Legal & Democratic Services

Memo

Legal Privilege Applies
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Date: 11 December 2024
From: Brent Pizzey (lawyer)
To: Scott Blair, Senior Planner

Whether a Mitre 10 Mega store is within the definition of "trade supplier" lex25963

Issue

1. Application RMA/2024/2460 is for a Mite 10 Mega store in the Prestons Rd commercial core zone. Your question is whether it is within the definition of "*trade supplier*" in the District Plan.

Advice

2. To assess whether the proposal is within the definition of "trade supplier" you must be satisfied of the following factual matters:

   (a) Is the proposal engaged in sales to other businesses or institutional customers. Isolated trade sales will not suffice; but retail sales are not a disqualifying factor. There is no requirement that there be any "proportionality" assessment regarding whether sales are "primarily" to business or institutional customers; and

   (b) Does the proposal only consist of supplying products that fall within the products sold by the eight listed types of supplier – recognising that those types of suppliers can and do sell other incidental products; and

   (c) Is the proposal going to be primarily selling goods within the definition of "building supplier" and "garden and patio supplier".

Analysis

3. This question was addressed in detail in the attached 2010 advice and High Court decision on judicial review[1].

4. The definition of "trade supplier" at that time was:

   "Trade supplier" means a business engaged in sales to businesses and institutional customers and may also include sales to the general public, and wholly consists of suppliers of goods in one or more of the following categories:

   - *automotive and marine suppliers;*
   - *building suppliers;*
   - *catering equipment suppliers;*
   - *farming and agricultural suppliers*

[1] *Ferrymead Retail Ltd v Christchurch City Council* [2012] NZHC 358.

- *garden and patio suppliers;*
- *hire services (except hire or loan of books, video, DVD and other similar home entertainment items);*
- *industrial clothing and safety equipment suppliers; and*
- *office furniture, equipment and systems suppliers.*

5. The underlined terms in that definition were also defined:

"Building supplier" means a business primarily engaged in selling goods for consumption or use in the construction, modification, cladding, fixed decoration or outfitting of buildings and without limiting the generality of this term, includes:

- *glaziers;*
- *locksmiths; and*
- *suppliers of:*
  - *awnings and window coverings;*
  - *bathroom, toilet and sauna installations;*
  - *electrical materials and plumbing supplies;*
  - *heating, cooling and ventilation installations;*
  - *kitchen and laundry installations, excluding standalone appliances;*
  - *paint, varnish and wall coverings;*
  - *permanent floor coverings;*
  - *power tools and equipment;*
  - *safes and security installations;*
  - *timber and building materials; and*
  - *any other goods allowed by any other definition under 'trade supplier'* .

"Garden and patio supplier" means a business primarily engaged in selling goods for permanent exterior installation or planting and without limiting the generality of this term, includes:

- *garden centres;*
- *landscape suppliers; and*
- *suppliers of:*
  - *bark and compost;*
  - *clothes hoists and lines;*
  - *conservatories, sheds and other outbuildings;*
  - *fencing, gates and trellises;*
  - *firewood;*
  - *garden machinery;*
  - *outdoor recreational fixtures and installations;*
  - *monumental masonry;*
  - *patio furniture and appliances;*
  - *paving and paving aggregates;*
  - *statuary and ornamental garden features;*
  - *swimming and spa pools; and*
- *any other goods allowed by any other definition under 'trade supplier'*.

6. The interpretation issue arising there was whether, in order to be within the trade supplier definition, a business needed to show that it was proportionately involved in more trade with business and institutional customers than with the general public. The 2010 legal opinion concluded that was not needed. The factual issue was instead whether the goods sold by the business are primarily those that are sold by the suppliers that are within the definition of "trade suppliers".

7. The conclusion in the advice was *not* that Bunnings *is* a trade supplier. It was that the proposal is within the definition of "trade supplier" *if the consent authority is satisfied on the facts* that the goods sold are primarily those sold by the suppliers that are within the trade supplier definition.

8. The High Court held that legal opinion was correct[2]. On the provisions then in the City Plan, the High Court held that the correct interpretation of the provisions does not require a "proportionality" type assessment of whether sale activity is proportionately greater to business and institutional customers. The steps in assessing whether an activity was within the definition of "trade supplier" were *factual assessments* of [3]:

   (a) *Determine first whether the business is engaged in sales to other businesses or institutional customers. If not, the proposed activity cannot qualify as a "trade supplier". On the other hand, if the proposed activity is of the type specified, the fact that it also involves retail sales will not be a disqualifying factor. This reflects the reality that most trade suppliers will also be involved in retail sales*.

   …

   Before a business could satisfy the screening test the Council would have to be satisfied that it was genuinely engaged in trade sales (the first step). Isolated trade sales would not qualify. A common sense approach will avoid the pitfalls that are inherent in the proportional approach advocated on behalf of Mitre 10 [4].

   (b) If (a) is satisfied the next step is to determine whether the business wholly consists of supplying products that fall within one of the listed categories. I agree with counsel for Mitre 10 that the words "wholly consists of' indicate that the eight categories listed in the definition are exhaustive.

   (c) The third step involves applying the relevant definitions, in this case "building. supplier" and "garden and patio supplier". These definitions require the business to be "primarily engaged" in the specified activities. There is no justification for reading down the word "primarily" which indicates that goods sold must for the most part come within the described activities.

9. The Court accepted the submission for the consent holder and the Council that the goods sold by the store do not need to be solely those necessary to qualify as a "building supplier' or "garden and patio supplier" (emphasis added) [5]:

   The focus should be on the nature of the products sold in terms of the class or type of products specified in the "building supplier" and "garden and patio supplier" definitions. That was precisely the approach adopted by the applicant and the Council in this case. It was a purely factual exercise. Bunnings carries all the products necessary to qualify as a "building supplier" or "garden and patio supplier". <u>The carrying of other incidental goods not specifically identified does not alter the situation</u>.

10. Chisholm J noted in that case that the Commissioner deciding the resource consent application, applying and concurring with the 2010 legal opinion, did not expressly find as a fact that the store's goods primarily fell within the classification of suppliers which make up the trade supplier definition. However, he was not

[2] At [74].
[3] At [69].
[4] At [70].
[5] At [57].

troubled by that as he found that

> "*In any event, the conclusion reached by the Commissioner that the proposed store came within the definition of "trade supplier" was clearly right. Referral back on that factual issue would be futile because the same conclusion would be reached*" [6].

11. The relevant provisions of the District Plan have been changed since 2010 but not sufficiently materially to depart from that interpretation.

12. The definition of trade supplier is substantially the same:

> *Trade supplier*
>
> *means a business engaged in sales to businesses and institutional customers (but may also include sales to the general public) and consists only of suppliers of goods in one or more of the following categories:*
>
> 1. *automotive and/or marine suppliers;*
> 2. *building suppliers;*
> 3. *catering equipment suppliers;*
> 4. *farming and agricultural suppliers;*
> 5. *garden and patio suppliers;*
> 6. *hire services (except hire or loan of books, videos, DVDs and other similar home entertainment items);*
> 7. *industrial clothing and safety equipment suppliers; and*
> 8. *office furniture, equipment and systems suppliers.*
>
> *Building supplier*
>
> *means a business primarily engaged in selling goods for consumption or use in the construction, modification, cladding, fixed decoration or outfitting of buildings. It includes:*
>
> a. *glaziers;*
> b. *locksmiths; and*
> c. *suppliers of:*
> i. *awnings and window coverings;*
> ii. *bathroom, toilet and sauna installations;*
> iii. *electrical materials and plumbing supplies;*
> iv. *heating, cooling and ventilation installations;*
> v. *kitchen and laundry installations, excluding standalone appliances;*
> vi. *paint, varnish and wall coverings;*
> vii. *permanent floor coverings;*
> viii. *power tools and equipment;*
> ix. *safes and security installations;*
> x. *timber and building materials; and*
> xi. *any other goods allowed by any other definition under trade supplier.*

13. "Garden and patio suppliers" is no longer a defined term; however, the previous definition of that term is probably a useful guide to the type of goods that are sold by a "garden and patio" supplier.

14. A relevant step in the Chisholm J's reasoning in 2012 was identifying that where the City Plan took a "proportionality" approach it specified the proportion, so as to avoid vagueness and uncertainty. It used the

[6] At [76].

definition of "*yard-based supplier*" as an example of that [7]. That reasoning still holds. The definition of "Yard-based supplier" requires that "*more than 50% of the area devoted to sales or display is located within covered or uncovered external yard or forecourt space, as distinct from within a secured and weatherproof building*".

15. The definition of "*trade supplier*" in 2010 required that the type of supplier "wholly consists of suppliers" one of, or a hybrid of, the listed types. The legal opinion upheld by Chisholm J was that the "wholly" constrains the type of supplier not the type of goods. The term in the current definition is "*consists only of suppliers*". The meaning is unchanged.

16. I have not identified any changes to the wider context in the District Plan that warrants departing from that interpretative approach.

END.

[7] At [68].

Christchurch City Council
Legal Services Unit

LEGAL OPINION

For the exclusive use of Council Officers only

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Date: **16TH JULY 2010**

From: **BRENT PIZZEY** (Solicitor, Legal Services)

To: **MAL NASH** (Planner, Linwood/Lyttelton Area Development Team)

Whether the Proposed Bunnings Activity is a "Trade Supplier"

The Issue

The assessment sought is whether the activity of a proposed Bunnings Limited ("Bunnings") outlet at Ferrymead in the Business 4 zone is within the definition of "trade suppliers" for the purposes of City Plan rule 5.3.1 in Volume 3 Part 3.

The CCC has been provided with copies of two legal opinions on this issue. Simpson Grierson's assessment for Bunnings is that the proposed activity is that of a "trade supplier". The assessment by Simon Berry, barrister for Mitre 10, is that it would not be a "trade supplier". I have read those opinions.

Summary of Legal Opinion

The activity of a proposed Bunnings outlet at Ferrymead in the Business 4 zone **is within** the definition of "trade suppliers", provided that the consent authority is satisfied on the information provided by the applicant that the goods sold by Bunnings are *primarily* within the hybrid definition of "garden and patio supplier" and "building supplier".

The Facts

Bunnings has applied for land use consent for a Bunnings retail outlet with associated car parking and landscaping on a site in the Business 4 zone at Ferrymead. The building will be 8975m^2 GFA. The proposed activity has 218 customer car parks and five heavy goods vehicle spaces. The proposed activity is described in the application as that of a "trade supplier" within the City Plan definition.

The Law

The Interpretation Act 1999 applies to rules in district plans. Section 5(1) of the Interpretation Act 1999 provides:

> "Ascertaining meaning of legislation
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose. "

The Court of Appeal in *Powell v Dunedin City Council* [1] considered the approach to be taken to interpretation of provisions in a district plan. The Court reaffirmed the line of authorities including *J Rattray & Son Limited v Christchurch City Council* [2]; *Beach Road Preservation Society Inc v Whangarei District Council* [3]; and *Brownlee v Christchurch City Council* [4].

In *Powell* the Court held (at paragraph 35):

> "In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity, interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in Rattray, regard must be had to the immediate context (which in this case would include the objectives and policies and methods...) and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the Plan and the objectives and policies of the Plan itself. Interpreting a Plan by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with the judgment of this Court in Rattray or the requirements of the Interpretation Act."

It follows that the meaning of the rule must be taken from its text, in the light of its purpose, and with regard to its context, both immediate context and wider context within the City Plan.

The approach to interpretation in *Powell* requires looking at the words used in their immediate context, including objectives and policies, and then referring to other sections of the Plan if there is obscurity or ambiguity. Rigid adherence to the words used, without considering the immediate context, is not the correct approach.

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[1] [2004] 3 NZLR 721 (CA)

[2] (1984) 10 NZTPA 59

[3] [2001] NZRMA 176 (High Court)

[4] [2001] 12 NZRMA 539

However, whilst interpretation is not confined *to* the words used, it is confined *by* the words used. The first issue is the text in the immediate context. Assessment goes wider if there is doubt or ambiguity (*Environmental Preservation of Northland Wellington v Wellington City Council* Environment Court, Wellington (ENV-2009-WLG-121, [2010] NZEnvC 16, paragraph 7-8; *Lovegrove v Waikato District Council* (ENV-2007-AKL-394, [2010] NZEnvC 54) paragraphs 11 and 14).

If reference to matters other than the text and the immediate context is needed, then the wider context that may be relevant to interpretation includes the history of the City Plan (*Palmer v Timaru District Council*, ENV-2009-CHC-194, paragraph 22).

In *Queenstown River Surfing Ltd v Central Otago District Council* [2006] NZRMA 1 (Env Court, Judge Jackson) the Court held (paragraph 7):

> The relevant factors to consider in interpreting a district plan under the Resource Management Act 1991 were stated in *Brownlee v Christchurch City Council* and *First Light Holdings Limited v Thames Coromandel District Council* as including:
>
> (1) the text of the relevant provision [in its immediate context];
> (2) the purpose of the provision;
> (3) the context and scheme of the plan and any other indications in it;
> (4) the history of the plan;
> (5) the purpose and scheme of the RMA;
> (6) any other permissible guides to meaning.

