

Before a Commissioner
Appointed by the Christchurch City
Council

Under the Resource Management Act 1991

In the matter of a resource consent application for a free standing digital
billboard at 235 Manchester Street (RMA/2020/1877)

Legal submissions on behalf of Wilson Parking Limited

1 March 2022

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May it please the Commissioner

- 1 This hearing concerns an application by Wilson Parking Limited (**Wilson Parking, the Applicant**) for land use consent to erect a double-sided freestanding 18m² LED digital billboard (**Billboard**) at 235 Manchester Street (**the site**) (RMA/2020/1877).
- 2 The Applicant, in response to submitter and Council concerns, has removed the green frame surrounding the Billboard, reducing the overall size of the Billboard by 50% from 36m² to 18m².
- 3 The key matters for consideration are the extent to which the Billboard:
 - (a) would distract or confuse motorists in their observance of traffic signals and result in unacceptable traffic safety effects; and
 - (b) will have an adverse effect on the visual amenity and character of the receiving environment.
- 4 The Resource Management Act 1991 (**RMA**) does not anticipate no, or even minimal, effects. Any assessment of effects must be informed by the existing environment. The objectives of the Christchurch Replacement District Plan (**District Plan**) are relevant to this assessment. Signs are integral to commercial environments, and for their contribution to Christchurch's vitality and recovery through supporting business, infrastructure and community activities and this is directly relevant to the Commercial Central City Business Zone (**CCBZ**).
- 5 Digital billboards are not new. Advertising of both on-site and off-site activities is commonly presented in the form of a Billboard, considered a more sustainable approach to advertising. Billboards form part of the existing urban fabric in Christchurch and are often located in proximity to intersections in the city, across all central city zones.
- 6 Having regard to the context of the site and its surrounds, the Applicant's case is that when viewed objectively in the context of what the District Plan anticipates the Billboard is not expected to generate unacceptable visual effects. Traffic effects will be acceptable.
- 7 The Applicant is confident that matters raised by Council and submitters have been appropriately considered and responded to through the technical evidence and volunteered conditions of consent.

Activity Status

- 8 The Billboard requires discretionary consent under Rule 6.8.4.1.4 D1 and D2 under the District Plan as a digital sign in the CCBZ. It does not meet all of the built from standards under Rule 6.8.4.2.¹

Law – discretionary activity

- 9 An application for a discretionary activity is to be assessed in terms of section 104 and 104B of the RMA.

Section 104

- 10 Section 104 of the RMA provides that:

Section 104 Consideration of applications

- (1) When considering an application for resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -
 - (a) any actual or potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of - ...
 - (vi) a plan ...
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect on the environment if [[a national environmental standard or]] the plan permits an activity with that effect.
- (3) A consent authority must not -
 - (a) when considering an application, have regard to -
 - (i) trade competition or the effects of trade competition;
 - (ii) any effect on a person who has given written approval to the application.

¹ Resource Consent is required for any built development in this zone, including billboards.

Section 104B

- 11 Section 104B of the RMA provides that a consent authority after considering the application may grant or refuse the application, and if it grants the application, it may impose conditions under section 108 of the RMA.
- 12 Your evaluation requires giving 'genuine thought and attention' to the various matters set out in section 104 RMA.² To "have regard to" does not require you to "give effect to". The matters of consideration under section 104 are on equal footing, so that none of the subsections are to be elevated to a primary status.³ All matters are to be considered and given such weight as you see fit.⁴
- 13 It is for the Commissioner to:
 - (a) assess the relevant potential effects of the proposal, in the context of the objectives and policies of the District Plan. Your duty under section 104 is to consider all relevant effects, both positive and negative otherwise the assessment may be incomplete and the balancing of conflicting considerations may be distorted.⁵ An assessment must be completed against the existing environment (discussed below).
 - (b) have regard to relevant objectives and policies. An assessment of relevant objectives and policies requires "a fair appraisal of the objectives and policies read as a whole"⁶.
 - (c) consider Part 2 (more as a check to the interpretation of the planning framework, noting that Part 2 cannot be used to render planning provisions under a broad judgement ineffective); and
 - (d) weigh these conclusions, to determine whether the consent for the Billboard can be granted and the purpose of the RMA is achieved.

