

**BEFORE A COMMISSIONER APPOINTED BY
THE CHRISTCHURCH CITY COUNCIL**

Under the Resource Management Act 1991 (**RMA**)

In the matter of an application for resource consent by Lumo Digital Outdoor Limited to establish two digital billboards at 399 Lincoln Road, Addington.

Reference RMA/2020/702

**LEGAL SUBMISSIONS ON BEHALF OF
LUMO DIGITAL OUTDOOR LIMITED**
1 December 2020

Duncan Cotterill
Solicitor acting: Jamie Robinson
PO Box 5, Christchurch 8140

Phone +64 3 379 2430
Fax +64 3 379 7097
jamie.robinson@duncancotterill.com

Background to the applicant

- 1 These submissions are made on behalf of the applicant, Lumo Digital Outdoor Limited (**Lumo**).

- 2 Lumo has submitted an application including an Assessment of Environmental Effects, and provided briefs of expert evidence from:
 - 2.1 Richard Knott (urban design);

 - 2.2 Chris Rossiter (traffic); and

 - 2.3 John Scheele (planning).

- 3 Mr Phil Clemas, a co-founder in Lumo and CEO, is also present today. He has not provided any pre-circulated evidence, however if there are any questions of practicality or about other similar sites that the Commissioner may wish to ask, Mr Clemas is available to answer questions.

The issues

- 4 The evidence covers the main issues in detail, and they are not repeated here. However, I consider that legal submissions on the following matters will be useful:
 - 4.1 Traffic safety;

 - 4.2 Cumulative effects;

 - 4.3 Permitted baseline; and

 - 4.4 Cross-zone effects.

Traffic safety

- 5 The s42A report accepts the findings of the ViaStrada report, and in particular it concludes on the traffic safety issues that:
 - 5.1 Potential cumulative effects could arise; and

- 5.2 The Turner report “shows that digital displays significantly impact on our detection of and response to hazards and that the result of this is sometimes a crash”¹.
- 6 The matter of cumulative effects is addressed below.
- 7 In relation to the conclusion at paragraph 5.2 above, the s42A officer appears to be concluding that the effects of the proposal on traffic safety is one of low likelihood, but high potential impact. I make this inference as there appears to be no discussion in the ViaStrada report or the s42A report that attempts to assess the *likelihood* of a crash.
- 8 Interestingly, I note that the s42A officer, although stating reliance on the ViaStrada report, concludes that the effects on traffic safety will be more than minor and potentially significant². This conclusion goes further than the ViaStrada report, which concluded that there would be a “more than minor” effect. I can see no justification in the s42A report to depart from the conclusion reached by the ViaStrada report.
- 9 Regardless, effects of low likelihood but high potential impact are relevant considerations pursuant to the definition of “effect” at s3(f) of the RMA. The Court in *Shirley Primary School v Christchurch City Council*³ provided useful guidance as to the ways in which s3(f) may be meant to be read.
- 9.1 An effect of low statistical probability but high impact which research has reliably shown is more than 50 percent (perhaps 99 percent or higher) likely to occur to a small sample of the population (hence its low probability as a cause of death for any one individual). Such effects are scientific facts.
- 9.2 An effect of low scientific probability (loosely, as in plausibility) but high potential impact. Here there is none of the “certainty” of a scientifically proven fact.
- 10 Therefore, in my submission, your consideration of this application needs to assess the opinions (and key differences) of the traffic experts before you. The ViaStrada report relies heavily on the Turner report, and concludes an

¹ At paragraph [50] of the s42A report.

² At paragraph [51] of the s42A report.

³ [1999] NZRMA 66 at para [134]

increased risk in distraction (and by extension, crashes). By contrast, the evidence presented by Mr Rossiter examines the actual causes of crashes, and narrows it further to crashes caused by distraction, and narrows again to distraction caused by signage (although not necessarily electronic billboards).

11 In my submission, the evidence of Mr Rossiter is significantly more useful to you when determining whether the traffic effects are something that will fall within the definition of s3(f). His conclusions outline that he considers the 'effect' that the ViaStrada report relies on is a perception of an effect, rather than something conclusively established. By contrast, he considered a much wider range of recent reports, and has concluded that there is no evidence that the proposal will adversely affect road safety.

12 I have one final comment on the relevance of the Turner report to your decision making. I am aware of a recent determination by the Environment Court to grant resource consent for an electronic billboard at the Hoyts EntX site in Christchurch central⁴. The decision to grant was made by consent between the parties, and so the determination of the Court does not contain a full consideration of the facts or the issues. However, at paragraph [9] of the determination, Judge Borthwick makes the following statement, with reference to an affidavit provided by S A Turner (author of the Turner report):

“While there is clear evidence that vehicle drivers are distracted by signs, there is no consensus on whether the distraction results in a noticeable increase in crashes in the variety of situations in which these signs are installed”.

