

Before Hearing Commissioners
appointed by Selwyn District Council

under: the Resource Management Act 1991

in the matter of: application RC195454 for land use consent to establish
and operate a supermarket and café, with associated
car parking and landscaping at 581 Birchs Road,
Lincoln

and

in the matter of: **Lincoln Developments Limited**
Applicant

Closing legal submissions on behalf of Lincoln Developments
Limited

Dated: 8 September 2020

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CLOSING LEGAL SUBMISSIONS ON BEHALF OF LINCOLN DEVELOPMENTS LIMITED

INTRODUCTION

- 1 These closing submissions are made in support of Lincoln Development Limited's (*LDL*) application (the *Application*) for land use consent to establish and operate a supermarket and café, with associated car parking and landscaping (the *Proposed Supermarket*) at 581 Birchs Road, Lincoln (the *Proposed Site*).
- 2 The Application is for a discretionary activity and therefore the Commissioner has full discretion on whether to grant the consent or not and as to what conditions should be imposed should it be granted. We emphasise that the discretionary activity status of this Proposal recognises that there are some instances where development, other than what might typically be provided for in a particular zone (which is usually provided for as permitted activities), may be appropriate and that such an assessment should be conducted on a case by case basis.
- 3 These submissions respond directly to issues raised at the hearing by both submitters and council officers. These submissions also provide for a set of conditions which LDL considers , they will then provide further comment on the conditions proposed by the Selwyn District Council (the *Council*) in its section 42A Report (*Officer's Report*).

RESPONSES TO GENERAL ISSUES OF CONCERN AT HEARING

Effects on amenity values

- 4 One of the biggest points at issue at the hearing related to the effects of the Application on amenity values. The majority of submitters were concerned that the Proposed Supermarket would have unacceptable adverse amenity impacts on their properties.
- 5 The Act defines "amenity values" as meaning those natural or physical qualities and characteristics of an area that contribute to people's

appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.¹

- 6 The assessment of amenity values is therefore partly subjective by ascertaining the views of the residents who live in and around the Proposed Site. Those views however, then need to be objectively scrutinised to determine whether they are reasonably held by reference to the District Plan and the experts' assessment of the effects generated by the proposal.
- 7 In *Schofield v Auckland Council*, the Environment Court noted the difficulties associated with assessing amenity, and summarised the test as follows:²

The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s 7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself provides some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activities they undertake there, and the emotions they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in the space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of the subjective, it must be able to be tested objectively.

- 8 As was heard in oral submissions, the key amenity aspect that is valued by residents is the quiet, residential nature of the Flemington subdivision.

¹ Resource Management Act 1991, section 2.

² [2012] NZEnvC 68 at [51].

- 9 At the hearing, we heard a number of subjective views on what the Proposed Supermarket would do to the amenity values of the area.
- 10 For example, Mr Meier and Ms Hobby (who live at 14 Caulfield Crescent) consider the structure would be overbearing and too corporate and that the design, size and materials are inconsistent with the surrounding residential setting. At the hearing, Mr Meier and Ms Hobby expressed that there was not a single amendment that could be made that would alleviate their concerns. They simply do not want a supermarket there at all, whether or not the applicant can demonstrate that amenity effects have been mitigated to an appropriate scale.
- 11 The objectives and policies in the Selwyn District Plan (the *District Plan*) and the Canterbury Regional Policy Statement (the *RPS*), along with the discretionary activity status of this Proposal, clearly indicate that commercial developments may locate out of centre, in residential zones, where appropriate and where the proposal will not give rise to significant distribution or urban form effects.³
- 12 As demonstrated by both Mr Thompson and Mr Heath, the proposal will not give rise to significant distribution effects. We deal with the evidence of Mr Nicholson further below, but note that Mr Knott's objective assessment of the amenity effects of the Proposal concludes that:⁴
- 12.1 The effects on the amenity of residential neighbours to the Proposal will be minor or less than minor.
- 12.2 The architectural treatment of the building is appropriate for the context and provides an appropriate relationship to neighbours.
- 12.3 Significant thought and attention has been given to the detailed design of the southern elevation of the building to ensure that it is expressed as a series of elements, each of an appropriate

³ Canterbury Regional Policy Statement, Objective 6.2.6, and Policy 6.3.6; Selwyn District Plan, Policy B3.4.2, Policy B3.4.18, Policy B3.4.23, Policy B3.4.27, Objective B4.3.8, Policy B4.3.4, and Policy B4.3.10.

⁴ Evidence of Mr Knott.

proportion and scale, and to be sure that the building will not be viewed as a single large mass.

- 13 We rely on the evidence of Mr Knott in the assessment of effects on amenity values and urban design.