² *Foodstuffs South Island Limited v Christchurch City Council* (1999) 5 ELRNZ 308 (HC), at p 309.

³ *Norwood Lodge v Upper Hutt City Council* HC Wellington CIV-2004-485-2068; *Henderson v Papakura District Council* A019/03 at [34].

⁴ *Kennett v Dunedin City Council* (1992) 1A ELRNZ 168 at 182. *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209 at [25].

⁵ *AFFCO v Far North District Council* A 6/94 at 233.

Te Aroha Air Quality Protection Group v Waikato Regional Council (No 2) A 70/93; see also *Baker Boys Ltd v Christchurch City Council* (1998) 4 ELRNZ 297.

⁶ *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209 at [25]; Referred to with approval in *Davidson R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

Permitted baseline

- 14 Section 104(2) RMA provides you with discretion to disregard any adverse effect of the Proposal if a plan permits an activity with that effect.
- 15 The permitted baseline for signage on the site includes 11m² of signage, (being two signs at the pedestrian and vehicle access ways) with illumination and 20 lux of light spill as a permitted activity.⁷ Ms Collie considers this demonstrates that the CCBZ anticipates signage and a well-lit environment.
- 16 The Officer Report discusses the permitted baseline⁸ but considers that given the off-site, digital and changing nature of the Billboard, it is of limited relevance.
- 17 It is submitted that it is not fanciful for the strategically located Application Site to contain lit signage of Wilson Parking red corporate colours. A visual representation has been provided which demonstrates the credibility of this sign.

The environment

- 18 It is important to determine the environment against which the proposal should be assessed. Based on an orthodox application of the law, the environment includes the environment as it currently exists and the environment as it would exist with permitted activities and/or unimplemented resource consents.⁹
- 19 However, some care needs to be taken in applying that approach too strictly in circumstances where intensification is clearly signalled in a district plan, as is the case here. In *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815 (HC), the High Court observed at [36] (in the context of section 104D gateway test):

That the cornerstone material fact in the application of the first gateway test is that there is an operative district plan which contains objective 6, which provides for the urbanisation of this area to accommodate residential, commercial and industrial activity.

⁷ Statement of Evidence of Anita Collie at [13(a)].

⁸ Officer Report at [36] -[38].

⁹ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] 12 ELRNZ 299, at [84].

20 The Court went on to find that (at [85]):

Section 104D, and indeed the RMA as a whole, calls for a "real world" approach to analysis, without artificial assumptions, creating an artificial future environment. Read as a whole, *Hawthorn* endorses having regard to objective 6 and its policies. The current development of the Frankton Flats, of which these applications are only part, was inconsistent with the plan statutory injunction imposed on the consent authority to consider the adverse effects on the future environment, contained in the phrase "will be". To read down s104D(1)(a) to that the judgment will be "minor" if established in an undeveloped environment was contrary to the operative plan and the facts, and so thwarted the intention of Parliament.

21 The High Court in *Queenstown Central* considered the Environment Court should have recognised that the future environment of relevance was urban (not undeveloped), consistent with the operative plan objectives and policies, as well as the practical reality that there was a high demand for this land to be urbanised¹⁰. This case has been confirmed in subsequent decisions¹¹.

Existing physical environment

22 On a strict orthodox view of the existing environment:

- (a) The AEE describes the existing environment as an urban area, defined by its significant amounts of roading, traffic including bus movements, signage, lighting and additional infrastructure.¹² Mr Compton-Moen describes it as a dynamic environment dominated by vacant sites, carparking and a lack of built form.¹³
- (b) Mr Yateen Lallu, a submitter, currently holds consent (RMA/2017/467) for a mixed-use development at 221 Manchester Street, which includes a 55m² billboard to locate on the northern side of the development facing 235 Manchester Street. A subsequent resource consent application has been lodged for the same scale development, however the design has been amended and it is now proposed an 18m² digital billboard is located on the side of the

¹⁰ Ibid, at [13], [38], [63], [123], and [160].