The Court also noted that because the Interpretation Act 1999 applies to rules in plans, items (1) and (2) are mandatory considerations, and (3) to (6) are to be considered if appropriate.

Interpretation assessment should also apply the "fundamental issues of policy associated with which meaning should be adopted" identified by Young J in *Nanden v Wellington City Council* [2000] NZRMA 562 (HC):

1. It is desirable for an interpretation to be adopted which avoids absurdity or anomalous outcomes.

2. It is also desirable for an interpretation to be adopted which is likely to be consistent with the expectations of property owners.

3. Practicality of administration by City Council officers is also an important consideration. In particular, it is unlikely that the City Council would deliberately adopt a rule which meant that the lawfulness or otherwise of proposed houses or renovations could only be assessed after lengthy historical research had been carried out.

The Rule and the Definitions

The site is within the B4 industrial business zone.

Rule 5 in Volume 3 Part 3 of the City Plan contains rules for industrial business zones. The development standards in rule 5.2 are focussed on amenity, including open space, street scene, separation, sunlight and outlook, visual amenity, landscaping, height. Breach of these standards is restricted discretionary activity.

Rule 5.3 in Volume 3 Part 3 is a community standard. It is appended to this memorandum. Activity in breach of that rule is fully discretionary. The focus of the rule is on types of activity that are constrained within the industrial business zone. Rule 5.3.1 constrains retail activity. Rule 5.3.2 constrains residential activity. Rule 5.3.3 constrains offices.

The relevant part of the rule is:

> 5.3.1 Retail activities
>
> Business 3B and 4 Zones (Plan Change 18)
> Note: additional information to assist users in applying rules (b), (c) and (d) below may be found in an Information Booklet provided by the Council.
>
> (b) Any retail activity shall only consist of one or more of the following:
> (i) yard based suppliers.
> (ii) trade suppliers.
> (iii) second hand goods outlets.
> (iv) food and beverage outlets.
> (v) retail activities (other than those specified in (i) to (iv) above), which comprise either:
> • a single tenancy ; or
> • a group of tenancies sharing vehicle access and/or parking;
> • and which comprise no more than 2000m 2 of gross leasable floor area.
> For the purpose of this rule, ' tenancy' shall mean one retail activity occupancy created by freehold, leasehold, license or any other arrangement to occupy.

The Information Booklet referred to in the rule does refer to trade suppliers. It paraphrases to rule. It does not assist interpretation of the rule.

The Bunnings application is made on the basis that the proposed activity is a "trade supplier" under 5.3.1(b)(ii). The applicant accepts that if it is not classed as a trade supplier, the activity would not be permitted under this rule.

The rule is exhaustive and mandatory. The proposed Bunnings activity must be entirely that of a "trade supplier" if it is to be permitted under this rule.

"Trade supplier" is defined in the City Plan:

> Trade supplier
> means a business engaged in sales to businesses and institutional customers and may also include sales to the general public, and wholly consists of suppliers of goods in one or more of the following categories:
> - automotive and marine suppliers;
> - building suppliers;
> - catering equipment suppliers;
> - farming and agricultural suppliers;
> - garden and patio suppliers;
> - hire services (except hire or loan of books, video, DVD and other similar home entertainment items);
> - industrial clothing and safety equipment suppliers; and
> - office furniture, equipment and systems suppliers.

The definition is exhaustive. To be within the definition, the proposed activity must be a business engaged in sales to businesses and institutions, and may also include sales to the general public, in the listed categories of business activity.

The range of businesses that are within this definition "wholly consists of" suppliers in the particular categories that are listed in the definition. "Wholly" means exclusively, or entirely (Concise Oxford English Dictionary (9th edition). However, the word "wholly" in this definition relates to the exhaustive list of *types of suppliers*, rather than a list of goods. It is the categorisation of the business that is primarily relevant in this definition, rather than the categorisation of the products sold by the business. Accordingly, I differ from the opinion expressed in Mr Berry's assessment for Mitre 10.

For the proposed activity by Bunnings, the relevant business categories are "garden and patio supplier" and "building supplier". Both are defined in the City Plan as follows:

> Garden and patio supplier
> means a business primarily engaged in selling goods for permanent exterior installation or planting and without limiting the generality of this term, includes:
> - garden centres;
> - landscape suppliers; and
> - suppliers of:
>   - bark and compost;
>   - clothes hoists and lines;
>   - conservatories, sheds and other outbuildings;
>   - fencing, gates and trellises;
>   - firewood;
>   - garden machinery;
>   - outdoor recreational fixtures and installations;
>   - monumental masonry;
>   - patio furniture and appliances;
>   - paving and paving aggregates;
>   - statuary and ornamental garden features;
>   - swimming and spa pools; and
> - any other goods allowed by any other definition under 'trade supplier'.
>
> Building supplier
> means a business primarily engaged in selling goods for consumption or use in the construction, modification, cladding, fixed decoration or outfitting of buildings and without limiting the generality of this term, includes:
> - glaziers;
> - locksmiths; and
> - suppliers of:
>   - awnings and window coverings;
>   - bathroom, toilet and sauna installations;
>   - electrical materials and plumbing supplies;
>   - heating, cooling and ventilation installations;
>   - kitchen and laundry installations, excluding standalone appliances;
>   - paint, varnish and wall coverings;
>   - permanent floor coverings;
>   - power tools and equipment;
>   - safes and security installations;
>   - timber and building materials; and
> - any other goods allowed by any other definition under 'trade supplier'.

Both definitions are of businesses that *primarily* sell goods of the type included in the definitions. As noted above, it can also be a hybrid of activities that involve primarily selling goods within both of those definitions. Accordingly, it is not on point to focus on whether the proposed Bunnings activity includes the sale of goods that are not within those two categories, so long as the proposed business is "primarily" one of selling goods within those categories.

The Simpson Grierson letter emphasises the goods sold by Bunnings stores elsewhere that are clearly within the categorisation of goods supplied within those definitions. Mr Berry's letter emphasises goods sold by Bunnings elsewhere that are not the type of supplies that fit within these definitions. However, the question is not whether the goods sold will be wholly within that definition. The question is *whether the business is primarily engaged* in the sale of goods within those categories.

These secondary definitions are inclusive rather than exhaustive. They have a general definition, then list types of suppliers that are included within the definition. Other types of suppliers could also be within the definitions. Moreover, the definitions are again of types of suppliers rather than types of goods.

It is also relevant that the exhaustive parts of the definitions of both "garden and patio supplier" and "building supplier" require that it be a business that is primarily engaged in selling fixtures and installations rather than chattels. This appears from the use of the terms "*permanent exterior installation or planting*" and "*for consumption or use in the construction, modification, cladding, fixed decoration or outfitting or buildings*".

The question that arises is whether the proposed Bunnings activity is that of a business that is *primarily engaged* in a hybrid of "*selling goods for permanent exterior installation or planting*" and "*selling goods for consumption or use in the construction, modification, cladding, fixed decoration or outfitting of buildings*". This is a factual, not legal, question. The consent authority must be satisfied on the evidence that the goods sold by Bunnings are primarily within that hybrid definition of "garden and patio supplier" and "building supplier".

The definition begins with the words "*means a business engaged in sales to businesses and institutional customers and may also include sales to the general public...*". The word "primarily" or "principally" is not part of that definition. It does not say "*means a business engaged* primarily/principally *in sales to businesses and institutional customers and may also include sales to the general public...*". A question arises as to whether that word should be read into the definition.

One construction would be that the principal part of the definition is that it is a business engaged in sales to businesses and institutional customers, and that this is then qualified by it also including "*sales to the general public*". If a reference to "primarily" being engaged in sales to businesses and institutional customers is read into this definition, then the consent authority would need to be satisfied on the evidence that Bunnings is going to be primarily engaged in sales to businesses and institutional customers, if the activity is to be within the definition of "trade supplier".

The applicant does not claim that the proposed business will be *principally* engaged in sales to businesses and institutional customers. The Simpson Grierson letter sates that "*Bunnings customers include members of the public as well as trades people and contractors. The proportions of such customers and products sold vary from store to store*". On the information provided by the applicant, the CCC cannot be reasonably satisfied that the proposed activity is primarily engaged in sales to businesses and institutional customers, whilst also including sales to the general public.

An alternative construction is that the second part of the definition is the assurance that the business is one that is engaged in sales to business and institutional customers. The exhaustive list of types of suppliers of goods provides the assurance that the business is *engaged in sales to businesses and institutional customers* to the extent intended by the drafters of the City Plan.

There is some doubt or ambiguity in the definition. The following assessment uses the wider context, including the history of the City Plan, to resolve that doubt.

The City Plan Context

Analysis will now turn to the wider context of these provisions within the scheme of the City Plan, looking at other rules, the objectives and policies, and Variation 86 that introduced some of these provisions.

First, the context of other rules, and the reasons for the rules.

Volume 3 Part 3 rule 4.4.1 establishes a critical standard for permitted activity in the retail park zone. "Trade suppliers" are exempt from the requirement for a minimum glfa of 450m^2. Trade suppliers in that context are small scale activities. The reasons for this rule state that (Part 3, rule 7.4.10)

> "Particular retail activities are exempt from the floor area threshold as they do not, by their nature, generate distributional effects even if they establish at a smaller floorspace and in a clustered or agglomerated pattern".

The reason that the retail park zone requires a minimum glfa is to ensure that these zones do not have adverse distributional effects by allowing retail activity which will result in reduced activity in other centres. Therefore that description is classing "trade suppliers" as businesses that do not result in "distributional effects". However, this does not assist in determining whether "trade suppliers" is intended to mean businesses primarily engaged in sales to business and institutional customers.

The reasons for the rules for the rules for retail activity in the business 3, 3B, 4, 4P, 5, 6 and 7 zones state Volume 3 Part 3, 7.5.8:

> ....The rules restrict a dispersal of retail activities over industrial areas generally in order to avoid cumulative adverse effects on the roading network and on the amenity and functions of the Central City and district centres, and to limit the potential displacement of permitted industrial activities (reverse sensitivity effects). In those zones in which some additional retailing is provided for as of right (specifically the B3, B3B and B4 zones), there is no restriction on the establishment of commercial services

but the extent of retail activity has been limited in order to reinforce a centres-based approach to retail distribution throughout the City.

....However, in recognition that some limited retail activity may be able to occur without the resultant adverse distributional effects on existing commercial centres, a balance has been struck to allow retail activities of a particular scale and nature to continue in some industrial zones. In particular, 'trade suppliers' is a specific category that encompasses a range of retail activities that are considered unlikely to give rise to adverse distributional effects on the central city and district centres. Similarly, 'food and beverage outlets' have been provided for as not only are they unlikely to give rise to distributional effects but they also provide an important service to workers in industrial areas. ...

Those "reasons for rules" expressly categorise "trade suppliers" as being a range of businesses that are unlikely to result in adverse distributional effects on central and district centres, regardless of the proportion of sales to the general public. Moreover, these "reasons for rules" provide that when seen in context, and taking a purposive approach, one must regard trade suppliers as being businesses that are within the listed categories, regardless of the proportion of sales to the general public.

The scheme of the City Plan is to group types of business activity together in various zones. The description of the purposes of those zones casts some light on the meaning of "trade suppler". A crucial part of those purposes is concern with retail distribution effects. The Statement of Issues in Volume 1 Part 3, 3.11.3 Commercial activity outside the Central Area, states:

Commercial activities, including retail and office uses, have progressively occurred outside recognised commercial areas. A combination of changes in consumer preferences, a rapid trend among goods distributors (from wholesalers through to retailers) to embrace larger store formats than previously utilised, and evolving changes in industrial activity (including a reduced emphasis on manufacturing activity) have created favourable conditions for the establishment of substantial trade supply and large format retail outlets in industrial areas. Some have relocated to industrial areas where floorspace is cheaper than in commercial centres and good access and parking is available. These areas have primarily attracted large format stores, including discount retail warehouses and trade supply outlets also selling a wide range of goods direct to the public, and supermarkets. Between March 2000 and April 2003, approximately 66% of all commercial floorspace added to the City was in industrial zones.

This trend was more pronounced during a period of liberal planning provisions which resulted in new commercial centres, primarily associated with large format retail outlets, establishing in light industrial zones.

In Part 3, 3.11.4 Trends in commercial activity includes the following trend:

- some retailers and trade suppliers moving out of traditional commercial areas to drive-in large format retail complexes or to new or existing stand-alone premises in industrial areas.

