolved almost all their outstanding differences of opinion.
99. The provisions filed on 9 December 2016 incorporate this agreed set of landscape provisions in orange and this includes the addition of reference to the landscape planting design along the Marchwood Grove boundary as a matter of control in 17.2.4.1B.
100. The only outstanding matter between the two relates to the minimum depth of landscaping on Salisbury Road. Ms Riley would prefer a minimum depth of 4.5m however this is not possible due to size constraints on both sides of the landscape strip. Ms Gavin considers 2m (with an average of 3m) is appropriate to provide for the health of the required trees and to ensure that has added a requirement for root guard barriers at Ms Riley's request.

CROSS BOUNDARY ISSUES

101. In their opening legal submissions the Nelson City Council (**NCC**) set out their evidential position with reference to the obligations and duties contained in sections 30, 31, 32, 74 and 76 of the Act.
102. However TDC is the unitary authority hearing PC62, not the NCC.
103. The Nelson Resource Management Plan (**NRMP**) does have relevance under section 74 of the Act which sets out the framework by which TDC is to prepare and change the TRMP. This includes (relevantly):
- ...have regard to the extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.⁷⁸*
104. Importantly, in exercising your decision making functions you “shall have regard” to such a plan, not give effect to it. As such, in our submission you need to give significantly more weight to the TRMP when exercising your functions under section 31 than provisions of the NRMP.

⁷⁸ Section 74(2)(c)

105. The Environment Court has determined⁷⁹ that “have regard to” means the matter must be given material consideration but the rules or policies that the in the plan need to necessarily be followed. A fetter is therefore placed on the relevance of the NRRP to your decision making when compared against the provisions of the TRMP.
106. In her summary statement of evidence Ms Gibellini discussed the NCC’s functions under section 30(1)(gb) of the Act. However, in fulfilling their obligations under this section NCC need only be concerned with their region (see section 30(1)). In relation to the Site NCC have no obligations under this section.
107. Any aspirations NCC hold for their territorial area (for example Stoke Centre) are not relevant to your decision making other than any regard to have to the extent PC62 is consistent with the NRMP.
108. The TRMP contains a chapter to address cross territorial issues. Relevantly this includes an objective of full and effective resource management decisions and results concerning cross boundary issues. The methods for implementing this objective include perusing consistent resource management policies to address issues.
109. Ms Gibellini has pointed to NRMP Policy IC1.1 in relation to maintaining the centres hierarchy and avoiding leakage to maintain a strong vibrant commercial focus in centres. However, this Policy relates to the role of the Nelson City Centre, which no evidence has been called suggesting is inappropriately impacted by PC62. Regardless, a policy of a neighbouring territory cannot be used to booster activities at the expense of another.
110. Nor does PC 62 offend against the other NRMP provisions identified in Ms Gibellini’s Appendix 1. In particular, you have robust evidence that PC62 will not cause significant flow on retail distribution effects on the Stoke Centre and the amendments made to the provisions to require the upgrade of the TDC roundabout ensure wider road network effects, (including those in NCC’s jurisdiction) are appropriately controlled.
111. In our submission, provided you are satisfied that under section 32(3)(b) PC62 is the most appropriate way to achieve the settled broader objectives

⁷⁹ In *Winstone Aggregates Ltd v Papakura District Council* EnvC A096/98

of the TRMP, which Mr Rae confirms it is, you can be satisfied it will also not be inconsistent with the NRMP in any material way (to the extent you even need to “have regard to” those provisions).

112. The roundabout upgrade will also benefit the NCC roading network and Progressive’s contribution will potentially reduce the amount required to be paid by NCC. These are both significant benefits for NCC and their ratepayers. If any of the upgrade falls on NCC land (which looking at the plan attached to Ms Gibellini’s evidence appears unlikely given NCC’s boundary is shown as the NW site of Champion Road) they will have an inevitable involvement in the process as land owner.
113. The third question NCC put to the hearing was whether PC62 adequately managed effects. In terms of effects assessment, relevant technical experts have not let council boundaries limit their assessments. Relevantly this includes transportation assessments of the wider roading network and economic assessments on the Stoke and Richmond centres. The evidence on behalf of Progressive is clear that PC62 will appropriate manage effects. Mr Carr for NCC has agreed that transportation effects can be managed with appropriate controls for the update of the TDC roundabout.