Alternative sites

- 14 Many submitters commented on the fact that they considered there were other sites located in Lincoln that would be more appropriate to establish the Proposed Supermarket. For example, Mr Meier suggested the use of the site across from Lincoln University which he said has been on sale for years. It is not clear what piece of land Mr Meier was referring to but as demonstrated in the Reports of Mr Thompson, there was no other suitable site in Lincoln at the time of the Application.
- 15 Mr Peter at the hearing suggested the corner of Edwards Road and Ellesmere Junction Road as an appropriate alternative place to establish the supermarket. With respect, that site is not located within Lincoln and is very unlikely to be a feasible option for a supermarket development when considering all the factors that should be taken into account (as set out in the evidence of Mr Shaw).
- 16 Mr Nicholson in his evidence considers a more comprehensive study of both the costs and potential benefits of alternative spatial locations would be appropriate.⁵ We have already expressed our view multiple times that this comment goes beyond the realm of Mr Nicholson's expertise.
- 17 Clause 6(1)(a), Schedule 4 of the Resource Management Act 1991 (RMA) requires that any assessment of an activity's effect on the environment must include:

*"if it is likely that **the activity will result in any significant adverse effect** on the environment, **a description of any possible alternative locations** or methods for undertaking the activity."*

⁵ Evidence of Mr Nicholson at [3.6].

[emphasis added]

- 18 Case law has held that a 'description' does not extend to a full cost-benefit analysis of alternative locations or methods. Nor is an applicant required to demonstrate the proposal represents the 'best' use of resources or is best in terms of net benefit.⁶
- 19 In addition, the Court has determined that it is not necessary to demonstrate that there is no alternative method or site, or that adequate consideration has been given to alternative sites or methods where the application is for a discretionary activity. Such an application is tested by reference to the provisions of the Act and of the Plan.⁷
- 20 While LDL did not consider that the Application was likely to have significant adverse effects, it nevertheless included a description of possible alternative locations considered in its Application.
- 21 As has been set out in our opening legal submissions, the evidence of Mr Foster, and the Reports of Mr Thompson, LDL did consider a range of alternatives within Lincoln to site a supermarket before the Proposed Site was selected.
- 22 The suitability of potential sites was evaluated against a number of criteria, including commercial feasibility, site size, dimension, and market access.⁸ The Proposed Site was the only site available in Lincoln at the time which matched all of these criteria and would be suitable for a supermarket development.
- 23 We are therefore satisfied that both the Council and the Applicant have had appropriate regard to alternative locations as required under the RMA. No further assessment by the Commissioner is required or necessary.

⁶ *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477.

⁷ *Freilich v Tasman DC* [2005] NZRMA 410.

⁸ Economic Report by Adam Thompson dated 20 February 2018. Appendix 5 of the AEE.

The Rail Trail

- 24 There was a lot of concern by submitters at the hearing around the safety of the existing rail trail alongside Birchs Road. LDL proposes that the Birchs Road entrance be specifically designed to include a narrowed vehicle entry/exit for carpark traffic in order to remove the crossing width for such movements and require vehicles to approach the shared path at a perpendicular angle providing improved visibility of pedestrians and cyclists on the rail trail path.⁹
- 25 Reference was made by submitters to the death of a young girl who was fatally struck by a truck driver turning left into a construction site on Springs Road.¹⁰ The circumstances of that tragic event are not comparable to the circumstances at hand. Notably, that fatality occurred at the temporary entrance of a construction site along a stretch of road where there was only a narrow gravelled cycle lane separated by road cones.
- 26 Mr Carr at the hearing stated that most fatalities concerning 'B-Train' trucks occur when the trucks turn left as they have a blind spot. This is an inevitable reality for all development sites in Christchurch requiring servicing by 'B-Train' trucks. Mr Carr went on to state that if the entry/exit is designed well, issues concerning safety can be mitigated.
- 27 Mr Whittaker in his evidence considered that the proposed narrow entry/exit, as described above, combined with measures to appropriately delineate the rail trail path consistent with industry standards will ensure a suitable and safe outcome for all users.
- 28 We discuss the detailed design of roading elements further at paragraphs 81 to 84 below. However note that the Council has put forward a condition, which LDL agrees to, that requires the proposed changes to Birchs Road, including the site entrance interface with the rail trail, be subject to an independent road safety audit, prior to Council reviewing and approving the design. It is submitted that this

⁹ Evidence of James Whittaker dated 14 July 2020 at [47].

¹⁰ Jake Kenny and Sam Sherwood "Truck driver hit, killed cyclist while turning at 'deathtrap' motorway worksite" (30 October 2019) Stuff <www.stuff.co.nz>.

is an appropriate mechanism to ensure to ensure a safe outcome will be delivered for rail trail users.

Staff parking

- 29 A number of submitters raised the issue of staff parking contributing to congestion on the surrounding streets.
- 30 The proposed on-site staff parking comfortably satisfies the District Plan provisions and exceeds the minimum requirements by more than 20 car parks. Further, it is anticipated that a percentage of staff are likely to come from the surrounding residential area and utilise a range of transport modes (including walking, cycling, bus, drop off/pick up).
- 31 Nevertheless, LDL is willing to accept as a condition of consent the requirement to implement a parking management plan for staff to ensure associated parking within Makybe Terrace or Caulfield Crescent does not materialise. This is included as recommended condition 29 in the Officer's Report.

