

**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

**RIGHT OF REPLY ON BEHALF OF
LUMO DIGITAL OUTDOOR LIMITED**
3 December 2020

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Right of Reply

- 1 The hearing was adjourned on 1 December 2020, subject to the applicant's right of reply. It was also agreed that the parties (i.e. Lumo, the Council and Mr Garlick) would work together to prepare a version of proposed consent conditions that could assist the Commissioner, if it is determined that it is appropriate to grant resource consent.

- 2 This right of reply addresses the following issues:
 - 2.1 The permitted baseline;
 - 2.2 Traffic evidence;
 - 2.3 Urban design matters;
 - 2.4 Proposed consent conditions; and
 - 2.5 Timeframes.

The permitted baseline

- 3 The matter of the permitted baseline was explored in some detail, however I consider there remains some confusion with the Council's evidence in terms of how this should be applied, and how effects should be assessed. This is explained in detail below under the headings of "*traffic evidence*" and "*urban design matters*".

- 4 The applicability of the permitted baseline was outlined in my opening submissions, and the evidence of Mr Scheele and Mr Klomp. The decision to consider the permitted baseline is discretionary. However, if the permitted baseline is to be applied, it is critical that the Commissioner keep in mind the correct question:

What are the effects arising from this application, and how do these differ from the permitted baseline?

- 5 It is important that any consideration of effects is **not** confused with the difference of effects between no billboard, and the proposed billboard. The permitted baseline and allowable effects must always remain forefront in the assessment of effects and subsequent decision making.

Traffic evidence

- 6 Lumo agrees with the statement of the Commissioner that traffic is one of the critical issues for this hearing (with character/amenity being the other).

Reports considered by the traffic experts

- 7 Mr Downard-Wilke continued to consider that the Turner report was the most robust and relevant report. In particular, he stated:

I consider that the onus should be on the Applicant to demonstrate that the adverse effects will be acceptable, and that Council should not be required to undertake a full review of the most current research and the latest guidelines at the time of assessing each application for a digital billboard¹.

- 8 This evidence raises two critical matters to be addressed:

- 8.1 Firstly, the Turner report includes, in its introduction, the following statement:

The advice provided in this report is based on latest world's best practice (as on 2015). This is an area of research focus and evolution of regulation. It is important that every few years the Council does take a look at the latest research and guidelines in this area and updates their regulation around advertising signage as required.

- 8.2 The Council presented no evidence at the hearing that it has undertaken any kind of re-assessment of the latest research, as its evidence was reliant on the findings of the Turner report.

- 8.3 Secondly, Mr Downard-Wilke identified that the onus should be on the Applicant to establish the effects of the proposal. That has been done. Mr Rossiter's evidence referred to the Turner report, and then outlined several reasons for considering that other information may assist the Commissioner in the specifics of this application:

- 8.3.1 An assessment of CAS data, as it relates to crashes caused by distraction, and advertising signage as a sub-set of that. Mr Rossiter found that over the five year period 2015-19 and January to October 2020, over 200,000 crashes had been

¹ Paragraph [13] of Axel Downard-Wilke evidence .

reported and included in CAS. Driver distraction was identified as a contributing factor in 14,000 crashes. Only one crash report explicitly mentions a billboard while other advertising such as fuel prices, sandwich board or building signage was identified as a contributing factor in twelve crashes. Even accounting for under-reporting, this indicates that a negligible proportion of accidents are caused by billboards.

8.3.2 To further 'ground-truth' the above finding in relation to crash data, Mr Rossiter firstly considered the report prepared by Andy Carr (**the Carriageway Report**). The shortcomings of the Carriageway Report were acknowledged both within it by Mr Carr, and also in Mr Rossiter's evidence. It is accepted that no "statistically significant" conclusions can be reached, however it is accurate to say that the Carriageway Report indicates no linkage between increased crash rates, and electronic billboards.

8.3.3 Mr Rossiter also referred to the monitoring results which arose as a consent condition from a billboard on Blenheim Road. Again, this study (as Mr Downard-Wilke points out) does not establish a statistically significant trend. With respect, that was not the point of the consent condition, or indeed Mr Rossiter's mention of it in his evidence. Rather, the purpose of that monitoring was to establish whether there is an indication that the billboard is influencing what is happening with traffic in that area. Mr Rossiter's conclusions are that there is no indication of that occurring. Although the information set was small, any change in crash rate (even if that number fell within the "statistically insignificant" range) would have been reported on by Mr Rossiter.