13 In my submission, it would appear that the evidence Mr Turner placed before the Court in 2018 was different to the position in his 2016 Report. His most recent position, that there is no consensus, is aligned with the evidence of Mr Rossiter, and so is a further reason that his evidence should, in my submission, be preferred.

Cumulative effects

14 As outlined above, the s42A report concludes that cumulative effects from traffic safety issues may arise. I have been unable to find the section of the

⁴ Consent reference RMA/2017/1365, issued by consent notice by Judge Borthwick, reference *Calder Stewart Development Limited v Christchurch City Council* ENV-2018-CHC-170.

ViaStrada report that references cumulative effects, and so again question the justification for this conclusion seemingly reached not on the evidence.

- 15 The issue of cumulative effects also arose in some detail in the evidence of Mr Hattam, to which Mr Knott has responded.
- 16 The issue of cumulative effects can be likened to “the straw that breaks the camel’s back”. It typically arises in situations where the receiving environment is strained, and any additional effects would reach an unacceptable threshold.
- 17 For the reasons outlined below, in my submission this is not a situation where the receiving environment is strained:
- 17.1 In relation to traffic, I cannot see reference to cumulative effects in the ViaStrada report. It does not appear to be a concern put forward for the Council, other than in the s42A report without justification. Mr Rossiter has indicated no concerns from cumulative effects, and so I submit there are no cumulative effects as they relate to traffic safety.
- 17.2 In relation to urban design and ‘clutter’, I submit the evidence of Mr Knott should be preferred. He has addressed cumulative effects from paragraph 57 onwards of his evidence.

Permitted baseline

- 18 The decision of whether to apply the “permitted baseline” test is a discretionary one left to the decision maker, pursuant to s104(2). Detailed guidance on when to apply the permitted baseline has been provided by the Courts⁵, however I submit you should be guided by the fact that both Mr Scheele for the Applicant and the s42A report agree that an applicable permitted baseline can apply in this context.
- 19 On that basis, when considering traffic effects and cumulative effects above, in my submission it is vital that the consideration is done with full regard to the permitted baseline. Only those effects which arise over and above what could be done as of right should be considered.

⁵ See in particular *Lyttelton Harbour Landscape Protection Association Inc v Christchurch City Council* [2006] NZRMA 559.

Cross-zone effects.

- 20 The urban design evidence of both Mr Knott and Mr Hattan considers the impact of the proposed signage on users of Hagley Park, and residential dwellings. Those briefs reach different conclusions, which I don't propose to go into here.
- 21 Instead, I wish to briefly explore the relevance of cross-zone effects, where the proposal is located within the Industrial General Zone, and the assessment of effects is focused on users of neighbouring zones.
- 22 The s42A report at [10] identifies that the objectives and policies in relation to signage generally seek to ensure that the character and amenity values of sensitive environments are protected from adverse visual and amenity effects.
- 23 However, it is important that the urban design evidence and signage provisions are considered within the industrial zone objective and policy framework. That framework identifies that sites (such as residential) adjoining the industrial zone may be subject to different effects due to that proximity.
- 24 The s42A report **only** identifies objectives and policies that relate to signage. Although these are undoubtedly the appropriate starting point, it has neglected to consider the objectives and policies that apply within the industrial zone, which must be relevant given the zoning of the application site.
- 25 In my submission, the following two are particularly relevant:

Objective 16.2.3 – Effects of industrial activities

- a. Adverse effects of industrial activities and development on the environment are managed to support the anticipated outcome for the zone while recognising that sites adjoining an industrial zone will not have the same level of amenity anticipated by the Plan as other areas with the same zoning.

Policy 16.2.3.2 – Managing effects on the environment

- b. Effects of industrial activities are managed in a way that the level of residential amenity (including health, safety, and privacy of residents) adjoining and industrial zone is not adversely affected while recognizing that it may be of a lower level than other residential areas.

26 There is no question that the effects on neighbours – both residential and users of Hagley Park – are relevant considerations. However, in my submission your decision needs to be considerate of the above objective and policy from the industrial general zone.

Dated 1 December 2020

A handwritten signature in blue ink, appearing to read 'Jamie Robinson', with a long horizontal flourish extending to the right.

Jamie Robinson
Solicitor for Lumo Digital Outdoor Limited