Scale of Signage

- 32 Mr Nicholson and a number of submitters are concerned that the proposed signage for the supermarket is significant and excessively large.
- 33 We note that the revised plans for the Proposed Supermarket have amended the signage to improve visual appearance. Notably, the height of the pylon sign has been reduced to comply with the District Plan requirements.
- 34 Mr Knott, in his evidence, considered that the pylon sign at this reduced height would be appropriate and would sit comfortably within the local environment. It is not clear on what basis Mr Nicholson seeks a reduction of 33% in the size of the pylon sign, where the height of that sign is now balanced against the height of permitted buildings within the zone.

RESPONSES TO ISSUES RAISED BY SUBMITTERS

- 35 LDL would like to thank all the submitters and Council officers who attended the hearing and contributed in this process.

- 36 Below LDL provides comments to some more specific matters raised by submitters at the hearing.

Steve Meier – 14 Caulfield Crescent

Property valuations

- 37 Mr Meier advised that he had spoken to two separate real estate agents who had told him that the Proposed Supermarket would result in decreased house valuations for properties in the vicinity.

- 38 We note that Mr Foster in his evidence provided comments from a real estate agent who was certain that supermarkets do not have a negative effect on house prices and who provided examples of the same.

- 39 Nevertheless, case law has found that effects on property values are generally not a relevant resource management consideration as any impact on property values is a reflection of all effects on the property.¹¹ Therefore to take into account property values in this process would arguably constitute the double counting of effects.

- 40 It is submitted property values is not something the Commissioner should take into account in making his decision on this Application. Similarly, the amount of money spent by Mr Meier on his house is not a relevant consideration.

Sheltered loading zone

- 41 Mr Meier mentioned at the hearing the possibility of having a sheltered loading zone. While sheltered loading zones can generally reduce noise effects, Mr Meier rightly pointed out that such loading zones also have further associated adverse amenity effects.

- 42 LDL had considered the possibility of a sheltered loading zone from the outset, however, considered that an uncovered loading zone with an acoustic fence would more appropriately mitigate effects at this particular site, without the need to further increase the bulk of the building.

¹¹ *Guthrie v Queenstown Lakes District Council* [2019] NZEnvC 148 at [14]; *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137; *Foot v Wellington City Council* EC Wellington W73/98, 2 September 1998 at [254].

- 43 We consider the other points raised by Mr Meier have been addressed in some way or another above or in evidence.

Suzanne Hobby – 14 Caulfield Crescent

Precedent/floodgate effects

- 44 Ms Hobby raised issue with the potential for the granting of this Application to establish a precedent effect which would open the floodgates to enable more commercial developments to establish in the area.
- 45 Precedent effect is a legitimate consideration under s 104(1)(b)(vi) of the RMA.¹² Importantly, however, in order to create a precedent from the grant of a resource consent, there must be a situation of 'like for like.'¹³ While the granting of one consent may well have an influence on how another application should be dealt with, the extent of the influence will obviously be dependent on the extent of similarities between the two proposals.
- 46 The leading authority on precedent effects is *Dye v Auckland Regional Council*¹⁴ where the Court of Appeal found that there is no strict precedent effect in the legal sense,¹⁵ as a consent authority is not bound by its previous decisions. So granting consent to one application does not necessarily mean consent has to be granted to a later, similar application. However, precedent effects may be relevant and may have to be taken into account if they are referred to in a plan or proposed plan.
- 47 While certain parts of the *Dye* decision have been criticised to some extent in subsequent decisions, the following more recent cases confirm the correct approach to precedent issues relating to discretionary activities:

¹² *Progressive Enterprises Ltd v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009 at [66].

¹³ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [49].

¹⁴ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

¹⁵ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [32].

47.1 *Progressive Enterprises Ltd v North Shore City Council*¹⁶ held that it is not because an activity is classified as discretionary that means it cannot have a precedent effect. Instead, the reason it should not be seen as having precedent effect is because the outcome of any future application should depend on the evidence before the Court at the time, assessed against the relevant criteria in the plan.

47.2 In *Campbell v Napier City Council*,¹⁷ the Environment Court considered it was only appropriate to consider whether the grant of consent to discretionary activities would cause an undesirable precedent if precedent issues were raised by the relevant provisions of a plan or proposed plan.

48 The Selwyn District Plan does not raise any precedent issues/considerations in its relevant objectives and policies. Further, 'commercial development' establishing within the vicinity of the application site, as asserted by Ms Hobby, would not be a precedent effect unless a substantially similar supermarket (with similar effects) was proposed. Any suggestion that this might occur is fanciful.

49 Should any subsequent commercial developments seek to establish in this area, they will be assessed on a case by case basis as against the relevant provisions of the District Plan. The risk of precedent effects arising from this Application are, therefore, non-existent.

Scott Loeffler – 47 O'Reilly Road

50 Mr Loeffler supported the Application but noted at the hearing that the Proposed Supermarket could provide for better bike access, solar panels, and electric bike chargers.

51 The Proposed Supermarket will provide 10 bicycle parks close to the customer entrance area. This has been assessed as sufficient cycle parking to meet anticipated demand and the design of the driveway and car park will include paint marking/symbols and coloured

¹⁶ *Progressive Enterprises Ltd v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009 at [70].