Those passages demonstrate that an issue being addressed by the zoning provisions in the City Plan is that a change in the consumer preferences of the general public had resulted in

large trade supply and other large format retail outlets establishing in industrial areas. In those passages, the differentiation between substantial trade supply activity, and large format retail activity, appears to make sense only if the retail activity of Bunnings, Mitre 10 or Placemakers is what is meant by "substantial trade supply", identifying "retailers" and "trade suppliers" as being two types of activities that are moving to "large format retail complexes". Accordingly, in the Statement of Issues, it is clear that when the City Plan is referring to "trade suppliers" it is not intending that term to relate solely to small scale activities. This strongly suggests that activities such as Bunnings, Mitre 10 or Placemakers were intended to be within the definition of "trade suppliers".

The description in the City Plan of the purpose of the BRP zone (Volume 3 Part 3, clauses 1.1 and 1.7) state that the BRP zone is intended to provide for two types of large format activity: large format retail outlets; and large format trade supply outlets. However, when one takes into account the history of the City Plan, it is apparent that the purpose of these provisions is not one of constraining trade suppliers to the BRP zone (assessed in more detail below).

The objective and policies for large format retail parks do not expressly mention "trade suppliers". However, the explanation to policy 12.9.1 provides that

> There are limited opportunities within the central city and suburban centres for large showrooms and large format retailing activities. Historically, large format retail activities have developed in a number of suburban locations principally in industrial areas adjacent to arterial roads. Specific provision is therefore made for the range of retailing activities that function at a lower intensity than those predominantly undertaken in suburban locations or in the central city. These are predominantly second tier retail activities such as discount merchandising, bulky goods showrooms and home improvement centres.

In that context, activity such as the proposed Bunnings activity is that of a large format "home improvement centre". The City Plan there identifies it as a type of activity that does not have adverse distributional effects.

The Business 4 (suburban industrial) zone is intended to be for light industrial/industrial activity, with some commercial activity, and some limited retailing. The zone description and purpose in Volume 3 Part 3 1.10 Business 4 (Suburban Industrial) Zone states

> The Business 4 (Suburban Industrial) Zone includes a number of light industrial and servicing areas in the city generally located within or adjoining suburban living areas. It also includes light industrial areas intended to serve as buffer zones between living zones and the Business 5 (General Industrial) Zone, and servicing areas adjoining some large suburban centres..... The zone's purpose is to provide for light industry, warehousing and service industries, and some commercial activities such as offices. Some retailing is provided for in these areas, with an emphasis on retail activities of a nature and scale that do not lead to significant adverse effects on the function and amenity of the central city and district centres....
>
> Retail activity is subject to restrictions in scale in order to prevent the adverse effects of dispersal and dilution of this activity outside the Business 1 and 2 zones, and the Central City zone, as these zones serve as important focal points for community activity and provide convenient access to a range of goods and services. Office development is not considered to be incompatible with the environmental effects

> anticipated in this zone. In the Business 4 Zone bounded by Deans Avenue, Blenheim Road, Whiteleigh Avenue and the railway line, development of the area shall be in accordance with an outline plan which specifies the roading pattern and open space linkages.

"Scale" in this context could have two meanings: as reference to the size of the retail outlet; or as reference to number of retail outlets. I consider that taking a purposive approach, the intent of the City Plan is the latter.

However, the anticipated environmental results suggest that references to "scale" were intended to relate to the size of each retail activity, rather than to the retail activity as a whole.

The anticipated environmental results for the B4 zone include:

(a) A diverse range of light industrial activities, some office and commercial service activities and limited retail activities, with frontages of larger industrial enterprises set aside for parking, landscaping and offices.
(b) A zone environment with a high density and scale of industrial, office and commercial service buildings. Some limited retail activity buildings establishing at a small to medium scale in reflection of traditional established activities. A proportion of smaller sites developed intensively.

The objectives and policies for business and commercial activity are relevant. Part of the objective for distribution of business activity is that the distribution minimises unnecessary vehicle trips and maintains the safety and functioning of the road network, and that the distribution ensures that the functioning, vitality and amenity of existing centres is maintained. Policy 12.1.1 under that objective is

> To differentiate and manage various types of business activities both on the basis of the nature of the activity, and the potential local and strategic effects of their operations. This is to be achieved principally by distinguishing between commercial and industrial activities and enabling these activities to locate within particular zones, at a scale and with environmental standards which reflect their location and role.

Policy 12.1.2, Distribution of Commercial Activity, provides:

> To provide for varying levels of commercial activity, both within and beyond identified commercial centres and areas, to meet the wider community's social and economic needs. This is to be achieved by:
> (a) encouraging consolidation of commercial activity, particularly retailing, at existing commercial centres while ensuring the maintenance and enhancement of the function and amenity of the centre;
> and
> (b) managing local and strategic adverse effects of commercial activity in a way that:
> - maintains the amenity of nearby living environments;
> - avoids reverse sensitivity effects;
> - sustains existing physical resources and ensures the continuing ability to make efficient use of, and undertake long-term planning and management for, the transport network and other public and private infrastructural resources, including parks and community facilities;
> - for retail activity, avoids adverse effects on the function and the efficient use of the central city and district centres;

- for retail activity, limits adverse effects on people and communities who rely on the central city and district centres for their social and economic wellbeing and require ease of access to such centres by a variety of transport modes; and
- for retail activity, maintains the amenity values of the central city and district centres.

The explanation states that in this policy, commercial activity means retail activities, commercial services and office activities. As noted above, trade suppliers are within the definition of retail activity. The explanation further provides that

> Part (b) of the policy enables commercial activity to establish within and beyond identified commercial centres to varying degrees, depending upon the nature of the receiving environment, the anticipated effects of the scale of the activity and the Plan's intentions for that environment. For example, retail activity is permitted to an extent in airport, cultural, rural and industrial zones.
>
> Commercial activity outside of identified commercial centres has the potential to create adverse effects of both local and strategic (or wider) significance. These include effects on the transport network, nearby living environments, economic effects on existing commercial centres (where such effects are of scale that they affect the function and amenity of such centres), and consequential effects on people and communities that rely on these centres for their social and economic wellbeing. Reverse sensitivity effects can also arise where, for example, an agglomeration of retail activity in a heavy industrial zone places pressure upon permitted industrial activities to reduce their level of effects or relocate.
> (Plan Change 22)

This shows that the intent of the policy for distribution of commercial activity is that retail activity establish principally within commercial centres, but be provided for outside of those zones if that is appropriate taking into account the anticipated scale of adverse effects of the activity on the transport network, living environments, commercial centres, and displacing industrial activity.

That explanation is of mixed utility for this interpretation assessment. The scale of effects on roads, living zones and displacement of industrial activity that results from activity such as Bunnings could be significant.

The objective for industrial business areas (the Business 4 Zone being a suburban industrial zone) is (objective 12.10)

> A wide range of industrial areas which accommodate a diversity of appropriate business activities, where adverse effects are avoided, remedied or mitigated.

Industrial Business policy 12.10.1, the Range of Activities, is

> To provide for a wide range of business activities in industrial areas appropriate to the levels of effects provided for in these areas, and also having regard to any potential cumulative impacts on the continuing ability of:

- the central city and district centres to provide for the community's social and economic wellbeing while maintaining and enhancing their level of amenity;
- the central city and nine consolidation focal points to serve as effective centres around which to concentrate increased population densities.

The explanation states

> The various industrial areas enable a range of business activities to establish and operate, with their associated effects being managed through the standards applicable to each zone. These zones particularly enable activities of an industrial nature to establish in a number of locations throughout the city. However, there is a measure of limitation placed upon commercial activities in industrial areas through the employment of controls upon office accommodation in the heavier industrial zones, and upon retailing.
>
> ...The scale of retail activity has been restricted in the industrial business zones to ensure that local and/or strategic adverse effects pursuant to retail development are subject to assessment; refer Objective 12.1 and its associated policies.

In that context, "trade suppliers" could well be one of the range of business activities intended to locate within the industrial business zones. However, reference to the scale of activity being restricted so as to control both local adverse effects, and strategic adverse effects on retail development, suggests that the intent was that activity such as Bunnings, which may have local adverse effects, was intended to be subject to assessment rather than being permitted.

Assessment will now take into account the history of the City Plan.

History of the City Plan

The "trade supplier" definition was introduced to the proposed City Plan in Variation 86. Provisions in the proposed City Plan notified in 1995 sought to restrict retail activity in the industrial business zones. Those provisions were deleted in 1999 in light of submissions seeking less regulatory control. The result was provisions that enabled significant retail activity in the industrial business zones. That development started occurring. There were no rules focussed on controlling retail distribution effects on existing centres. Some large format retail hubs were built, such as at Tower Junction. The purpose of Variation 86 was to address these issues.

In that context, the introduction of the BRP zones in Variation 86 was an endeavour to create appropriate zoning for areas that already existed on the ground. The provisions for those zones must be read in that light. References to them being appropriate locations for large format retail activity does not, in that context, mean that there are no other appropriate locations.

The text of the "trade supplier" definition when Variation 86 was introduced was:

> Trade supplier
> means a business engaged in sales to businesses and institutional customers and may also include **a proportion of its** sales to the general public, and wholly consists of suppliers of goods in one or more of the following categories:
> - automotive and marine suppliers;
> - building suppliers;

- catering equipment suppliers;
- farming and agricultural suppliers;
- garden and patio suppliers;
- hire services (except hire or loan of books, video, DVD and other similar home entertainment items);
- industrial clothing and safety equipment suppliers; and
- office furniture, equipment and systems suppliers.

The rationale for this approach is expressed most clearly in Appendix 8 to the section 32 report for Variation 86. This is a report by marketplace, a consultancy on retail markets and strategies. The purpose of the new definitions was to prevent "shopping centre" type retailing from proceeding as of right in the B4 zone (paragraph 1.5.1), so as to mitigate distributional effects, defined as being effects attributable to changing patterns of support for and supply of retail space (paragraph 2.3.1). A current trend being addressed by the variation was a shift towards fewer, larger retail outlets and new "nodes" (paragraph 4.2.1). An express concern was control over establishment of supermarkets in B4 zones as displacing activity from existing centres (5.2.6). The report expressly noted that the development of large format-orientated centres had not resulted in any traceable significant adverse effects, and that the concern about these centres was that they may change in the future to smaller floor area retail activity that would directly complete with the existing centres (5.3.3).

That report analyses what constraints should be introduced for retail activity in industrial business zones. It proposes the constraints, and the exceptions. The author noted that all businesses will have some sales to other businesses. There is a spectrum. At one end are those that have very low business or trade sales. At the other end are those that have almost total business or trade sales. Those at the former (retail) end of that spectrum "...may be critical to shopping centre function and community wellbeing..". All were classed in the proposed City Plan as retail activity. Some would have potential to create adverse distributional effects if located out of existing centres. Others would not. The purpose of the new definitions proposed in this report was to ensure that only activities capable of generating adverse distributional effects would be excluded from the constraint on retail activity (paragraphs 6.2.3-6.2.4).

The author sought a definition of "trade supplier" that would take an effects-based approach and not rely on a "list approach". The intent was that "traders with a ***significant*** business or trade customer base" would be excluded from the retail constraints (paragraph 3.2.1.5 in Appendix 1 to Appendix 8 to the Section 32 report).

When that report in the section 32 analysis refers to "trade suppliers" as not being subject to constraint in the industrial business zones, it is referring to the following definition in the report:

> Trade supplier
> means a business *substantially* engaged in sales to businesses and institutional customers as well as to the general public and without limiting the generality of this term, includes the following:
> - automotive and marine suppliers;
> - building suppliers;
> - farming and agricultural suppliers;
> - garden and patio suppliers;
> - officer product suppliers;
> - catering equipment suppliers
> - hire services (suitably qualified); and
> - industrial clothing and safety equipment suppliers.

Accordingly, it appears that the original intent of the analysis behind Variation 86 was that trade suppliers may have significant adverse distributional effects if they are not substantially engaged in sales to business and institutional customers.

As noted above, that intent was carried through in the definition of trade supplier as originally notified.

Ngai Tahu Property Limited submitted. The submission sought deletion of the phrase "a proportion of its" from the definition. The Council's planning evidence sought retention of the notified definition. The Council's decision on submissions under clause 10 of the First Schedule rejected that submission, stating that "Definition as presently worded appropriate. The approach adopted does provide for some useful flexibility". The submitter appealed. The Council settled the appeal by consent. The consent order deleted the reference to "a proportion of" from the definition of "trade supplier".

That history demonstrates that whilst initially the intent of the trade supplier definition was to enable some scrutiny of the extent of sales to public when considering whether a 'trade supplier" was permitted in the zone, the City Plan definition of "trade supplier" that resulted from the Variation deliberately removed any consideration of the proportion of sales to business and institutional customers rather than to general public.

Conclusion on "Trade Suppliers" Definition

The words used, immediate context and broader context all establish that the proposed Bunnings activity is within the definition of "trade supplier", provided that the consent authority is satisfied on the information provided by the applicant that the goods sold by Bunnings are *primarily* within the hybrid definition of "garden and patio supplier" and "building supplier".