¹¹ Most recently in *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 84 at [51].

¹² Statement of Evidence of David Compton-Moen at [14].

¹³ As above.

development. It is likely the existing consent will need to be surrendered (or it will lapse¹⁴), and in accordance with *Hawthorn* it cannot be considered to form part of the existing environment. Further, as the new consent has not been granted to the amended development this cannot form part of the existing environment.

- (c) To the east of the site is Ōtākaro Limited's (**Ōtākaro**) designation V4 'The Frame – North & East'. These properties are designated for a broad purpose, including residential development. Superlots 11 and 12, which are adjacent to the site, are still vacant and awaiting development by Fletcher Living under the designation. This designation expires on 30 July 2022. The Applicant was advised yesterday that an application has been filed to extend the designation by 5 years. The application is light on detail but confirms the designation has not yet been given effect to on 192 Gloucester Street. The Council is yet to determine whether to fix a longer period for the designation to be given effect to. In making this determination, Council needs to be satisfied that substantial progress and or effort has been made towards giving effect to the designation in the 10 years it has been operative and continues to be made.¹⁵ Until such time, as the Council makes its decision, it is fanciful to consider that a residential development could be constructed in accordance with the designation within 5 months, so cannot form part of the existing environment.

- 23 In my submission, simply assessing the existing environment based on the orthodox application of *Hawthorn* creates an artificial environment and lacks a real world approach.

Future anticipated environment under the operative plan

- 24 It is submitted, applying *Queenstown Central* the environment against which you assess the Billboard includes the likely future state of the environment in the District Plan. Particularly, in these unique circumstances, where the Application Site and its surrounds are undeveloped but will be rebuilt in time to regenerate the central city.

¹⁴ The consent RMA/2017/467 was granted on 9 June 2017, and will lapse if not given effect to on 9 June 2022.

¹⁵ Section 184(2)(b) of the RMA

- 25 The District Plan provides for the surrounding environment to be developed as a "*highly urban, well lit, busy, commercial environment*"¹⁶ as part of the CCBZ. Further intensification, large scale commercial buildings, mixed-use development with residential components, signage, vehicles, public transport, lighting and infrastructure will all form part of the receiving environment in time. The residential development at 192 Gloucester Street could feasibly form part of this future environment, with the underlying commercial zone.
- 26 As a consequence, the environment is going to be very different to what we see today. As a short term consent is not sought, it is appropriate for the Billboard to be assessed against the future environment.
- 27 This reality is acknowledged by the Heritage Council Officer¹⁷. Ms Richmond is familiar with the Application site as she passes it regularly on the way to work. She considered the proposed billboard would feature in some but not all the significant views to and from the heritage buildings but she doesn't consider the impact to be significant. Ms Richmond states:

"It is important to note that the unobstructed views to the heritage buildings from the north are temporary views which have only opened up since earthquake demolitions in the block containing the application site, and the expectation is that once this block is redeveloped these views will again no longer be possible..."

Effects on the environment

Visual effects

- 28 Mr Nicholson of Urban Shift has provided advice to the Council regarding visual effects and urban design. He considers the Billboard will have high adverse effects on the existing environment which he describes as the high quality public spaces along Manchester Street between Worcester St and Gloucester St. Mr Nicholson considers the Billboard will also have high adverse effects on the character and amenity of the residential units anticipated at 192 and 198 Gloucester St.

¹⁶ Statement of Evidence of Anita Collie at [48(b)].

¹⁷ Heritage Assessment, Appendix 1c, Section 42A Staff Report.