¹⁷ *Campbell v Napier City Council* EC Wellington W67/05, 8 August 2005 at [63].

surfacing to increase driver awareness of the potential presence of pedestrians and cyclists.¹⁸

- 52 We note there is no requirement to provide for solar panels and/or electric bike chargers in the District Plan. Further, we consider this to fall within the scope of 'sustainability features' of the development. Mr Shaw provided evidence that such features are usually decided on in the detailed design stage of a proposal, following grant of resource consent. It would, therefore, not be appropriate to require such features as a condition of consent.

Laura Hull – 560 Birchs Road

- 53 Ms Hull sought that the proposal be held to the District Plan noise limits which provide for 'day time' noise limits being between 7.30am and 8.00pm, and 'night time' noise limits being between 8.00pm and 7.30am.
- 54 Mr West in his reports and evidence found it appropriate, and in line with the most up to date guidance relating to noise, that the 'day time' noise limits be proposed to apply between 7.00am and 10.00pm. The Selwyn District Plan is unusual in its approach to setting the night time hours as starting at 8.00pm. While, strictly speaking, 8.00pm is 'night time', for the purposes of noise generating activities, people are generally still awake and undertaking activities at this time.
- 55 Consistent with other supermarkets around the Canterbury region, a 'night time' limit set from 10.00pm is more appropriate and the resultant noise effects are assessed to be acceptable.
- 56 It is noted that when compared to the District Plan noise standards, the predicted noise levels will only exceed the permitted noise standard by 3 decibels at 560 Birchs Road. Further, this exceedance is only generally expected to occur where there are heavy vehicle movements – which are short periods.

¹⁸ AEE at p 20; Transport Assessment Report by Stantec dated 30 July 2019. Appendix 2 of the AEE at [4.4].

- 57 Mr West notes that a 3dB increase in noise level is 'just perceptible' and anticipates that it will be subjectively difficult to distinguish between traffic noise on the public road network and vehicle noise from the supermarket site.¹⁹

Don Babe – Chairperson for the Christchurch-Little River Rail Trail Trust and Spokes Canterbury

- 58 We address the concerns raised by Mr Babe around the safety of the rail trail at paragraphs 24 to 28 above.

- 59 However, Mr Babe raised further concerns with the possibility of a bus stop being established outside of the Proposed Supermarket along Birchs Road and that it was not clear where this would fit in with the wider road network, and particularly the rail trail.

- 60 The inclusion of a future bus stop along Birchs Road was raised in Environment Canterbury's submission on the Application. Mr Whittaker notes in his evidence²⁰ that the planning for and identification of new locations for bus stops falls outside of this Application and LDL's responsibility. While the Application does not preclude the ability to establish a bus stop adjacent to the Site, the assessment and development of that is in the hands of Environment Canterbury.

Richard Clarke - 12 Caulfield Crescent

- 61 Mr Clarke at the hearing noted an error in Mr Foster's evidence.²¹ Mr Foster has advised that in responding to a particular submission point made by Mr Clarke, he mistakenly had in mind 11 Caulfield Crescent. Nevertheless, this error does not change the conclusions Mr Foster has reached in his report and evidence. Effects on Mr Clarke's property at 12 Caulfield Crescent have been fully assessed.

Nathan Peter – 11 Caulfield Crescent

- 62 Mr Peter asserted at the hearing that the effects of the Proposal on his property are not stated anywhere. We reject this assertion. Mr Peter's property was considered by all of our experts, whether or not

¹⁹ Evidence of Mr West at [3.8].

²⁰ Evidence of Mr Whittaker at [54].

²¹ Evidence of Mr Foster at [11.19].

his property was specifically noted within the various expert reports does not mean to say effects on his property were not considered.

63 For example, the traffic report²² does not necessarily list the effects that will be experienced at each specific property, but rather considers the effects of the Proposed Supermarket on the transport network as a whole, which invariably will include an assessment of effects on Mr Peter's property.

64 On the other hand, Mr Peter's property is specifically considered in the assessment of noise effects²³ where it was assessed that anticipated noise levels at 11 Caulfield Crescent would comply with the proposed noise limits.

65 Mr Peter is also concerned about the reserve. He is concerned that the reserve will be turned into a petrol station following the establishment of the Proposed Supermarket.

66 We can assure Mr Peter that the reserve will not be turned into a petrol station. The reserve, once established, will be vested in the Selwyn District Council and will no longer be owned by LDL.

67 Nevertheless, it appears Mr Peter is not happy with the reserve whatsoever (noting he has concerns about shading from trees) and stated that should the Commissioner be of the mind to grant the consent, he does not want the reserve to go ahead.

68 We note that Mr Nicholson conceded at the hearing, that had he taken into account the reserve in his assessment of effects (which we assert he should have), then this would remove his concerns regarding the southern landscaping of the car park.

Cooke Family Trust and Robert Lineham – 555 Birchs Road

69 At the hearing, some of the commercial history between the Cooke's and LDL was discussed. This will not be repeated here as it is not a relevant consideration under the RMA.