Brent Pizzey
SOLICITOR
Legal Services Unit
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16th July 2010

5.3.1 Retail activities
Updated 16 November 2009

Business 3 Zone
(a) Any retail activity undertaken from a site shall only consist of one or more of the following:
- (i) the display and sale of goods produced, processed or stored on the site, and ancillary products, up to 20% of the net floor area on the site used to produce, process or store those goods, or 350m 2 retail floorspace, whichever is the lesser;
- (ii) yard base suppliers.
- (iii) trade suppliers.
- (iv) second hand goods outlets.
- (v) food and beverage outlets.
- (vi) service stations.

Business 3B and 4 Zones (Plan Change 18)
Note: additional information to assist users in applying rules (b), (c) and (d) below may be found in an Information Booklet provided by the Council.
(b) Any retail activity shall only consist of one or more of the following:
- (i) yard based suppliers.
- (ii) trade suppliers.
- (iii) second hand goods outlets.
- (iv) food and beverage outlets.
- (v) retail activities (other than those specified in (i) to (iv) above), which comprise either:
  - a single tenancy ; or
  - a group of tenancies sharing vehicle access and/or parking;
  - and which comprise no more than 2000m 2 of gross leasable floor area.

For the purpose of this rule, ' tenancy' shall mean one retail activity occupancy created by freehold, leasehold, license or any other arrangement to occupy.

(c) Notwithstanding compliance with (b) above, retail activities will be discretionary activities where the aggregate gross leasable floor area of:
- the proposed retail activity; plus
- any other existing or approved retail floorspace, of which some part of the site is located within 200 metres of any part of the proposed development site;

exceeds 3000m 2 provided that:
- (i) this clause shall not apply to proposed retail activities that are allowed by (b)(i) to (iv) above, nor to:
  - the display and sale of goods produced, processed or stored on the premises (and ancillary products), up to 20% of the net floor area on the premises used to produce, process or store those goods,or 350m 2 retail floorspace, whichever is lesser.
  - pharmacies contained within the structure of a health facility, up to 20% of the net floor area of the balance of the facility or 350m 2 , whichever is lesser.

(ii) any existing or approved retail activity on a site wholly or partly within 200 metres of the proposed development site shall be excluded from assessment of the gross leasable floor area where:
- it consists of an activity allowed by clause b(i) to (iv) above, or listed in (c)(i) above.
- it is located wholly or partly within a Central City Zone, B2 Zone or contiguous B2/B1 Zone, and any part of the development site is within 50 metres of a Central City, B2 or contiguous B2/B1 Zone, and any intervening land is zoned B3B, B4, Special Purpose (Road) or Special Purpose (Rail) Zone.

Note: refer to Appendix 2 diagrams and clause (d) below to assist in interpreting clause (c).

(d) For the purpose for applying (c) above:
- (i) existing and approved retail floorspace information is to be obtained from the Council. Note: the applicant may choose to verify that information through additional site survey work.
- (ii) where:

- a person/applicant (A) obtains retail floorspace information from the Council; and
- another retail application (B) (for resource consent (including Certificate of Compliance) or building consent) is granted within the 200 metre threshold, which causes the information obtained by applicant (A) to become outdated;
- then the additional retail floorspace proposed by (B) and any consequential breach of rule 5.3.1(c) above by applicant (A) will be required to be included and assessed by applicant (A), even if their application has already been lodged.

(iii) the term 'contiguous B2/B1 Zones' shall mean that two zones are adjacent, or separated only by a Special Purpose (Road) Zone.

(iv) the term 'site' and 'development site' shall mean subclauses 1 to 3 under the definition of 'site' in Part 1 of Volume 3.

(v) the term 'approved' shall include any retail activity for which resource consent (including Certificate of Compliance) or building consent has been granted; provided that the application of this term:

- shall not include retail activity for which resource consent (including Certificate of Compliance) or building consent has been granted, but which has since been cancelled, or which has lapsed and for which no application has been made within applicable statutory time frames to extend the time in which to give effect to it; and
- shall not include retail activity for which building consent has been granted but which cannot be given effect to because resource consent for the retail activity is required and has not been obtained; and
- in those situations where more than one application has been made for a retail activity on the same part of a site and no construction progress has been made toward giving effect to any of the proposals, shall only consider the largest floorspace for which resource consent (including Certificate of Compliance) or building consent has been granted.

Business 4P, 5, 6 and 7 Zones.

(e) Any retail activity undertaken from a site shall only consist of the display and sale of goods produced or processed or stored on the site (and ancillary products), up to 20% of the net floor area on the premises used to produce, process or store those goods, or 350m $_2$ retail floorspace, whichever is the lesser.

(f) Community Standard 5.3.1 clauses (a) to (d) above do not apply to the B4 zoned site at 2 Waterman Place, where retail activities on the site shall be limited to a maximum gross leasable floor area of 6,500m 2 , provided that such retail activity shall occur at ground level only. (Plan Change 23

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2001-409-000333
[2012] NZHC 358

BETWEEN	FERRYMEAD RETAIL LIMITED Plaintiff
AND	CHRISTCHURCH CITY COUNCIL First Defendant
AND	BUNNINGS LIMITED Second Defendant

Hearing: 28, 29 and 30 November 2011

Appearances: N Flanagen/K Francis for Plaintiff
T C Weston QC for First Respondent
JGA Winchester/F C Sing for Second Respondent

Judgment: 8 March 2012

RESERVED JUDGMENT OF CHISHOLM J

A The application for judicial review is dismissed.

B Costs are to be resolved in terms of [134].

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REASONS

Introduction

[1] On 1 December 2010 Christchurch City Council granted Bunnings Limited land use consent to establish and operate a major store at Ferrymead, Christchurch. For some years Ferrymead Retail Limited (Mitre 10) has operated a Mitre 10 mega

store at Ferrymead. Despite the efforts of Mitre 10 (and others) to have the application processed on a notified basis, it was processed and granted by the Council without notification.

[2] Mitre 10 seeks judicial review of the Council's decisions to process the application on a non-notified basis and to grant the application. It contends the Council made three primary errors when processing the application:

(a) applying an incorrect interpretation of the words "trade supplier" used in the City Plan;

(b) processing the application without having sufficient information to enable the decisions to be made; and

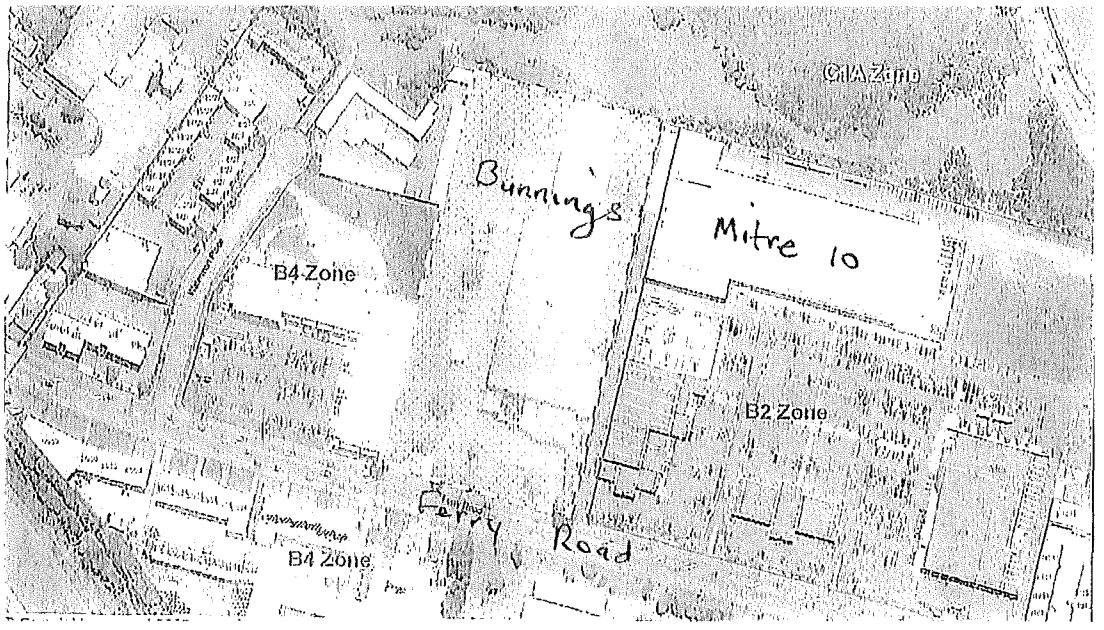
(c) granting consent in reliance on conditions that were inadequate.

For any one or more of those reasons Bunnings seeks orders declaring the decisions to be invalid and setting them aside.

Background

[3] Ferrymead, a suburban centre, is located on Ferry Road which provides a link between central Christchurch and Sumner. Access from the proposed Bunnings store to Ferry Road was a central issue. Mitre 10 has operated its mega store at Ferrymead since 2007. The proposed Bunnings store would occupy a 2.08 ha site immediately adjacent to the Mitre 10 store.

[4] It is convenient to explain the relationship between the two stores and the relevant zoning by reference to an aerial photograph taken in 2002 which was included in the decision granting consent:



Mitre 10 is located within the Business 2 (B2) zone, a district centre core zone which permits retailing. The proposed Bunnings store is within the Business 4 (B4) zone, a suburban light industrial zone which allows limited retailing.

[5] The B2 zone at Ferrymead of about 6ha comprises a reasonably large suburban shopping centre and associated parking. Apart from the Mitre 10 store, there is a supermarket and other smaller retail outlets, all of which were established pursuant to resource consents granted by the Council at a time when the land was zoned B4. In 2008 the zoning was changed to B2 by Variation 86.

[6] The balance of the Ferrymead suburban centre (including the Bunnings site) is zoned B4. The purpose of this zone is to provide for light industry, warehousing and service industries, and some commercial activities such as offices. Limited retailing is permitted, with an emphasis on retailing activities that are of a nature and scale that do not lead to significant adverse effects on the function and amenity of the central city and district centres.

[7] In February 2009 Bunnings sought land use consent to establish:

> ...a warehouse with a total gross floor area...of 8975m^2 – comprising main warehouse retail space (5912 m^2), a timber trade sales yard (1380m^2), outdoor nursery (1255m^2), and associated office and staff spaces.

In addition the application sought consent for car parking, shifting and widening the

existing access onto Ferry Road, creating a new secondary access onto Ferry Road, and landscaping.

[8] Difficulties arose. The application was lodged on the basis that the proposed store qualified as a "trade supplier" under the City Plan and that it would be processed as a restricted discretionary activity. However, Mitre 10 (and others) questioned whether this was so. It believed the application needed to be processed as a full discretionary application and conveyed that belief to the Council.

[9] As the matter progressed Marilyn Nash, a city planner handling the application, formed the view that the application would need to be notified. To a large extent this reflected that Paul Durdin, a transportation consultant engaged by the Council, had expressed strong concerns about traffic leaving the site and making a right hand turn into Ferry Road. Based on figures as to the traffic that would be generated that were before the Council at that time, he considered the proposed activity would have more than minor effects on traffic safety. Bunnings was informed that the application was unlikely to succeed.

[10] In November 2009 Bunnings withdrew its application so that it could take advantage of a new, less stringent, statutory regime for the assessment of resource consent applications introduced by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. Amongst other things this Act modified the provisions in the Resource Management Act 1991 (RMA) relating to public notification of resource consent applications. There is no suggestion that it was improper for Bunnings to take advantage of this new regime.

[11] A new application was lodged in November 2009. Although the activity for which consent was sought remained the same, it was supported by a new Transportation Assessment Report which predicted a much lower traffic generation than the report accompanying the original application.

[12] Once again Mitre 10 (and others) attempted to persuade the Council that the application should be notified, this time because the effects of the proposal would be more than minor in terms of ss 95A-95F of the RMA (those sections having been

introduced by the 2009 amendments). A legal opinion supporting Mitre 10's stance was passed on to the Council by Mitre 10. Patrick Sloan, the owner of the B2 land at Ferrymead, supported Mitre 10. The Council also received enquiries from other quarters, including elected Council members, the local residents' association, and some members of the public.

[13] In due course the Council appointed Rachel Dunningham, a senior Christchurch lawyer experienced in resource management matters, as a Commissioner to determine Bunnings' application (including whether it should be notified). On 1 December 2010 she issued two decisions, the first deciding that the application did not need to be notified, and the second granting consent subject to conditions.

[14] This proceeding for judicial review was issued by Mitre 10 on 15 February 2011. It seeks a declaration that the decision granting the consent (including the decision not to notify) is invalid, an order quashing the decision, and an order remitting the matter back for a further decision on notification of the application in terms of ss 95A-95F of the RMA.