NATURE OF RETAIL ENABLED

Community Facility

114. As you know in addition to the retail activities, carparking and amenity planting, PC62 provides of 600m² of space for a community activity. Community activity is defined in the TRMP as:

Means the use of land and buildings for the primary purpose of health, welfare, care, safety, education, culture or spiritual well-being, but excludes recreational activities. A community activity includes schools, preschools, day-care facilities, hospitals, doctors’ surgeries and other health professionals, churches, halls, community centres, police stations, fire stations, stations, courthouses and probation and detention centres.

115. Mr Foy considers that given the nature community activities, this is not relevant to his assessment.

116. Given the size of the proposed community activity, realistically it is expected that the most likely uses would be activities such as a gym, medical centre or child care facility. In our submission you can take comfort from the fact that those facilities do not exist in the Stoke centre so any community activity enabled by PC62 would not be attracting Stoke centre based facilities.

Not a Centre

117. During the hearing some suggestions were made that PC62 would enable a “centre”. Given the geographical and floor area constraints contained within the PC62 provisions and Structure Plan a centre cannot be enabled.
118. The GFA limits proposed will ensure that. In particular the 200m² cap on retail or commercial activity other than the proposed supermarket. This can be compared to Richmond Mall that has over 20,000 m² lettable retail/commercial space⁸⁰.

NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT

119. The National Policy Statement on Urban Development Capacity 2016 (**NPS**) was proposed when PC62 was heard in October 2016 but only became operative following the hearing on 1 December 2016.
120. There are no transitional provisions provided in the NPS and therefore the Commissioner must give effect to particular policies in the NPS when making a decision in respect of PC62.⁸¹
121. The NPS seeks to ensure that planning documents provide adequately for both business and housing development. It *“covers development capacity for both housing and business, to recognise that mobility and connectivity between both are important to achieving well-functioning urban environments. Planning should promote accessibility and connectivity between housing and businesses. It is up to local authorities to make decisions about what sort of urban form to pursue.”*⁸²
122. Although a number of the objectives and policies in the NPS must be given effect to immediately, as local authorities have not yet had an opportunity

⁸⁰ EIC of Mr Tansley, paragraph 13

⁸¹ Section 75(3) of the Resource Management Act 1991

⁸² Preamble of National Policy Statement on Urban Development Capacity 2016 at page 3

to identify what additional growth capacity is required and where this should be located the weight that you can give to aspects of the policies is limited.

123. However taking a pragmatic approach to the application of the NPS we submit that PC62 gives effect to the Objective Group A - Outcomes for planning decisions, namely:
- (a) effective and efficient urban environments that enable people and communities and future generations to provide for their social, economic, cultural and environmental wellbeing;⁸³
 - (b) urban developments that have sufficient opportunities for the development of housing and business land to meet demand, and which provide choices that will meet the needs of people and communities and future generations for a range of dwelling types and locations, working environments and places to locate businesses;⁸⁴ and
 - (c) urban environments that, over time, develop and change in response to the changing needs of people and communities and future generations.⁸⁵
124. Finally, we submit that PC62 gives effect to the NPS as it recognises the national significance of:
- (a) urban environments and the need to enable such environments to develop and change; and
 - (b) providing sufficient development capacity to meet the needs of people and communities and future generations in urban environments.⁸⁶