²² Report by Stantec dated 30 July 2019. Appendix 2 of the AEE.

²³ Report by Marshall Day Acoustics dated 29 July 2019. Appendix 4 of the AEE.

Birchs Road entrance and turning lane

70 The Cooke's raised issue with any gradual turning lane on Birchs Road which would be likely 'cut off a portion of their front drive.' As noted at paragraphs 81 to 84 below, detailed design of the roading elements will be developed after the grant of consent and subject to Council review. As part of this, we note that LDL would not be able to include any privately owned land in its roading design, the design of any roading associated with the Proposed Supermarket would have to occur within the road corridor. We emphasise that the detailed design will be subject to a road safety audit undertaken by Council which will inevitably have regard to the safety of vehicles using the Cooke's driveway.

71 Further, as set out in the evidence of Mr Whittaker²⁴ he recommends that the Birchs Road entrance is designed with a narrowed vehicle entry/exit in order to reduce crossing width for vehicle movements turning left and require such vehicles to approach the shared path at a perpendicular angle and therefore providing improved visibility to pedestrians and cyclists on the path. This type of treatment would inherently not consist of a long gradual left turning lane, which would not achieve the outcomes recommended by Mr Whittaker.

Noise

72 The Cooke's also raised concerns about noise coming from the car park along the northern boundary of the Proposed Site and did not consider it appropriate that their shelter belt hedge be considered as mitigating any such effects.

73 The revised plans for the Proposed Supermarket propose a 2.5 metre high acoustic fence along the length of the supermarket on the northern boundary but not along the length of the carpark along the northern boundary. The Cooke's at the hearing indicated that they wished for that fence to go along the entire northern boundary. This was not initially proposed as LDL considered it was possible such a long fence façade along the northern boundary could have adverse amenity effects on 555 Birchs Road. However, LDL would be happy

²⁴ Evidence of Mr Whittaker at [47].

to accommodate this request as a condition of consent and considers a fence height of 1.8 metres would be appropriate.

Storm water drainage

- 74 The Cooke's were concerned about storm water drainage over the carpark and roofs of the Proposed Supermarket, noting that they have previously had issues with low lying land at 555 Birchs Road.
- 75 Storm water impacts will be appropriately designed for and modelled as part of the detailed design and in accordance with the technical requirements for Selwyn District. It is anticipated that the development of the supermarket will, if anything, mitigate the effects of storm water ponding on the Cooke's land as levels and falls will be designed to reduce impacts on other sites.

Other points

- 76 We do not accept that the Proposal will result in the shelterbelt hedge becoming dangerous to maintain, or that construction of the Proposal would damage the roots.
- 77 Concern was also raised about light spill to the north. We note that Electrical Consulting Services Limited has reviewed the proposed lighting plan and determined that lighting would comply with the standards set out in the District Plan.²⁵

RESPONSES TO ISSUES RAISED BY COUNCIL OFFICERS

Jeremy Trevathan - Noise

- 78 We generally agree with the findings and evidence of Mr Trevathan, particularly that the measures of a 2.5 metre high acoustic fence around the loading bay, service vehicles, deliveries, and forklift only operating between 07:00am and 7:00pm, and all mechanical plant noise being limited to 35dB LA_{eq} at all neighbouring boundaries, will assist to mitigate common sources of noise from the Proposed Supermarket, with the expected noise effects of this Proposal being minimal.

²⁵ Report by Electrical Consulting Services Limited dated 18 July 2019. Appendix 6 of the AEE.

- 79 Mr Trevathan and Mr West, however, do not agree with extending the 'day time' hours for the noise limits to 10:00pm. For the reasons set out above at paragraphs 53 to 55, we consider the limits set by Mr West to be appropriate and consistent with the New Zealand Standards and WHO guidance.

Andy Carr - Traffic

- 80 Mr Carr discussed in some depth the issue the swept paths of trucks tracking across the centre line on Makybe Terrace. We note that LDL has no issue with proposed condition 33 in the Officer's Report and considers this condition adequately addresses those concerns. Further, we consider that Condition 33 could also have the effect of mitigating safety concerns along the rail trail.
- 81 Mr Carr's main concern was the low level of detail around the road networks and proposed entrances/exits to the supermarket. Further, Mr Carr was concerned about the costs of some of the potential road treatments (such as the widening of Birchs Road).
- 82 With respect, whether a particular treatment is expensive or not, and whether the applicant has the funds to undertake such a treatment is not at all relevant to the granting of consent.
- 83 Further, we reject Mr Carr's proposition that detailed design of roading elements after the grant of consent is uncommon in resource management processes. We and Mr Foster are aware of such an approach being accepted on a range of applications.
- 84 Importantly, proposed condition 32 in the Officer's Report (which LDL agrees to) requires that this design comply with certain standards, be subject to an independent safety audit, and be submitted to Council for approval. This mechanism will ensure that a good roading outcome is achieved and we consider this entirely appropriate for this type of development.
- 85 Mr Carr noted that the example photo under paragraph 47 of Mr Whittaker's evidence shows a central island in the middle of the supermarket entrance and that there was no central island in the plans for the Proposed Supermarket. We note LDL have no issue with

this proposal and anticipate details such as this one to be added at the detailed design stage of the roading layouts (as per condition 32).