Council decisions

[15] Ms Nash, the city planner handling the application, has deposed that the written reasons for the decision "are comprised within my recommendation to the Commissioner." She also deposes that the Commissioner reviewed with her and discussed various aspects of her recommendation. Given the qualifications and experience of the Commissioner I am satisfied that there is no basis for any suggestion that she was simply "rubber stamping" the recommendations of officials as happened in *Videbeck v Auckland City Council.*[1]

[16] Although there is extensive duplication between the two decisions, it is convenient to summarise them separately. Both decisions have the same attachments which form part of the decisions.[2]

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[1] *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC)
[2] These attachments comprise a peer review of the Transportation Assessment Report by Paul Durdin;

Decision as to whether or not the application should be notified

[17] Ms Dunningham proceeded on the basis that the proposed Bunnings Store came within the "trade supplier" definition and that it needed to be assessed as a restricted discretionary activity. She had the benefit of three legal opinions concerning the definition of "trade supplier": an opinion from Bunnings' lawyers supporting its interpretation that the proposed activity came within the definition; a contrary opinion from the solicitors for Mitre 10; and an opinion from the Council's solicitor, Mr Pizzey, which supported the Bunnings interpretation.

[18] When considering whether the application needed to be notified the Commissioner considered the question:

> Pursuant to s 95A, will the adverse effects of the activity on the environment be more than minor, or are they likely to be more than minor?

Given that she was proceeding on the basis that the proposal was a restricted discretionary activity, the Commissioner confined her attention to the following matters in respect of which the requirements of the City Plan were breached: effects relating to traffic, visual amenity, and environmental health.

[19] *Traffic effects*:

(a) This was considered to be the primary planning issue. Ms Dunningham observed that there had been a number of amendments to the original application following feedback from Council staff and the traffic consultants engaged by the Council. She also noted that there had been a peer review of the Transportation Assessment Report accompanying the application.

(b) A number of matters were eliminated from further consideration on the basis that they were of no significance: a shortfall in parking

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a memorandum from the Council's economist, Adam Naiman; an arborist's memorandum; a landscape report; an environmental health report; a legal opinion as to the "trade supplier" definition by Brent Pizzey, the Council's in-house lawyer, and an opinion from Mr Pizzey concerning reliance on unseen data for an assessment of environmental effects.

spaces; proposed reconfiguration of access points to provide for pedestrian safety; and the ability of vehicles to queue on site. Having eliminated those items the Commissioner concluded that traffic generation was the major issue and she proceeded to consider it at length.

(c) Ms Dunningham explained that whereas Bunnings had originally used a model based on *gross floor area* to support its first application, it now relied on a model based on *indexed annual sales figures* to support the current application. This was on the basis that the gross floor area model was not an accurate predictor of traffic generation for Bunnings stores. Ms Dunningham expressed concern that the sales data upon which the modelling was based had not been disclosed to the Council (on the basis of commercial sensitivity) and that there was insufficient data for the Council to provide a fully independent analysis.

(d) Nevertheless the Commissioner accepted that the sales methodology had been reviewed by the Council's senior economic analyst (Mr Naiman) who was satisfied that it took into account all the relevant variables, conformed to best practice, and that the description of the data elements provided him with "sufficient confidence to believe the model's results". She also took into account that the transportation consultant retained by the Council to peer review the Transportation Assessment Report (Mr Durdin) had reported that the predicted traffic generation would be "at the lower limit of that likely to occur".

(e) The Commissioner then noted that Bunnings had offered a condition of consent restricting traffic numbers to overcome any concerns the Council might have about the absence of sales data and the methodology used. This offer, which the Commissioner adopted, limited the number of vehicles exiting at the primary exit point to 70 trips over the week day peak hour and 125 trips over the weekend

afternoon peak hour. She was satisfied that this condition could be supported by conditions requiring monitoring.

(f) Having addressed those matters the Commissioner expressed the view that "any residual doubts about traffic generation from the site are met by the condition restricting traffic numbers from the site". She expressed satisfaction that Mr Durdin, in consultation with Council staff, had undertaken a thorough assessment of the relevant issues concerning the effects of traffic generation. She also noted that Bunnings had agreed to relocate a bus stop and shelter.

[20] *Visual amenity effects*:

(a) Given that this topic is not central to the proceeding before the Court, the Commissioner's approach only requires a very brief explanation.

(b) The Commissioner was satisfied that: non-compliance with the requirement as to location of the offices[3] would not result in any loss of visual amenity; to the extent that signage did not comply with the Plan the effects on visual amenity would be "less than minor"; any adverse effects on a notable tree could be "adequately mitigated"; and any non-compliance arising from landscaping would be "less than minor".

[21] *Environmental health effects*:

(a) This matter is in a similar category to visual amenity. It concerned breach of a noise standard on the northern boundary with the Conservation 1A zone. A noise assessment from Bunnings' acoustic consultants had been reviewed by the Council's senior environmental health officer.

[3] The requirement was for offices to be at the front of the building.

(b) Provided the development proceeded in accordance with the plans that had been submitted, the Commissioner was satisfied that any adverse environmental health effects arising from noise would be "less than minor". She also considered that a review condition pursuant to s 128 of the RMA could respond to any unanticipated noise effects.

[22] Having addressed those issues the Commissioner said that she was satisfied for the purposes of s 95A(4)[4] that no special circumstances existed in relation to the application that could lead to the conclusion that the application ought to be publicly notified. She also said that she was satisfied that in terms of s 95E(1) no parties were adversely affected and that the application should be processed on a non-notified basis. The application was processed on a non-notified basis accordingly.

Substantive decision granting the application

[23] As already indicated, this decision repeated a good deal of the background material contained in the decision not to notify.

[24] Having addressed s 104(1) the Commissioner concluded:

> ...the City Plan anticipates this type of retail activity within the Business 4 zone subject to adverse effects being avoided, remedied, or mitigated. In this instance, given the mitigation proposed in the application along with the conditions proposed, I am satisfied that the proposal is overall consistent with the relevant business and transport related Objectives and Policies.

She also considered that the proposal was consistent with Part 2 matters in that it would maintain the amenity of the surrounding environment and that it was in accordance with ss 7(c) and 7(f) of the Act.

[25] Consent was granted, subject to 45 conditions. I will return to the relevant conditions when considering the third ground of appeal.

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[4] This subsection provides that a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.

The evidence

[26] Numerous affidavits are before the Court, with some deponents having sworn more than one affidavit. Some parts of the affidavits were criticised on the basis that they were contrary to *Northcote Mainstreet Inc v North Shore City Council* in which Randerson J observed: [5]

> ...judicial review generally proceeds on the basis of the evidence available to the decision maker at the time of the decision. It follows that further evidence, whether of fact or opinion, which was not before the decision maker before the time of the decision, is normally irrelevant and inadmissible in proceedings of this kind. The attempted introduction of material after the event, especially for the purpose of casting doubt on the substantive reasonableness of the decision in question, is generally inappropriate.

I keep those observations in mind when considering the three grounds of appeal. In the meantime I will briefly outline the content of the various affidavits.

Affidavits on behalf of Mitre 10

[27] *Patrick Sloan*, the owner of the land zoned B2 (which includes the Mitre 10 site) summarises the history of the resource consents relating to this land. He explains the further development that could be undertaken within the zone and produces correspondence between his lawyers and the Council.

[28] *Timothy Andrews* is a director and shareholder of Mitre 10. He discusses the "trade supplier" definition with reference to Mitre 10 stores, the proposed Bunnings store, and other stores. He also discusses the likely impact of the proposed Bunnings store on parking and congestion at Ferrymead.

[29] *Dr James Fairgray* is a principal of an independent research consultancy. He has wide experience in analysing the Christchurch business sector, especially in relation to retail.

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[5] *Northcote Mainstreet Inc v North Shore City Council* (2004) 10 ELRNZ 146 (HC) at [68]

[30] It is Dr Fairgray's view that the Council did not have sufficient information to determine whether Bunnings would be a "trade supplier". Before such a decision could be made the Council needed to differentiate between retail sales (to the general public) and trade sales (to business/institutional customers) in accordance with the City Plan. Then the Council needed to determine whether the proportion of trade sales was sufficient to render the proposed store a "trade supplier". In the absence of this information the Council could not embark upon an informed decision-making process. Good quality decision-making is fundamental to the sustainable management of resources.

[31] The necessary information could have come from Bunnings, retail experts, property experts, or the Council's own resources. Ms Nash's visit to a Bunnings store and the legal opinions before the Commissioner were insufficient to enable the Commissioner to make the necessary decision. Moreover, Mr Naiman[6] did not have sufficient information to verify the sales projections provided by Bunnings in relation to the traffic generation.

[32] *Raymond Edwards* is a Christchurch transportation engineering consultant. He addresses the adequacy of the information before the Council concerning traffic generation. It was his view that the traffic assessments supporting the Bunnings applications contained a number of errors, lacked important data, and potentially created an unreliable basis on which to decide whether there should be notification and whether the application should be granted.

[33] Mr Edwards deposes that his concerns were repeatedly raised with the Council's transportation engineering consultant (Mr Durdin). Nevertheless, the Council proceeded to rely on deficient information. Particular matters raised by Mr Edwards are: lack of information in support of traffic generation rates; incorrect consideration of through traffic flows on Ferry Road; potential inconsistencies between the traffic reports supporting each application; potential problems with the monitoring conditions; and the inability of Bunnings to guarantee the necessary relocation of a bus stop. Mr Edwards considers that the Council had insufficient information to reach a confident conclusion about traffic generation.

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[6] The Council's economist.

[34] *Jeremy Phillips*, a consultant planner, was involved with Variation 86 which he discusses in detail. He contends that if large scale retail activities are allowed in zones designed for industrial uses the latter will be driven out.

Affidavits on behalf of Bunnings

[35] Bunnings' operations are described by *Daniel Kneebone*, the company's national property and development manager. He also discusses two other matters: the methodology adopted by Bunnings' traffic consultants in support of the second application, which he considers provided an accurate indication of the likely traffic generation; and whether the Council had sufficient information to assess whether the Bunnings activity was correctly assessed as a "trade supplier", it being his view that there was sufficient information.

[36] *Michael Chrystal*, a planning consultant, was involved in the preparation of the two Bunnings applications. He describes the history of the applications, including the further information requested by the Council and provided to it.

[37] In relation to Dr Fairgray's views about the "trade supplier" definition he traces the history of Variation 86 and the modifications to the various definitions that arose. It is his view that the definition was not intended to limit sales to the general public because the specific activities listed in the definition do not have "distributional effects". On this basis he contends that detailed information about projected sales and product/customer mix was not required by the Council.

[38] Mr Chrystal also explains why a different traffic generation model was used in the second application: in the case of Bunnings stores it was considered that data based on floor area represented a "relatively poor fit", especially given the proximity of the Mitre 10 store.

[39] *Anthony Penny*, a transportation engineer, was also involved with both Bunnings applications. He outlines the reason for the change in the traffic generation model, namely, that by the time the second application was made more data was available and it was decided that sales data provided a more accurate

prediction of the likely traffic generation, especially with a major competitor on the adjoining site. Interaction with the Council concerning the model was traversed.

[40] Mr Penny also responds to Mr Edwards' affidavit. He does not accept that there are any errors in his approach and believes that the indexed annual sales model is more robust in the situation under consideration. Mr Penny also considers that his assessment withstood intensive and thorough review by the Council and its consultants.

Affidavits on behalf of the City Council

[41] *Marilyn Nash*, a Christchurch city planner, handled both applications. In relation to notification she identified at the outset that there were two primary issues: whether the proposed store was a "trade supplier"; and the traffic effects of the proposed activity. She describes her interaction with Bunnings and others in relation to those issues.

[42] Ms Nash explains that at an early stage Mr Durdin was appointed by the Council to provide expertise on traffic issues. She also records that after lingering doubts about traffic issues were brought to the attention of Bunnings, that company offered conditions that enabled Council officers to conclude that adverse effects would be no more than minor and that the application could proceed on a non-notified basis.

[43] Another Council planner, *David Punselie*, managed Variation 86 and the resulting plan changes. He produces documents arising from that process.

[44] *Joseph Durdin,* a transportation consultant, was appointed by the Council to provide independent advice on traffic issues arising from both applications. The approach to traffic generation based on indexed annual sales was new to him, and therefore he recommended that the Council obtain advice from someone with economic expertise to assess the robustness and reliability of the sales forecast methodology. After considering advice received from that person (Mr Naiman) he was satisfied that the sales model was robust and that its use to estimate trip

generation was appropriate. Mr Durdin also responds to various allegations in the statement of claim and in the Mitre 10 affidavits. He is satisfied that any adverse transport related effects will be appropriately mitigated by the monitoring conditions if the Bunnings activity generates more trips than expected.

[45] As already mentioned, *Adam Naiman*, a senior economics analyst employed by the Council, was asked to provide advice about the use of the indexed annual sales model. Having obtained further information and discussed the matter with Council officers and Mr Durdin, he was satisfied that the results of the modelling were sufficiently accurate to act as an input for other models. Although he did not have access to the underlying sales figures, he had no reason to doubt that appropriate methods had been used to produce these figures.

First ground of appeal – Bunnings is not a "trade supplier"

[46] It is accepted by both defendants that this issue is amenable to judicial review.