- 29 Mr Nicholson and Mr Compton–Moen have differing opinions of the magnitude of change, and resultant adverse effects that will be experienced.
- 30 The Applicant's case is that signage is an integral part of a city's character, and while the sign is larger than the District Plan Standards and noticeable, it is of a scale which can be readily absorbed into the city character.
- 31 Mr Compton–Moen has undertaken additional assessment in response to Mr Nicholson's concerns regarding the pedestrian environment, the high-quality environment of the streetscape, and the future residents of 192 Gloucester St. For context, he has also assessed the visual effects of the proposal against an onsite sign that could be built on the Application Site as a permitted activity. Mr Compton-Moen considers the sign will be viewed in the context of the Super stop, moving vehicles and buses, traffic light signals and buildings. Generally, he considers "*over time the sign will be absorbed into wider urban cityscape view to simply be seen as a small component of the wider composition.*"¹⁸
- 32 The urban design assessment by Mr Nicholson has not had regard to the objectives and policies of the District Plan, and the expectation of signage in commercial areas. His assessment presumes a "sensitive" receiving environment equivalent to an open space or residential zone¹⁹ not recognised by the District Plan. Mr Nicholson also seems to imply that a billboard is not suitable in a high amenity area, particularly when it relates to off-site advertising. However, his assessment overlooks the placement of the digital billboard at the super stop. Whilst it is accepted that this billboard is of a smaller scale than the Billboard proposed and not freestanding, its presence does undermine the view that this type of advertising is not suitable in a high amenity area. Mr Nicholson essentially assesses the future environment with respect to the residential activities, but ignores the reality that the site and its surrounds could also be built up under the District Plan zone and would not remain vacant.
- 33 Mr Compton–Moen has undertaken an assessment of the Billboard in the existing orthodox environment, but also in a "real world" context with the District Plan's intention for the CCBZ in mind (including potential for residential activity) and has concluded the effects will be acceptable and

¹⁸ Statement of Evidence of David Compton-Moen at [32]

¹⁹ Policy 6.8.2.1.2 controls off-site signage in sensitive locations (i.e. residential, open space and rural zones) to protect character and amenity values.

will become more so as the area develops. I submit his more well-rounded and representative conclusions should be preferred.

Traffic effects

- 34 Mr Downard-Wilke has provided advice to the Council on traffic effects relating to the Billboard. He holds concerns about the secondary traffic signal pole 5 and the visual overlapping of the Billboard behind it. Mr Carr agrees this overlay will occur but considers that it is very unlikely adverse safety effects will arise from the Billboard.²⁰ Examples of this reality have been included in Mr Carr's evidence, and there has been no recorded evidence that this causes crashes. This is the only issue of contention regarding traffic effects.
- 35 There is an evidential burden on all parties, including Council officers, to produce evidence tending to support an allegation. It is not enough to speculate, to simply entertain a possibility, or to assert that something "may be" an outcome of this proposal. With respect, that is not the threshold. There must be cogent evidence to support a particular conclusion. In other words, there needs to be material of probative value which tends to logically show the existence of facts consistent with the finding. The evidence must satisfy you of the fact that there will be such an effect on the balance of probabilities. Essentially, you need to be persuaded that it is correct.
- 36 For Mr Downard-Wilke's concerns to materialise it would require an extraordinary set of events which simply lack reality - a colour-blind driver, a vehicle of a particular height, use of a bus lane, illegal manoeuvres and signal and image changes within a zone of critical decision making.
- 37 The RMA requires assessment of the effects of an activity on the basis of an ordinary reasonable person, not a person that is particularly sensitive or hypersensitive.²¹ There is no place for the Court to be influenced by the mere perception of risk which is not shown to be well founded.²²
- 38 However, given the difference in opinion of the traffic experts, the Applicant engaged an additional expert, Mr Harries to peer-review the material and provide his opinion. This was also done to address the concern about an

²⁰ Statement of Evidence of Andrew David Carr at [106]

²¹ In *Re Meridian Energy Limited* [2013] NZEnvC 59, agreeing with *Motorimu Wind Farm Ltd v Palmerston North City Council* (W067/08, 26 September 2008 (Judge Dwyer) at [327].