- 86 Further Mr Carr criticised drawing mistakes in the plans for the Proposed Supermarket (for example he noted that the direction of the stripes on the median strip was incorrect). We do not consider this in any way material. Again, the detailed design of the roading layout is adequately dealt with in proposed condition 32. Undoubtedly, this design, and Council's subsequent review will deal with any such minor corrections to the plans.
- 87 In relation to the concerns of submitters around access of the surrounding streets for emergency vehicles, we agree with Mr Carr's comments that if residents are already experiencing such issues currently then they are not relevant to this Application, except to the extent that cars from the Proposed Supermarket might park on the street and contribute to this congestion. Mr Carr considered that a parking management plan would address these concerns and we agree.

Hugh Nicholson – Urban Design
'Spatial' retail fragmentation

- 88 In our opening legal submissions and at the hearing, we expressed our particular concern for the fact that Mr Nicholson's report and evidence go well beyond the scope of his expertise. We do not repeat those concerns here.
- 89 Mr Nicholson clarified at the hearing that where he is refers to a fragmentation of the retail offering, he is referring to a 'spatial' retail fragmentation from an 'amenities perspective.'
- 90 While we accept that spatial considerations may be an amenity consideration, it is not possible to uncouple a number of comments in Mr Nicholson's evidence with economic effects. For example the comment at paragraph 3.5 of his evidence that the Proposed Supermarket would attract a significant number of people away from the town centre, therefore reducing the number of clients for smaller businesses in the KAC which rely on retail anchors such as supermarkets to attract them. In our view, Mr Nicholson is clearly suggesting here that the location of the Proposed Supermarket will

have the effect of drawing business away from the KAC – a matter which should, and has been, deal with by LDL and the Council's economists. It is not clear whether Mr Nicholson's report or evidence was reviewed by Mr Heath.

- 91 For this reason, we still consider the conclusions of Mr Nicholson should be treated with considerable caution.

Proposed tree specimens

- 92 Mr Nicholson considers that the proposed trees for planting are too few in number and too small in size to mitigate adverse visual effects.

- 93 Mr Kamo does not agree and notes that the selection of these species served a dual purpose – to mitigate the visual effects of the car park, but also to allow a certain amount of visibility within the car park to ensure vehicle and pedestrian safety.

Internal loading bay

- 94 As above, while an internal loading area can assist in the mitigation of noise effects on surrounding properties, it can also add to the bulk of a building and increase adverse visual amenity effects.

- 95 We do not agree with Mr Nicholson that an internal/covered loading bay would be appropriate for this development, particularly where noise effects are already adequately mitigated.

Tim Heath - Economics

- 96 We agree with the conclusions of Mr Heath in his report and in his responses to the questions posed by the Commissioner in writing.

Jane Anderson - Planning

- 97 Ms Anderson noted at the hearing that she considered the site should have been rezoned, instead of the applicant seeking a resource consent.

- 98 We submit that it is not for Ms Anderson to determine a development would be more appropriately enabled through a plan change. The status of the activity is discretionary and the process the Applicant has chosen is a resource consent, and the Commissioner must consider this Proposal on its merits.

99 Ms Anderson stated at the hearing that she would want a new set of plans to fix the inconsistencies. We assume she is referring to the minor errors in the roading layout of the plans as identified by Mr Carr. Again, we do not consider a revised set of plans necessary, proposed condition 32 will ensure that detailed design of the road is correct and safe.

100 Ms Anderson confirmed that she too, like Mr Nicholson, was referring to 'spatial' retail fragmentation in her report. Again we contend that despite this assertion her conclusions, based on Mr Nicholson's evidence, do assume certain economic effects which were not drawn from the conclusions of the economic experts, nor it seems put to Mr Heath for review.

101 For example, after being asked about what she meant by a certain statement in the Officer's Report at the hearing, Ms Anderson said she would be happy to remove the following sentence from her assessment:²⁶

"The construction of an additional commercial development... may compromise the visual amenity of the existing Rosemerryn centre by attracting customers and investment away from the centre."

102 This statement clearly considers an economic effect which is not evidenced by the economic experts. While we accept that Ms Anderson has retracted that statement, it calls into question what other parts of her report, relying on the evidence of Mr Nicholson, take into account matters which do not derive from expert evidence.

Consistency with Objectives and Policies

103 As set out in our opening legal submissions and in the evidence of Mr Foster, we reject Ms Anderson's proposition that the Proposal is contrary to the objectives and policies of the District Plan and/or the RPS.

104 We note that her conclusion on the consistency of the Proposal with the District Plan objectives and policies is largely based on the conclusions she has drawn from Mr Nicholson's reports and evidence.

²⁶ Officer's Report at [151].

As we have noted, there are considerable issues with the evidence of Mr Nicholson and we urge the Commissioner to prefer the evidence of Mr Knott and Mr Kamo. Once the evidence of Mr Knott and Mr Kamo is accepted it would not be possible to find that the Proposal was contrary to the objectives and policies of the District Plan.