Relevant definitions in the Plan

[47] The words "trade supplier" are defined in the City Plan:

> "**Trade supplier**" means a business engaged in sales to businesses and institutional customers and may also include sales to the general public, and wholly consists of suppliers of goods in one or more of the following categories:
>
> - automotive and marine suppliers;
> - building suppliers;
> - catering equipment suppliers;
> - farming and agricultural suppliers
> - garden and patio suppliers;
> - hire services (except hire or loan of books, video, DVD and other similar home entertainment items);
> - industrial clothing and safety equipment suppliers; and

- office furniture, equipment and systems suppliers.

The underlining has been added to indicate the parts of the definition that are central to the competing interpretations in this case.

[48] In the context under consideration the definition of "trade supplier" needs to be read in conjunction with the definitions of "building supplier" and "garden and patio supplier".

> "**Building supplier**" means a business primarily engaged in selling goods for consumption or use in the construction, modification, cladding, fixed decoration or outfitting of buildings and without limiting the generality of this term, includes:
>
> - glaziers;
> - locksmiths; and
> - suppliers of:
>   - awnings and window coverings;
>   - bathroom, toilet and sauna installations;
>   - electrical materials and plumbing supplies;
>   - heating, cooling and ventilation installations;
>   - kitchen and laundry installations, excluding standalone appliances;
>   - paint, varnish and wall coverings;
>   - permanent floor coverings;
>   - power tools and equipment;
>   - safes and security installations;
>   - timber and building materials; and
>   - any other goods allowed by any other definition under 'trade supplier'.
>
> "**Garden and patio supplier**" means a business primarily engaged in selling goods for permanent exterior installation or planting and without limiting the generality of this term, includes:
>
> - garden centres;
> - landscape suppliers; and

- suppliers of:
    - bark and compost;
    - clothes hoists and lines;
    - conservatories, sheds and other outbuildings;
    - fencing, gates and trellises;
    - firewood;
    - garden machinery;
    - outdoor recreational fixtures and installations;
    - monumental masonry;
    - patio furniture and appliances;
    - paving and paving aggregates;
    - statuary and ornamental garden features;
    - swimming and spa pools; and
- any other goods allowed by any other definition under 'trade supplier'.

Argument for Mitre 10

[49] According to Mitre 10 the "trade supplier" definition has two parts:

> The first is that the applicant is "a business engaged in sales to businesses and institutional customers and may also include sales to the general public".
>
> The second is that the applicant is a supplier of goods in a given category (of which building supplies is one).

Both limbs must be satisfied before a business can come within the definition.

[50] The first step focuses on the identity of the supplier, who must be selling to other businesses. This is consistent with the intent of Variation 86. It is supposed to be an exception to retailing because the seller's business is involved in selling to other businesses. The second step then restricts the businesses of the seller that can fall into the category defined by the first step. This restriction is by reference to specific categories of products or services, for example a building supplier or a

garden/patio supplier. Both limbs focus on the identity of the seller, not simply the products being sold.

[51] It is clear from the word "wholly" that the list of categories of suppliers is exhaustive. It is not a reference to the type of goods, but to the types of suppliers.

[52] While sales to the general public are permitted, they are not the essence of the activity. A trade supplier is not excluded from the definition simply because it makes sales to the general public. But a general retailer is not a trade supplier simply because it makes sales to the trade. This reflects that there would be few retailers that do not make some trade sales or vice versa. Thus a definition of "trade supplier" that excluded all sales to the public would be unworkable. This interpretation is supported by the wording of the definition which says "may also include" general sales, which is plainly ancillary or additional to the definition rather than the essential defining quality of it.

[53] There is no indication in the Commissioner's decisions that she recognised that the definition had two limbs, both of which needed to be satisfied. Rather, she focused solely on the second limb and the question of whether Bunnings was primarily a building supplier or a garden/patio supplier. She should have addressed the first question by requiring an assessment of the proportion of sales as described by Dr Fairgray.

[54] To compound matters the Commissioner incorrectly quoted Mr Pizzey's legal advice.

Argument for Bunnings

[55] It is clear from the relevant definitions that "trade supplier" is to be read in conjunction with the other relevant definitions, including "building supplier" and "garden and patio supplier". In other words, the meaning of "trade supplier" is effectively expanded by direct reference to the other defined terms used in that definition and takes its meaning from those terms.

[56] The only reference to the potential customer base arises in the definition of "trade supplier". It does not arise in the other two definitions. In those more detailed and inclusive definitions the focus is on the nature of the products carried rather than the customer base. Nothing in the City Plan indicates that information about projected sales of particular types of products and/or the likely customer base is required. What is required is a factual analysis on a case by case basis. There are no set "targets" or proportions of sales either in respect of the customer base or categories of products.

[57] The focus should be on the nature of the products sold in terms of the class or type of products specified in the "building supplier" and "garden and patio supplier" definitions. That was precisely the approach adopted by the applicant and the Council in this case. It was a purely factual exercise. Bunnings carries all the products necessary to qualify as a "building supplier" or "garden and patio supplier". The carrying of other incidental goods not specifically identified does not alter the situation.

[58] Rather than requiring a factual assessment, Mitre 10's approach requires a complex and relatively speculative exercise based on sales figures and other projections. Such an approach is not typical under the RMA or under District Plans. That type of information is usually used to assess likely or potential effects, not as a means of interpreting definitions in a plan. In the absence of an explicit requirement in the Plan there is no authority supporting the Mitre 10 approach. Such an approach would lead to an unworkable situation for people seeking resource consents and would not result in greater certainty or clarity. It would also require a re-writing of the definitions in the Plan which are plain on their face.

[59] While it is acknowledged that the Commissioner misquoted Mr Pizzey's legal opinion, that error was immaterial to the outcome. Sufficient material was before the Commissioner for her to arrive at the decisions that she did.

Argument on behalf of Council

[60] The Council supports the Bunnings arguments. While it accepts that the definition consists of two parts, its response is that Mr Pizzey's opinion, which was applied by the Commissioner, correctly recognised those parts.

[61] Any suggestion that the definition is to be approached on a proportionality basis is rejected. Such an approach is contradicted by the drafting history of the definition and the plan does not provide any direction as to what would be an appropriate proportion as between trade and retail. Had a proportionate approach been contemplated the City Plan would have included information of that nature.

Discussion

[62] To my mind the critical issue is whether the definition requires a proportionality analysis, as contended by Mitre 10 but denied by the defendants. Several factors count against the proportionality interpretation.

[63] First, the history of Variation 86. This Variation was introduced because the Council had become concerned about ad hoc retailing in the city's business and industrial zones. In *National Investment Trust v Christchurch City Council*[7] the Environment Court observed that the Variation "sets its face against such ad hoc development". See also *Stirling v Christchurch City Council.*[8]

[64] When the Variation was first introduced it included the following definition of "trade supplier":

> means a business engaged in sales to businesses and institutional customers and may also include a proportion of its sales to the general public, and wholly consists of suppliers of goods in one or more of the following categories...(emphasis added)

Given the underlined words it must have been contemplated at that time that there would have to be some sort of proportionality assessment.

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[7] *National Investment Trust v Christchurch City Council* [2007] Env C Christchurch C 152/07, 26 November 2007 at [20]

[8] *Stirling v Christchurch City Council* HC Christchurch, CIV-2010-409-002892 19 September 2011 at [4]-[6]

[65] As the Variation progressed it became apparent that there would be problems with a proportionality assessment. For example, it was recorded in the report under s 32 of the RMA[9] that because the proposed Variation was intended to be effects based:

> ...it is important that assessment rules do not apply to kinds of retailing that have little or no propensity to give rise to adverse social and economic effects in the City's centres. Thus, the first aspect of the strategy has focused on introducing a more relevant set of Definitions.

Later the report noted that the "real world" involved a range of trading with wholesale distribution at one end and retail distribution at the other.[10] Tracked changes in an appendix to the report indicate that a very simple definition of "trade supplier" was recommended at that time.[11]

[66] Ultimately, however, there was a different outcome: the definition of "trade supplier" that had been originally introduced[12] was retained, except for the words "a proportion of its sales". This was implemented by a consent order of the Environment Court on 22 January 2008 in *Ngai Tahu Property Limited v Christchurch City Council.*[13] Significantly the Ngai Tahu submission giving rise to that order alleged:

> ...the definition of "Trade Supplier" is too uncertain and will inevitably be the subject of litigation...in the future. The problematic part of the definition is the phrase *"a proportion of its sales to the general public"* and it is considered that this ought to be clarified. The definition is not drafted with sufficient particularity to enable a reasonable layperson to ascertain whether a proposal would be permitted.

While the consent order does not state why the words "a proportion of its sales" were deleted, it can be safely inferred that this was for the reasons advanced by Ngai Tahu.

[67] With the benefit of that background I return to Mitre 10's proposition that the definition requires a proportionality approach. That approach would effectively require the words that were deleted by the consent order to be reinstated. Apart from

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[9] At 1.4.2
[10] At 6.2.3 and 4
[11] The proposed definition was: "**trade supplier** means a business engaged in the following..." The list of activities that followed included building suppliers and garden and patio suppliers.
[12] See [69] above
[13] *Ngai Tahu Property Limited v Christchurch City Council* ENV-2007-CHC-019

being contrary to the underlying intention of the City Plan, such an approach would also be contrary to basic principles concerning the interpretation of plans.[14]

[68] Secondly, and this point follows on from the first point, there is at least one definition in the District Plan that adopts a proportionality approach:

> "**Yard based supplier**" means any retail activity selling or hiring products for construction or external use...where more than 50% of the area devoted to sales or display is located in covered or uncovered external yard or forecourt space... (Emphasis added)

But, rather than adopting a vague proportionality approach along the lines envisaged in the initial definition of "trade supplier", this definition specifies the threshold that must be surmounted (more than 50%). No doubt this reflected the realisation that a vague proportionality approach was unworkable.

[69] Thirdly, the words used in the definition support the straightforward interpretation advocated by the defendants. When considering whether the proposed activity qualifies as a "trade supplier" the consent authority needs to:

(a) Determine first whether the business is engaged in sales to other businesses or institutional customers. If not, the proposed activity cannot qualify as a "trade supplier". On the other hand, if the proposed activity is of the type specified, the fact that it also involves retail sales will not be a disqualifying factor. This reflects the reality that most trade suppliers will also be involved in retail sales.

(b) If (a) is satisfied the next step is to determine whether the business wholly consists of supplying products that fall within one of the listed categories. I agree with counsel for Mitre 10 that the words "wholly consists of" indicate that the eight categories listed in the definition are exhaustive.

(c) The third step involves applying the relevant definitions, in this case "building supplier" and "garden and patio supplier". These

[14] See for example, *Powell v Dunedin City Council* [2005] NZRMA 174 CA at [30] – [35]

> definitions require the business to be "primarily engaged" in the specified activities. There is no justification for reading down the word "primarily" which indicates that goods sold must for the most part come within the described activities.

All of this will, of course, require a factual assessment of each proposal and an exercise of judgment as to whether or not the proposal comes within the definition. That type of situation often confronts consent authorities when they are administering their plans.

[70] The screening inherent in this approach to the "trade supplier" definition reflects that the definition has been designed to ensure that the types of business that the Council finds acceptable in business zones will be able to locate in such zones even if they involve retail sales. Before a business could satisfy the screening test the Council would have to be satisfied that it was *genuinely* engaged in trade sales (the first step). Isolated trade sales would not qualify. A common sense approach will avoid the pitfalls that are inherent in the proportional approach advocated on behalf of Mitre 10.

[71] Fourthly, this straightforward approach can be compared with the complications arising from the proportional approach advocated by Mitre 10. Given the absence of any guidance in the Plan as to the proportion of trade sales that would be needed to satisfy the "trade sales" threshold, there would be uncertainty about whether or not a particular proposal would qualify, which could not have been intended. On top of that there would be the additional cost of supplying and analysing such information.

[72] Finally, it seems to me that the interpretation that I favour is consistent with the objectives and policies that arose from Variation 86. I note that one reason for the rules relating to retail activities in industrial areas is to limit the potential displacement of permitted industrial activities (reverse sensitivity effects). However:

> ...in recognition that some limited retail activity may be able to occur without the resultant adverse distributional effects on existing commercial centres, a balance has been struck to allow retail activities of a particular scale and nature to continue in some industrial zones. In particular, 'trade

> suppliers' is a specific category that encompasses a range of retail activities that are considered unlikely to give rise to adverse distributional effects on the central city and district centres.[15]

This reflects the "effects-based" approach to retailing in industrial zones which has been accomplished by crafting definitions (such as "trade supplier") that will achieve the underlying policy as to the type of businesses that should be permitted in industrial zones.

[73] It remains to consider whether the erroneous quotation of Mr Pizzey's opinion gave rise to a material error. When referring to the legal opinions that had been obtained the Commissioner said:

> Mr Pizzey found that the Bunnings Warehouse activity should be considered as a trade supplier because its goods *primarily* fall within the classification of supplies which make up trade suppliers as defined in the plan.