²² *Contact Energy Limited v Waikato Regional Council* (2000) 6 ELRNZ 1 at [254].

"information gap" in the Officer's Report. Mr Harries considered the veracity of the evidence provide by both traffic experts in support of their conclusions, and undertook his own assessment concluding that:

*"the proposed mid-block location of the billboard is a good one, and the extent of visual overlapping that will occur will have no discernible adverse impact on either driver behaviour or driver performance that could in any way impact on road safety at the Manchester Street / Gloucester Street intersection."*²³

- 39 Accordingly, Mr Harries concluded there is no traffic effect that prevents consent being granted to the proposal and that the likely effects of the Billboard on the *"function, performance and safety of the local traffic environment, will be no more than minor."*²⁴ This conclusion supports the findings of Mr Carr.²⁵

Positive effects

- 40 Mr Turner has provided evidence that the Billboard will provide a supplementary income for the Applicant's business, which has been greatly impacted by COVID. Additionally, the Billboard will enable Wilson Parking to advertise its business, other local businesses to advertise and display of community messaging.²⁶

Plan provisions

- 41 Ms Collie has undertaken a comprehensive analysis of the applicable planning framework and rules where appropriate of the evidence of technical experts in formulating her opinion.
- 42 Further evidence has been provided in relation to the traffic effects which demonstrate those effects are acceptable. Therefore, we only record Ms Collie's disagreement with the assessment of Ms Brown regarding the degree of adverse effects on character and visual amenity.
- 43 Ms Collie concludes consent can be granted to the Billboard, the effects on the environment can be appropriately mitigated by the conditions proposed

²³ Statement of Evidence of Brett Harries at [22]

²⁴ Statement of Evidence of Brett Harries at [40].

²⁵ Statement of Evidence of Andrew David Carr at [106]

²⁶ As above

by the Applicant; and that overall the Billboard is consistent with the provisions in the District Plan.

Submissions

- 44 There have been nine submissions lodged in respect of the Billboard; one in support and eight in opposition. The majority of the matters raised in opposition related to billboards generally, rather than focused on the Billboard proposed at 235 Manchester Street.
- 45 The relevant issues raised in submissions that can be addressed on the site have been dealt with in technical evidence and proposed conditions of consent. This includes the removal of the green frame and consequent reduction of the overall size of the Billboard to 18m².
- 46 For completeness, it is noted that the appropriateness of advertising *per se* or brand marketing on Billboards is outside scope of this process.
- 47 Mr Lallu has stated he is not a trade competitor of Wilsons Parking notwithstanding the unique circumstances where both parties are seeking consent for digital billboards on neighbouring properties:
 - (a) In his further submission Mr Lallu "*believes that within the central city digital billboards are only appropriate when contained within the façade of a building*".²⁷ As he proposes. He attaches some non-representative photos of freestanding billboards in low built environments with the billboards forming part of the skyline, which are not reasonably comparable²⁸.
 - (b) This is a different position taken in his original submission filed and served on the Applicant which says "*I recently met with Ray at URBIS Group to go thru (sic) our consent and he suggested we put an electronic billboard on the forth face of our building. I had the plans re-done ... If this Billboard was to go ahead, it would render our billboard redundant as it would be pointless to have 2 billboards within the same proximity. We are going to great expense to rebuilt (sic) our building with (sic) is something not a lot of other landowners in the CBD are doing.*"

²⁷ Further submission from Mr Lallu dated 24 February 2022.

²⁸ Statement of David Compton-Moen at [28].

- (c) Trade competition has been considered in *Montessori Pre-school Charitable Trust v Waikato District Council*²⁹:

In characterising the respective activities as of "trade competition" or not, I have concluded that what matters is that there be a competitive activity having a commercial element.