RESPONSE TO REMAINING SUBMISSIONS

125. We have responded to the key submission points throughout these closing legal submissions.

⁸³ Objective OA1

⁸⁴ Objective OA2

⁸⁵ Objective OA3

⁸⁶ National Policy Statement on Urban Development Capacity 2016 at page 9

126. The majority of the remaining submissions were from residents and entities surrounding the PC62 Site who raised amenity related matters that were responded to in opening legal submissions and evidence during the hearing.
127. The PC62 provisions propose significant buffering mitigation between the Site and the properties along Marchwood Grove. In response to concerns raised by submitters this landscape strip has been increased to as wide as is feasible to while still providing for the functionality of the carpark. Importantly, much of the landscaping on Progressive's land is on the Marchwood Grove side of the acoustic wall further providing for the amenity of those residents.
128. This mitigation is in addition to the landscape planting already along much of Marchwood Grove.
129. During and subsequent to the hearing Progressive has made several amendments to the provisions to incorporate suggestions by Ms Riley. These have now all been incorporated and are included in the Final Version of provisions.
130. Concerns were raised about the impact of PC62 on some views from an adjoining site. However, the RMA does not provide a framework for the absolute right of protection of a particular private view rather it is an aspect of the general amenity to be evaluated with other factors such as sunlight and privacy.⁸⁷ Also, if the Site was fully developed for permitted activities views would be lost.
131. A range of mitigation measures to address the amenity of neighbours has been incorporated to the provisions. Ms Gavin considers that this landscaping will provide an appropriate level of amenity for the Marchwood Grove residents. Ms Riley for TDC has not raised any concerns regarding that aspect of the landscaping.

PROGRESSIVE VERSION OF PROVISIONS

132. The Closing Submissions Version of provisions sought by Progressive are **attached**.

⁸⁷ *Foot v Wellington City Council* W165/96

133. In summary, the provisions incorporate the following amendments made during and subsequent to the hearing:
- (a) The TDC roundabout controls (discussed above);
 - (b) Landscape amendments including enhancements to the Marchwood Grove boundary and landscaping planting on the road frontages;
 - (c) Noise and stormwater related amendments to the permitted activity conditions including an additional evening noise limit at Mr Hunt's request;
 - (d) Adding a certification requirement to the Noise Management Plan provisions;
 - (e) Amendments to the acoustic wall barrier specifications at the request of submitters;
 - (f) Requiring the loading bay to be enclosed and excluding it from the building envelope and setback requirements;
 - (g) Excluding the loading bay from the calculation of GFA given the addition of walls for noise mitigation had the potential unintended effect of triggering the Gross leasable floor area definition in the TDRP;
 - (h) The addition of construction noise controls; and
 - (i) A requirement that a Construction Noise Management Plan be provided and specification of what is to be included in it in the information requirements.
134. Mr Rae and Ms Deans have carried out a s32AA assessment of this version as detailed in their JWS dated 16 December. The table attached to that JWS outlines the significant agreement reached between Progressive and the TPC in relation to the majority of the provisions.

OVERALL CONSIDERATIONS

135. The RMA is enabling.
136. The corner of Champion and Salisbury Road is a gateway site to the Richmond township. PC62 will ensure that a high quality gateway development is enabled compared to the underutilised activities currently taking place on the site.
137. Considerable evidence has been presented at and following the hearing regarding the effects of PC62. In attributing weight to evidence, in our submission you need to weigh speculation or aspiration against evidential positions based on methodical and detailed data driven assessment.
138. To respond to the questions Commissioner McMahon put on day one of the hearing:
- (a) PC62 achieves the purpose of the Act as contained in Part 2.
 - (i) Its enabling nature utilises an existing scheduled site is the appropriate way to achieve the settled provisions of the TRMP.
 - (ii) The evidence shows that the Site presents no hurdles to development. In particular all transportation experts agree that effects on the transport network can be appropriately managed. You have heard significant economic evidence that PC62 will not change the functional and social amenity of the Stoke and Richmond Centres.
139. The third question relates to manging effects. The Closing Submissions Version of the provisions is the end product of significant consultation and collaboration with TDC and submitters pre, during and following the hearing. It contains a comprehensive set of controls that will ensure TDC has the appropriate tools in the toolkit to manage the effects of the anticipated development on the site at resource consent stage.
140. The activities enabled are the most appropriate way to achieve the settled objective and policy framework of the TRMP and at most only offend the aspirations of a neighbouring Council for a local shopping centre, rather it is submitted, than any relevant RMA reason.

141. As the Site is suitable for rezoning, and this rezoning will most appropriately achieve sustainable management of the natural and physical resources and settled provisions of the TRMP, we seek that you recommend approval of PC62.

AC Dewar / JMG Leckie

13 February 2017