105 We reiterate that the policy framework (including the Lincoln Development Plan) does not preclude development of this kind in areas where such development might not be expressly anticipated. As noted at the hearing by Mr Foster, while there is an emphasis on supporting the KAC in the RPS, and therefore in the District Plan, this is not a fait accompli.

106 The reason for the discretionary status of such a consent is so that decision makers can assess and consider a particular proposal on its merits within a particular environment. If commercial development locating in residential zones was intended to be outright precluded, this Application could be expected to have non-complying or prohibited activity status.

Conditions

107 Ms Anderson, in her report, provides a set of draft conditions should the Commissioner be of the mind to grant the consent. LDL is largely happy with these conditions being adopted, subject to the minor amendments at **Appendix 1**.

108 Finally, the applicant has been in touch with a number of the neighbouring submitters, some of whom would like to take up LDL's offers around fencing and planting for their properties. LDL therefore offers an *Augier* condition to incorporate into conditions what has been discussed with residents (this is included as condition 7 of **Appendix 1**).

109 It has generally been accepted that where an applicant gives an undertaking and, relying on that undertaking, the consent authority grants a resource consent subject to a condition in terms broad

enough to embrace the undertaking, the applicant cannot say later there was no power to require compliance with that undertaking.²⁷

- 110 Applying the Augier principle in this instance, LDL can proffer conditions that may otherwise be unenforceable if imposed, and the Council and Environment Court can rely on them as being enforceable.

CONCLUSION

- 111 As a discretionary activity, the Commissioner has the ability to consider all adverse effects that may arise from the Proposal and has full discretion to either grant (subject to conditions the Commissioner sees fit) or decline the Application.
- 112 We consider the Application has demonstrated that there is a need and a want in Lincoln for a second supermarket. Unfortunately, no suitable land is available within the Lincoln KAC that could accommodate a proposal of this kind.
- 113 Nevertheless, the Proposed Site location will not detract from the Lincoln KAC and overall the Proposal has been assessed as having appropriate, proportionate effects on the surrounding environment. Where there are adverse effects, these are appropriately mitigated by the conditions which we include at **Appendix 1** (marked up against the Council's recommended conditions) and which LDL is willing to accept. We would be happy to provide the Commissioner with a clean word version of these conditions if that would be helpful.

Dated: 8 September 2020



Jo Appleyard
Counsel for Lincoln Developments
Limited

²⁷ See *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556. See also *Hearthstone Properties Ltd v Waitakere City Council* (1991) 15 NZTPA 93; *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202.

APPENDIX 1 – AMENDED CONDITIONS ACCEPTED BY LDL

- 1 Except as modified by the following conditions, the development shall proceed in accordance with the following documents, plans and further information responses:
 - a The Application and Assessment of Environmental Effects prepared by Zomac Planning Solutions, dated July 2019; which includes:
 - Appendix 1 – Plans and Elevation (superseded);
 - Appendix 2 – Transport Assessment, issued on 30 July 2019, prepared by Stantec;
 - Appendix 3 – Landscape Design Statement, issued June 2019, prepared by KamoMarsh;
 - Appendix 4 – Assessment of Noise Effects Report, issued 29 July 2019, prepared by Marshall Day Acoustics;
 - Appendix 5 – Economic Assessment, issued 20 February 2018 and an Addendum to the Economic Assessment, dated 8 April 2019, prepared by Urban Economics;
 - Appendix 6 – Lighting Compliance, issued 18 July 2019, prepared by Electrical Consulting Services Ltd; and
 - Appendix 7 – Record of Title.
 - b The further information responses provided to the Council in full on 31 January 2020; and
 - c The revised plans, elevations and landscape plans, and letter from the applicant received in full on 1 July 2020, which includes:
 - Site Plans and Elevations referenced Job no 205-244-03 sheet numbers RMA A101 revision 7, A300 revision 1, and A401 revision 1, issued on 29 June 2020, prepared by BSM Group Architects Ltd; and
 - Landscape Concept Package, issued on 29 June 2020, prepared by KamoMarsh.

Urban Design

~~2 Prior to the issue of a building consent, a revised site plan shall be provided to Council for approval identifying a second east-west pedestrian route in the northern portion of the site;~~

32 Prior to the issue of a building consent, the proposed footpaths on the adjacent roads shall be formed and constructed with pedestrian priority.

Landscaping

~~43 Except as modified by Conditions 5–10, t~~The proposed landscaping shall be established and maintained in accordance with the information and plans contained in the Landscape Concept Package, Sheets 1001 ~~and to~~ 1004 and dated 29 June 2020.