8.3.4 Finally, Mr Rossiter also mentioned other reports² that he considered when presenting his evidence. Less weight was placed on these, however they were provided to assist the Commissioner as there is clearly benefit in being aware of

² Particularly Samsa Consulting (2015) and ARRB (2018)

the latest reports in an area where knowledge is constantly improving.

- 9 On the basis of the above, it is incorrect for Mr Downard-Wilke to indicate that the onus placed on the Applicant had not been met. It is likewise incorrect for Mr Downard-Wilke to rely on the Turner report with no further consideration of the increased information available since 2015 particularly given the increased prevalence of digital billboards. While a statistical analysis to demonstrate either no effect or a significant effect has not been undertaken, the very small proportion of crashes reported since 2015 where advertising is identified as a contributing factor does not suggest that digital billboards are adversely affecting road safety.
- 10 In RMA terms, the focus of any hearing is to consider the application based on the evidence presented at time of hearing. The duty of any resource management planner or expert witness is to consider all relevant information and not to discount or ignore recent data, which is pivotal to the determination of the application at time of hearing. Mr Downard-Wilke has tailored his evidence solely to that which supports his Council's position (i.e. the Turner Report), and accordingly the evidence of Mr Rossiter is to be preferred.

Mr Carr's position

- 11 This matter was traversed at the hearing, and is noted here only for completeness. As I identified when Mr Downard-Wilke presented his evidence, there are significant procedural issues with his reference to Mr Carr "changing his mind". My concerns with this (and conflicting information received by Mr Scheele) was outlined, and I understand the Commissioner intended to discount this element of Mr Downard-Wilke's evidence. I strongly support this position.

Appropriateness of CAS data

- 12 The accuracy of the CAS data upon which Mr Rossiter undertook his assessment was questioned by both the Commissioner, and the evidence of Mr Downard-Wilke. Mr Rossiter did not profess that the CAS data was perfect, and his findings reflected that there may be under-reporting. However, it is inappropriate to disregard this evidence entirely, as how else are we to assess traffic safety? The CAS data remains the only source of information on crashes, and it is used when undertaking crash reduction studies and road improvement projects. The RMA imposes an obligation to

use the best available information when making decisions, and the CAS data is the best available information as it relates to traffic safety, which is the focus of the restricted discretionary activity.

Left-turning vehicles from Moorhouse Ave to Lincoln Road

- 13 There was significant discussion on the impact on cyclists, arising from left-turning vehicles (mostly truck and trailer units) that encroach on the cycle lane. Mr Downard-Wilke referenced in his evidence that the Council intends to upgrade the cycleway by mid-2022, although due to a budget shortfall (oral evidence indicated around two million dollars), this may not occur. Arising out of this discussion was a recommended condition from Mr Downard-Wilke that the consent (if granted) be restricted until the cycleway upgrade is complete, and that Lumo contribute towards the upgrade as part of the consent.
- 14 As the Commissioner is aware, a condition on a resource consent must meet certain tests to be valid. In particular, a condition must:
- 14.1 Be for a resource management purpose, not an ulterior one;
 - 14.2 Be fairly and reasonably relate to the development authorised by the consent; and
 - 14.3 Not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it³.
- 15 In my submission, the proposal for Lumo to financially contribute towards the cycleway realignment clearly does not meet the above test. It appears to be for an ulterior purpose (i.e. to address an existing budget shortfall) and is to fix an existing problem that Council has identified needs addressing and not “fairly and reasonable” related to the development. For that reason, to impose a condition on Lumo to contribute to the upgrade would be unreasonable.
- 16 The Commissioner then questioned whether the condition could limit Lumo from developing the site until the upgrade occurred (i.e. the contribution element removed).

³ The Newbury test, applied to New Zealand law by *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

- 17 It is submitted that such a condition would also **fail** the reasonableness test. When considering the appropriateness of the condition, the permitted baseline must be considered. In a discussion with Mr Downard-Wilke, the Commissioner outlined the question before him as being:

Is the problem with trucks crossing the cycleway [i.e. the potential safety impacts on cyclists] sufficiently serious to disallow or delay the proposal?