It is common ground that this overstates what Mr Pizzey said. In fact he stated that the question whether the proposed Bunnings activities fell within the definition of "building supplier" or "garden and patio supplier" was of a factual, not legal, nature. In other words, the Commissioner had to satisfy herself on the evidence that the goods sold by Bunnings were primarily within either or both those definitions.

[74] For reasons already given I am satisfied that Mr Pizzey's opinion about the legal interpretation of the "trade supplier" definition was correct and that the Commissioner applied that definition. Understandably Mr Pizzey left it to the Commissioner to determine whether the proposed store actually fitted within the definition. Despite the misquotation there was adequate information before the Commissioner for her to resolve the factual issue. The reasons for that conclusion will be given when the next ground of appeal is considered.[16]

[75] I do not accept that the misquotation was a matter of substance. Obviously the Commissioner was aware that the factual issue of whether the proposed store qualified as a "trade supplier" had to be determined. She concluded that the proposed store came within the definition, which must mean that she turned her

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[15] Vol 3, Part 3, Clause 7.5.8 "Retail activities"
[16] See [97] – [115]

mind to the issue. Whether or not Mr Pizzey had indicated a view on that factual issue is beside the point. I reject the proposition that this was a situation where the Commissioner did not bring her mind to bear on the issue. Such a conclusion is not supported on a plain reading of her decision.

[76] In any event, the conclusion reached by the Commissioner that the proposed store came within the definition of "trade supplier" was clearly right. Referral back on that factual issue would be futile because the same conclusion would be reached. Thus had it not been necessary for relief to be considered I would not be prepared to exercise my discretion in favour of granting relief on this ground.

Conclusion

[77] The first ground of review has not been made out.

Second ground of appeal – insufficient information for decisions to be made

[78] In *Discount Brands Ltd v Westfield (New Zealand) Ltd*[17] the Supreme Court confirmed that a consent authority must have adequate information before deciding whether or not to notify a decision. Tipping J said:

> [146] Before a consent authority can properly conclude that adverse effects will be no more than minor, there must be an adequate informational basis for that conclusion. Information should be distinguished from assertion. The level of adverse effect may in some cases be physically self evident as no more than minor. In others, such as the present, whether that is so becomes a matter of assessment. Sections 93 and 94 read together clearly indicate that the assessment must be made on the basis of information which is adequate, both in the sense of reliability and in the sense that it is sufficiently comprehensive. It is a significant step to preclude opposition to a resource consent application, particularly when the application is of a substantial kind like the present, and, additionally, is of a kind which the district plan itself required to be thoroughly evaluated.

His Honour went on to say that the issue on the adequacy of information question was not whether there was "some" information supporting the consent authority's decision not to notify. It was whether the decision was based on "adequate"

[17] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC)

information.[18]

[79] There is case law holding that, despite the 2003 amendments to the RMA, *Discount Brands* continued to be good law on the issue of the information a consent authority should have when deciding whether to notify a resource consent application. "Adequate" information, not merely "some" information, is still required.[19] However, although these decisions were made during or after 2009, they considered the RMA as it stood before the 2009 amendments.

[80] To date, no cases appear to have considered whether "adequate information" is still required for decisions on consent applications submitted after the 2009 amendments. As a result of those amendments the presumption in favour of notification has gone. But there does not seem to be any good reason why *Discount Brands* should no longer apply and I hold that it continues to be good law.

Argument for Mitre 10

[81] There were significant deficiencies in the information relating to key issues that had to be decided by the Commissioner, in particular:

(a) the nature of the proposed Bunnings' operation, what it was to sell, and to whom;

(b) estimates of traffic that would be generated by the proposed store.

Both matters were fundamental to the decision. There is no discretion in the Court about whether or not this ground should be upheld: either there was enough information or there was not.

[82] As to (a) the Council did not seek or receive any information about the extent to which Bunnings was a "trade supplier". The application was erroneously

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[18] At 147

[19] *Mount Victoria Residents Association Inc v Wellington City Council* [2009] NZRMA 257 at [21] – [22]; *Palmer v Tasman District Council* HC Nelson CIV-2009-442-331, 30 March 2010 at [37]; *Stuart Allan Investments Ltd v Tasman District Council* (2010) 16 ELRNZ 137 at [64]

processed on the basis that such information was irrelevant because it was unnecessary to consider the proportion of the proposed sales that would be to business/institutional customers.

[83] Even if the Commissioner was not obliged to turn her mind to that aspect, there is a separate and fundamental problem. The Commissioner incorrectly interpreted Mr Pizzey's opinion and did not even refer to information concerning the nature of the Bunnings operation. This is the plainest possible instance of a decision being made with inadequate information, the deficiency being obvious on the face of the decision. It was not open to the Commissioner to rubber stamp the views of officers and any knowledge that Ms Nash might have had cannot be imputed to the Commissioner.

[84] As to (b) the Commissioner failed to adequately inform herself regarding the likely adverse effects arising from traffic that would be generated by the proposed activity. This was a critical issue and the Commissioner specifically acknowledged that "traffic- related non-compliances" were the primary planning issue.

[85] The second application was based on a Traffic Assessment Report that adopted a methodology that was new to the Council and was untested. Whereas the traditional method of calculating traffic generation for retail activities was by reference to gross floor area, this new approach was based on likely sales. The Council was not given access to the model used to project the sales figures, to the underlying workings, or to the underlying data. If the sales projections were inaccurate the adverse effects in terms of projected traffic generation could have been more than minor.

[86] It was incumbent on the Council to access and test the data provided by the applicant and it was not entitled to take it as a given. This is especially so when the different methodology produced such a dramatic reduction in the traffic generated (by comparison with the figures supporting the first application). Indeed, Mr Durdin's peer review indicated that the effects would be more than minor and that the safety of road users could be compromised.

[87] Although the new model was based on projected indexed annual sales from the proposed store, Bunnings were unable to provide supporting evidence for these new figures and both Mr Durdin and the Council were not wholly satisfied that the figures were reliable. Nor was Mr Naiman given access to the workings or underlying data. There was no reason for this information to be withheld. If necessary they could have been tested by an independent peer reviewer.

[88] The result was that, for the reasons given by Dr Fairgray and Mr Edwards, the steps taken to test the applicant's figures concerning traffic generation were superficial and completely inadequate.

Argument for Bunnings

[89] The key issue for the Council was whether the proposed Bunnings store would be, as a matter of fact, a "trade supplier". If Mitre 10 fails on that issue (the first ground of appeal) the second ground of appeal does not require any further consideration.

[90] "Adequate" information for a decision can come from the applicant, be gathered by the authority itself, or be derived from the specialist knowledge of officers and decision-makers. Evidence that the Bunnings store would qualify as a "trade supplier" came from a legal opinion (the Simpson Grierson opinion), the substance of which could be verified by Bunnings' website or a visit to a Bunnings store.

[91] While it is accepted that the Commissioner misquoted the Pizzey opinion, there was no room for misunderstanding on the part of the Commissioner as to the product range. She applied the correct test and reached correct conclusions. In the end result the misquotation was immaterial.

[92] It is accepted that traffic effects were a key consideration. However, that issue was under consideration for almost two years and the decision does not shy away from it. Moreover, there are a range of techniques for resolving such issues.

The Court should not set the bar for consent authorities unrealistically high. A consent authority does not have to check every last detail or piece of underlying data.

[93] Mr Naiman said that he had sufficient information to assess the sales approach. In this regard he had met with Ms Nash and obtained a further briefing from Mr Durdin and others. He knew how the model worked and did not need to see further sales data. What the Council had to measure were the actual and potential effects of the traffic generated in the context of Schedule 4 to the RMA. This required the exercise of judgment and there was sufficient information for such a judgment to be exercised.

[94] This ground of appeal reflects that Mitre 10 disagrees with the decision. Given that this is an application for judicial review and not an appeal, it is not for the Court to delve into whether one method of determining predicted traffic generation was better than another.

Argument for Council

[95] Again the Council adopts a similar approach to Bunnings.

[96] It believes that the traffic generation issue is effectively a dispute about two possible methods of predicting traffic generation. It relied on Mr Naiman's advice that it was unnecessary for the Council to obtain the actual sales figures. And it relied on the advice of Mr Durdin and Mr Roberts about traffic generation issues generally.

Discussion

[97] Unlike the first ground of appeal there is no direct concession by the defendants that this ground of appeal is amenable to judicial review. However, I am satisfied that the issue whether or not the Council had adequate information to determine whether the application should be notified is amenable to review.

[98] Having said that, I agree with the defendants that judicial review is a fundamentally different process from a general appeal or an appeal to the Environment Court. Judicial review is concerned with the lawfulness of the process by which the impugned decision is reached and it does not concern itself with the general merits of the decision attacked, except to the very limited extent that decisions may be challenged for *Wednesbury* unreasonableness: *Northcote Mainstreet Inc.*[20]

[99] The challenge to the adequacy of the information before the Commissioner involves two separate matters:

(a) whether the proposed store would be a "trade supplier";

(b) the effects of traffic generation.

Each of those matters will now be addressed.

[100] Conclusions reached on the first ground of appeal mean that the issue of whether there was sufficient information before the Commissioner for her to determine whether the proposed store came within the "trade supplier" definition is relatively narrow. Detailed information of the type advocated by Mitre 10 about the trade/retail split was not required. The only issue is whether the Commissioner had sufficient information to enable her to reach the conclusion that the proposed store would be a "trade supplier". Applying the test in *Discount Brands*, I am satisfied that she did.

[101] When she made her decisions the Commissioner had the benefit of factual information extending well beyond that contained in the application itself. She had the benefit of the Simpson Grierson opinion, including the reference to the Bunnings website, which was treated as part of the applicant's description of the proposed activity.[21] In addition Ms Nash had visited the Bunnings store at Shirley and, as Blanchard J explained in *Discount Brands*:[22]

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[20] *Northcote Mainstream Inc v North Shore City Council* (2004) 10 ELRNZ 146 (HC) at [67]
[21] Ms Nash's affidavit at [28]
[22] At [107]

> The information before the authority can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision-makers concerning the district and the District Plan...

Ms Nash's visit to the Bunnings store was an example of the consent authority itself gathering information, and given her role in relation to the application it was hardly surprising that she should make such a visit. There is no reason to believe that this information was not available to, and used by, the Commissioner.

[102] Now I turn to the issue of whether the Commissioner had adequate information to determine the traffic generation issue.

[103] Any suggestion that consent authorities are under a rigid obligation to check all the raw data accompanying resource consent applications (such as the sales figures used in the traffic generation model in this case) is untenable. No authority was cited to support such a far reaching proposition. Any such obligation would impose unrealistic and unworkable administrative burdens upon consent authorities, not to mention the cost implications. Whether or not such raw data needs to be tested will depend on the particular application. For example, if there is some reason to doubt the integrity or reliability of the data then further enquiry might be expected, with the nature of the enquiry being a matter of judgment for the consent authority, subject to appeal rights.

[104] With the benefit of those general observations, I turn to the facts of this case.

[105] When the second application was received the Council referred the report concerning traffic generation to Mr Durdin who had been retained by the Council soon after the first application was lodged. Actual sales figures supporting the traffic generation model were withheld by Bunnings on the grounds of commercial sensitivity. Since he was unfamiliar with the sales model and because it indicated substantially lower traffic generation figures, Mr Durdin took steps to have the matter referred to the Council's economist, Mr Naiman.

[106] Some insight into Mr Durdin's initial reaction and concerns is provided by his email of 19 January 2010 to Mr Naiman:

> Traffic Design Group's[23] approach of arriving at a trip generation estimate for the Ferrymead store is based on a relationship between sales transactions and observed trip generation at other Bunnings stores in NZ. I am comfortable with the methodology they have used to arrive at the relationship between sales transactions (presented as a sales index for commercial sensitivity) and trip generation. However, it is unknown how robust the sales estimate is for the Ferrymead store. This is important as the sales estimate directly relates to the trip generation estimate.

He asked Mr Naiman to provide some guidance on "a suitable level of error" that might exist so that the effects of an upper trip generation estimate could be considered.

[107] Following this Mr Naiman sought further clarification from Mr Kneebone, the Bunnings development manager, about the sales data. On 15 March 2010 Mr Kneebone wrote to the Council explaining how the sales projections had been reached. It is apparent from the documentary record before this Court that there were also discussions between Mr Durdin and the Bunnings transportation consultants.

[108] Legal advice was also sought by the Council about whether the Council could rely on unseen data (the sales figures) when considering the traffic generation issue. After drawing the Council's attention to Schedule 4 of the RMA and relevant authorities including *Discount Brands*, Mr Pizzey advised in May 2010 that Bunnings' decision to withhold sales figures did not mean that the application had to be placed on hold. He said that the Council could proceed to determine whether or not the decision needed to be notified so long as it had sufficient information upon which to base the decision. He warned, however, that an applicant who withholds commercially sensitive information runs the risk that the consent authority might reach conclusions adverse to the applicant. In my view his opinion was sound.