- (d) For completeness, it is recorded that a submission of a trade competitor is not able to be taken into account, unless they are directly affected by an effect of the activity applied for that:

- (i) adversely affects the environment; and
- (ii) does not relate to trade competition or the effects of trade competition.³⁰

48 A future building on the Applicant's site will completely screen the proposed Billboard on the Northern façade of Mr Lallu's site.

Officer Report

49 The resource management issues have been identified in the Council Officer's report by Ms Brown. Some aspects of the report have already been addressed in these submissions and will be discussed in more detail in evidence.

50 Ms Brown acknowledges that signage and billboards are not out of character nor wholly unanticipated³¹. Ms Brown is concerned that, due to the absence of any built form on the site, the freestanding sign will appear dominating and obtrusive when viewed by pedestrians and other users of Manchester Street, and nearby residential activities³². In forming this conclusion, it is notable that Ms Brown assesses potential, anticipated future activities in the surrounding environment but not on the site (i.e. the future environment is applied selectively).

²⁹ Cited in *Kapiti Coast Airport Holdings Ltd v Alpha Corporation* [2016] NZEnvC 137 at [13].

³⁰ Section 308B(2) of the RMA.

³¹ Officer's Report at [130].

³² Officer's Report at [59], [130].

51 It is noted for completeness that Ms Brown is assessing the original 36m² Billboard when reaching these conclusions.

Other matters – designation

52 To the east of the site is Ōtākaro Limited's (**Ōtākaro**) designation V4 'The Frame – North & East'. These properties are designated for a broad purpose, including residential development but are still vacant and awaiting development by Fletcher Living under the designation. This designation expires on 30 July 2022 but has been applied to be extended on Friday.

53 Ōtākaro and Fletcher Living did not make a submission regarding the Billboard despite this opportunity being provided to them.

54 It is accepted by the Applicant that some form of residential development may occur on these properties within the Frame, adjacent to the site, as part of the underlying CCBZ in the future environment, regardless of this designation.

Other matters – precedent

55 Mr Nicholson raises the concern that granting consent to the Billboard would create a precedent. There is no evidence to suggest the potential for a precedent effect to arise, should consent be granted, and Ms Brown does not raise this as a concern in her Officer Report.

Part 2

56 The obligation to refer to Part 2 remains unless the Commissioner is assured that it would not add to its evaluative exercise under s104 RMA to do so.³³ If a fair appraisal of the objectives and policies means the appropriate response to a particular application is obvious, it effectively presents itself. Genuine consideration and application of relevant plan provisions leave little room for Part 2 to influence the outcome.

57 It is submitted that the application is in accord with Part 2, and the Applicant agrees with the Officer Report conclusion that no further assessment against Part 2 is required.

³³ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [47]; in resource consent decisions it is not limited to the exceptions in *King Salmon* (uncertainty, invalidity or incomplete coverage).

Conclusion

- 58 Having regard to the context of the site and its surrounds, the Applicant's case is that when viewed objectively in the context of what the District Plan seeks to provide for the site and its surrounds the Billboard is not expected to generate unacceptable effects, and overall is consistent with the relevant District Plan objectives and policies.
- 59 The Applicant is confident that matters raised by Council and submitters have been appropriately considered and responded to in these submissions and through the technical evidence. Where practicable, the Applicant has responded with changes to design and willingly volunteered changes to the conditions of consent.
- 60 It is submitted that the proposed billboard is deserving of consent under the RMA.

Witnesses

- 61 The Applicant will call the following witnesses in support of its case:
- (a) Mr Peter Turner, Wilson Parking Limited – company evidence;
 - (b) Mr David Compton-Moen – urban design and landscaping;
 - (c) Mr Andrew Carr – transportation;
 - (d) Mr Brett Harries – transportation peer review; and
 - (e) Ms Anita Collie – planning.

Dated this 1st day of March 2022



Alex Booker
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