With respect, this is the wrong question. The effects **have** to be compared to the existing environment, and the permitted baseline. Mr Downard-Wilke specified in his evidence that this issue is not one of Lumo's making. The issues with the left-turning tracking path exists now. That is the existing environment. Then, the potential further effects of the billboard must be considered in light of the permitted baseline. The question is whether the effects from the proposed billboard are sufficiently serious, when considered against the effects of the permitted baseline scenario, to justify a decline or to delay the proposal. In my submission, on the evidence before you, they are not. Mr Downard-Wilke was concerned about any additional distraction. He had not considered the permitted baseline scenario. By contrast, Mr Rossiter's evidence outlines the reasons he considers conflict between those left-turning vehicles is unlikely, including the fact that awareness of cyclists in the cycle-lane means drivers actively avoid the tracking across.

Urban design matters

- 18 The matter of transition and 'cross-dissolve' was the subject of some discussion at the hearing. There appears now to be agreement between the Council and Lumo on what this means, and a proposed consent condition has been suggested which clarifies this for all parties. This condition, in combination with the condition limiting movements, is considered sufficient by Lumo to ensure the consent is clear that transitions that will distract are not permitted.
- 19 The only other effect relating to character and amenity that I propose to address in this response is the permitted baseline effect. Following questioning, Mr Hattam agreed that the proposal is "much tidier" than the permitted baseline, but also "much more impactful" given its location on the site. Mr Klomp, in his planning summary, questioned how the billboards could be located side-by-side with the same views. It is agreed that exactly the same viewshafts would not be available, however the permitted baseline would allow for the two billboards to be located in the middle of the canopy of

the petrol station. This would result in an “impactful” view from Hagley Park, and significantly more clutter than the proposed. The possible “permitted baseline scenarios” accompanying the application were not exhaustive, rather they were indicative of possible approaches.

Proposed consent conditions

20 Council, Mr Garlick and Lumo discussed consent conditions following the adjournment. Unless mentioned below, the conditions circulated by Mr Klomp are agreed between the Council and Lumo.

20.1 Proposed condition (h) includes an advice note that Rules 6.3.4 and 6.3.5 must be complied with. Lumo considers that these rules are not relevant. Section 6.3 of the District Plan relates to Outdoor Lighting (whereas Section 6.8 relates to Signage, including electronic billboards). Lumo considers that the proposed note should be **deleted**. However, if the Commissioner considers the outdoor lighting rules are relevant, the wording proposed by the Council is acceptable.

20.2 Proposed condition (j) has been introduced following the hearing. No evidence was presented by Council to support the condition, and no justification has been provided other than the comment from Mr Klomp:

“My understanding is that it comes from lighting standard NZS 4282:2019”.

Mr Clemas has advised that such a condition is practically difficult to implement and has not been imposed on other resource consents held by Lumo. In an absence of any reasoning (or indeed certainty from Council as to the reason for its inclusion), Lumo considers that this condition should be **deleted**.

20.3 Proposed condition (k) and (l) present two different versions of the same condition. Lumo seeks that industry standard be applied here, as the site is located within an industrial zone, including a petrol station with significant on-site lighting, and roadways which are lit by both streetlights and traffic lights. The Council’s argument that the site is “sensitive” due to its proximity to Hagley Park would be more relevant were the sign located on the Park side of the road (within the

park itself), however in its proposed location it will be backdropped against the well-lit industrial zone. Lumo considers that **condition (l) should be preferred.**

20.4 Proposed condition (r) relates to the proposed restriction on establishment of the billboard until the cycleway is upgraded and is **opposed** by Lumo. For the reasons outlined above, this condition is considered unreasonable, and not able to be related back to the effects of the proposal, particular when considered in light of the permitted baseline.

Timeframes

- 21 The Commissioner indicated availability issues from 18 December 2020 (which in any event is the last “working day” of the year pursuant to the RMA) until the end of January, due to pre-arranged holidays and a hearing scheduled.
- 22 Section 115(2) of the RMA requires that a decision be made within 15 working days from the end of a hearing. We do note that the Council has the ability to extend that period under s37A to 30 working days if special circumstances apply (s37A(4)(b)(i)).
- 23 Lumo would prefer that this matter be decided as quickly as possible, as it intends to begin work immediately if the consent is granted. However, Lumo is also conscious that the timeframes available before the holiday period is less than the RMA provides for. On that basis, Lumo will abide by the decision of the Commissioner in relation to timeframes.

Dated 3 December 2020



Jamie Robinson
Counsel for Lumo Digital Outdoor Limited