[109] After an initial report had been provided by Mr Durdin the Council arranged for Paul Roberts, another transportation engineer, to review Mr Durdin's assessment. Mr Roberts concluded that Mr Durdin's analysis was "thorough" and he endorsed Mr Durdin's conclusion that the trip generation estimates were based on "sound

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[23] Bunnings' transportation consultants

methodology". Subject to two qualifications he was prepared to agree that the likely transport effects of the current land use proposal would be less than minor.

[110] Mr Durdin provided a detailed final report to the Council on 29 November 2010. Following detailed analysis he reported:

> ...Abley [Mr Durdin's firm] concludes the trip generation estimate of the proposed Bunnings Warehouse in Ferrymead appears to be based on a sound, albeit a non-traditional, methodology.

He also addressed the proposed condition of consent concerning traffic entering Ferry Road. His view was that the condition was an appropriate means of protecting the safety and function of Ferry Road in the event that the non-traditional means of trip generation estimate proved to be inaccurate.

[111] It was also recorded in Mr Durdin's report that Mr Naiman considered the sales methodology to be "robust". In a separate memorandum to Ms Nash Mr Naiman confirmed that he had reviewed the application, and discussed the model with Council staff, transport planners, and Mr Kneebone. He said that he was satisfied that the modelling "takes into account all the relevant variables and conforms to best-practice". Although he had not viewed the sales data "the description of the data elements provided [him] with sufficient confidence to believe the model's results". He went on to discuss the problems surrounding modelling of this type and, after commenting that neither of the methodologies used by Bunnings would necessarily provide flawless results, confirmed that both were sufficiently accurate to act as an input for other modelling.

[112] A few days later the decisions were made.

[113] This history reflects that Council officers realised at an early stage that it was inappropriate to accept the annual indexed sales model of traffic generation at face value and that adequate information would be needed before any decisions as to notification were made. Consequently the Council sought advice from its transportation consultant, economist, and others. It also obtained further information from various sources including Bunnings. And the independent transportation advice received by the Council was peer reviewed by another consultant.

[114] All of this indicates that adequate information about traffic generation (including effects on the environment) was assembled for consideration by the commissioner. In other words, the *Discount Brands* test was satisfied. It then remained for the Commissioner, with the benefit of her legal knowledge and expertise in this field of law, to assess all relevant matters and determine whether the application was to be processed on a notified or non-notified basis. She decided that it should proceed on a non-notified basis.

[115] Notwithstanding the extensive material that has been present to this Court, it is not for this Court to become embroiled in the merits of the Commissioner's decision. No error in the decision-making process has been demonstrated and there is not the slightest chance that an allegation of *Wednesbury* unreasonableness could get off the ground. Indeed, none was mounted.

Conclusion

[116] This ground of appeal also fails.

Third ground of appeal – inadequate conditions

[117] This ground of appeal revolves around the following conditions relating to the traffic issue:

> 3. The maximum permitted total number of vehicles exiting the western site access shall be 70 during the weekday evening peak hour, and 125 vehicles during the weekend afternoon peak hour.
>
> 4. The consent holder shall undertake monitoring of the total traffic volume and delays for vehicles exiting the western site access. This monitoring shall be carried out in accordance with conditions 5 – 10.
>
> 5. Monitoring shall commence no later than six months following the opening of the Bunnings operation and shall be conducted at intervals no more than six months apart for a period of two years from its commencement.
>
> 6. Monitoring in each six monthly period shall be undertaken over four consecutive Thursdays (excluding weeks involving a public holiday) between the hours of 1600 and 1800.

7. Monitoring in each six monthly period shall be undertaken over four consecutive weekends (Saturday and Sunday), excluding weekends linked to a public holiday, between the hours of 1400 and 1600.

8. Traffic volumes and delays for individual vehicles shall be recorded in 15-minute periods with the peak hour being the highest total volume observed in any four consecutive 15-minute periods.

9. Delays for each exiting vehicle shall be measured as the difference between the time at which it joins the departure queue and the time at which it departs from the access. The average vehicle delay shall be calculated for each 15 minute period over the peak hour as defined by condition 8.

10. This monitoring shall be undertaken by a suitably qualified traffic engineer on behalf of and funded by the consent holder and results shall be lodged with the Councils Manager Resource Consents within 20 working days of the completion of each six monthly monitoring period.

11. Should the monitoring show that the predicted traffic levels stated in condition 3 are being exceeded by more than 10% and the average delays for any movement at the western access exceeds that specified in the Regional Land Transport Strategy for Level of Service E, the consent holder shall within six months provide the Councils Manager Resource Consents with a plan for implementing a left turn exit only restriction or such other traffic management measure subject to agreement by a suitably qualified Council traffic engineer.

12. This consent shall not be given effect to unless and until the Consent Holder has sought approval via a separate community board process for the relocation, or alternative solution, of the existing bus stop and shelter currently located outside 2 Waterman Place. The exact location and formation of the bus stop and shelter shall be subject to this community board process.

13. This consent shall not be given effect to unless and until the Consent Holder has installed tactile paving within the pedestrian island/refuge located opposite the eastern site egress. The Consent Holder shall meet 50% of the total cost of these works.

[118] Two issues are raised by Mitre 10; namely, whether as a matter of law the Council was entitled to rely on these conditions; and whether the conditions will actually ensure that there would be no more than minor adverse effects. Although it is not conceded by the defendants that these issues are amenable to review, I am satisfied that they are, subject to earlier observations about the scope of judicial review.

Argument for Mitre 10

[119] As to whether the Council was entitled to rely on these conditions, counsel for Mitre 10 accept that as a general proposition conditions may be taken into account when assessing adverse effects on the environment. However, they contend that there are two caveats, both of which are present in this case: first, decision-makers may only take into account those conditions that are inherent in the application and may not take into account prospective conditions that are not inherent in the application:[24] secondly, the imposition of a condition to mitigate effects cannot assist the Council if it did not have sufficient information in the first place to assess the extent of potential effects:[25]

[120] In relation to the second matter, Mitre 10 claims that the conditions are fundamentally flawed because they are ineffective. The condition limiting traffic (condition 3) depends on the monitoring conditions which effectively mean that any adverse effects could go unchecked for up to a year. The Council failed to consider the adverse environmental effects that may arise during that period. Indeed, there is no guarantee that any mitigation measures will be addressed because the store will be operating and "the horse may have bolted". In any event, the Council possessed insufficient information to assess the actual environmental effects of any traffic generation that exceeded Bunnings' projections.

[121] It is also contended that condition 12, which relates to the bus stop, is fundamentally flawed and ineffective because it says that Bunnings merely needs to have "sought approval via a separate community board process" before the consent can be implemented. In other words, there is no certainty about the outcome.

Response of Bunnings and the Council

[122] The adequacy of the conditions was assessed by Mr Durdin and Mr Chrystal in their affidavits and they disagree with the plaintiff's proposition. This is another

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[24] *Auckland Regional Council v Rodney District Council* (2009) 15 ELRNZ 100 (CA), [53]
[25] *Pacific Farms Limited v Palmerston North City Council* (2010) 16 ELRNZ 112 (HC) at [75]. The High Court decision was overturned on different grounds in *Pacific Farms Limited v Palmerston North City Council* [2011] NZCA 187

example of a difference in opinion and a dispute about facts that does not properly fall within the ambit of judicial review. The conditions do not reflect a lack of information. To the contrary they reflect the assessment of effects and are a safeguard in case the prediction about traffic generation proves to be inaccurate. They were, therefore, lawfully imposed and are effective.

[123] As to the bus stop, there can be no doubt that if the activity is to proceed the bus stop must be moved. This is common ground between Bunnings and the Council and it is confirmed in the affidavits of Ms Nash, Mr Durdin and Mr Chrystal.

Discussion

[124] I do not accept that the Commissioner erred in law by taking into account the proposed traffic conditions when considering whether the application should be notified. By the time the Commissioner made her decision Bunnings had decided to stand behind its traffic generation figures by proffering traffic conditions as part of its application. It had also agreed to relocate the bus shelter and again this constituted part of its application. These matters were recorded by the Commissioner who also noted that the suite of conditions had been reviewed by Mr Durdin. In short, the proposed conditions were an inherent part of the application.

[125] Contrary to the arguments advanced on behalf of Mitre 10, the *Rodney District Council* decision[26] supports the lawfulness of the approach adopted by the Commissioner. In that case the consent authority, Rodney District Council, had taken into account a condition that it intended to impose when deciding not to notify an application for land use consent to construct a large house within an outstanding landscape.

[126] One of the issues before the Court of Appeal was whether the Council was entitled to take into account prospective conditions of consent as mitigating the effects of the activity. The leading judgment on this issue was delivered by

[26] *Auckland City Council v Rodney District Council* (2009) 15 ELRNZ 100 (CA)

Baragwanath J who, having answered "yes" in respect of conditions that are inherent in the application and "no" in respect of those which are not, explained that in that case the: [27]

> ...form of condition was inherent in the application; the application states: "the dwelling has been designed to fit in with its site". The likely external colours for the exterior of the building are designed to reflect the colours of a pebble beach. A stone roof and natural timber sides aid in achieving this. The conditions imposed by the RDC (at 56) give effect to that and are therefore inherent in the application. They are not super-added conditions, which may be what s 127 is about.

The other members of the Court, William Young P and Ellen France J, supported that interpretation. In other words, the consent authority was entitled to rely on the conditions when assessing whether or not the application should be notified. Given Bunnings' decision to incorporate the traffic conditions in its application, the same principles apply in this case.

[127] Nor do I accept that the *Pacific Farms*[28] case assists Mitre 10. In that case Gendall J considered whether the Palmerston North City Council had erred when it decided to grant consent on a non-notified basis for a developer to fill part of a gully and discharge stormwater underneath it through pipes. One of the issues for the Court was whether the Council had sufficiently informed itself about adverse effects before deciding not to notify the application. The Council argued that it was entitled to rely on a condition that had been offered by the developer.

[128] After discussing the *Rodney District Council* case, Gendall J stated:

> [74] Whilst it is clear that the decision-maker is entitled to consider conditions when assessing "adverse effects" for the purpose of notification, the condition imposed here was in essence that the works "as far as possible" did not result in adverse effects, which tends to beg the question. Any "condition" accepted by a developer must be considered with an air of reality and it cannot be the case that the imposition of a condition such as this would mean that no further inquiry into adverse effects is required. To impose a condition such as framed in this case cannot excuse a Council from properly considering whether adverse effects may arise so as to require notification.

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[27] At [58]

[28] *Pacific Farms Limited v Palmerston North City Council* (2010) 16 ELRNZ 112 (HC)

> [75] In any event, I am persuaded that the Council did not sufficiently inform itself as to the potential effects. The imposition of a "condition" to mitigate effects cannot assist the Council if it did not have sufficient information in the first place to assess the extent of what those potential effects could be.

The application for judicial review was granted in part.

[129] Several features of that decision require comment. First, having considered the *Rodney District Council* case Gendall J was satisfied that the decision-maker was entitled to consider conditions when assessing adverse effects for the purpose of notification. In other words, he took a relatively robust approach. Secondly, unlike the conditions proffered by Bunnings in this case, the condition proffered by the developer in that case was effectively a "Claytons" condition. Thirdly, there can be no argument about the observation of Gendall J that the imposition of a condition to mitigate effects cannot assist the Council if it did not have sufficient information in the first place to assess the extent of those potential effects. However, that was not the case here. The Commissioner had extensive information to enable the potential effects to be assessed.

[130] The next point raised in support of this appeal is that the conditions are ineffective. I disagree. Condition 3 sets a ceiling for the total number of vehicles exiting via the western site access. The monitoring conditions are designed to ensure that the condition is honoured and, if not, that remedial action is taken. It is not surprising that the monitoring timeframe involves a relatively lengthy period. Before they were imposed the conditions were considered by the various consultants advising the Council. The Commissioner must have also been aware of the detail of each condition and the implications. There is not the slightest justification for concluding that she failed to consider the adverse effects that might arise during the period before remedial steps could be taken. Nor is there any merit in the suggestion that "the horse may have bolted". To the contrary, it would be within the powers of the Council to restrict traffic exiting to a left hand turn into Ferry Road.

[131] Finally, while I accept the bus shelter condition has not been very precisely drafted, the underlying intention is clear. The consent is not to be implemented until that issue has been resolved by the community board. Having accepted that

interpretation before this Court, Bunnings will have to comply with the underlying objective of the condition.

Conclusion

[132] The third ground of appeal also fails.

Result

[133] None of the grounds advanced in support of the application for judicial review have been made out. It is dismissed accordingly.

[134] Given that outcome, my preliminary view is that both defendants are entitled to costs against the plaintiff on a 3B basis, but without any allowance for second counsel. However, if the parties are unable to reach agreement on this issue, memoranda not exceeding three pages should be filed and served by the end of March 2012.

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