- 5—~~The landscape plan shall be amended to provide the following along the Birchs Road road frontage:~~
 - a—~~One large tree (greater than 10 metres in height at maturity) every ten metres of road frontage;~~
 - b—~~Adjacent to the car park, a minimum of 3 metres of the landscape strip shall be planted with a mixture of trees and shrubs;~~
- 6—~~The landscape plan shall be amended to provide the following along the Makybe Terrace road frontage:~~
 - a—~~One large tree (greater than 10 metres in height at maturity) every ten metres of road frontage;~~
 - b—~~Adjacent to the car park, a minimum of 3 metres of the landscape strip shall be planted with a mixture of trees and shrubs;~~
 - c—~~Adjacent to the supermarket, a minimum of 5 metres of the landscape strip shall be planted with a mixture of trees and shrubs~~
- 7—~~The landscape plan shall be amended to provide the following along the northern boundary of the site:~~
 - a—~~One medium sized tree (five to ten metres in height) for every five metres of boundary;~~
 - b—~~Provision of a five metre landscape strip planted in trees and taller shrubs.~~
- 8—~~The landscape plan shall be amended to provide the following along the eastern boundary of the site:~~
 - a—~~One small tree (up to five metres in height) every five metres;~~
 - b—~~Provision of a five metre landscape strip planted in trees and taller shrubs.~~
- 9—~~The landscape plan shall be amended to provide the following within the car park area:~~
 - a—~~One medium sized tree (five to ten metres in height) for every ten car parks (or 17 trees in total);~~
 - b—~~Provision of 1.8 x 10 metre intermediate landscape strips in each double row of car parks; and~~
 - c—~~Provision of 1.8 x 5.0 metre intermediate landscape strips in the single rows along the northern and western boundaries.~~
- 10—~~A landscaping strip with a minimum width of 5 metres shall be provided along the road frontages of Birchs Road and Makybe Terrace, plantings in the strip shall be as follows:~~
 - a—~~Adjacent to the car park, a minimum of 3 metres of the landscape strip shall be planted with a mixture of trees and shrubs;~~

~~b — Adjacent to the supermarket, a minimum of 5 metres of the landscape strip shall be planted with a mixture of trees and shrubs~~

~~114~~ All specimen trees identified on the plant schedule included within the Landscape Concept Package (Sheets 1001 ~~and to~~ 1004 dated 29 June 2020) prepared by KamoMarsh shall be at least 1.82 metres in height at the time of planting, and once established must be allowed to grow to the lesser of their full natural height, or the consented building height.

~~125~~ All required landscaping shall be provided on site within the first planting season following the work being completed on site.

~~6~~ All landscaping required for this consent shall be maintained. Any dead, diseased or damaged landscaping ~~is to~~shall be replaced ~~immediately within the following planting season~~ with plants of similar species. Where a tree is to be replaced, it shall be at least 1.82 metres in height at the time of planting.

~~7~~ The applicant shall offer to the properties at 8, 12, 14 and 16 Caulfield Crescent to undertake the following actions at the applicant's cost:

~~a~~ Plant additional mature trees, at least 1.8 metres in height, along the boundaries of the above named properties;

~~b~~ Liaise with Kamo Marsh, Landscape Architects, with regard to tree types and positioning to ensure that the tree planting on the reserve does not block the sun from the above named properties.

~~ac~~ Replace the existing fences at 12, 14 and 16 Caulfield Crescent with a 2 metre high acoustic fence and reinstate any damage to planter boxes and gardens arising from the construction of the fence.

Signage

~~13~~ ~~Revised plans of the proposed signage shall be provided to the Consent Manager for approval that;~~

~~a — Reduce the scale of the pylon sign by 33%; and~~

~~b — Reduce the extent of the signage on the southern elevation and relocate the signage to the western end of this elevation.~~

Lighting

~~148~~ Revised lighting plans shall be provided to the Consent Manager identifying lighting required for security purposes.

~~159~~ Prior to the issue of a building consent, the applicant shall submit an electrical ~~completion-certificatedesign report~~ demonstrating that the proposed outdoor lighting shall comply with the District Plan standards for lighting.

~~1610~~ Illumination of all signs shall be restricted to between 0700 hours and 2200 hours.

~~1711~~ All security lights shall be directed into the site and away from neighbouring properties.

Noise

~~18~~12 Noise from the activity should meet the following noise levels when received at the boundary of the neighbouring sites, and the notional boundary of the dwelling at 555 Birchs Road (measured and assessed in accordance with NZS6801:2008 and NZS6802:2008):

Daytime (0700 to 2200 hours) 55 dB L_{Aeq}

Night-time (2200 to 0700 hours) 45 dB L_{Aeq} / 75 dB L_{AFmax}

~~19~~13 That a 2.5 metre high acoustic fence is constructed around the supermarket loading bay.

~~20~~14 That any forklifts on the site shall be fitted with broadband alarms.

~~21~~15 Service vehicles and deliveries, and the use of forklift shall only occur between 0700 and 1900 hours.

~~22~~16 Prior to the issue of a building consent, the applicant shall submit a report from a suitably qualified person demonstrating that the mechanical services for the facility shall comply with a noise level of 35 dB L_{Aeq} at all neighbouring site boundaries.

~~23~~17 In the event that additional residential dwellings are constructed on the 555 Birchs Road site, 1.8~~m~~ metre high acoustic fencing shall be installed, at the applicants cost, along the northern boundary of the car park, and the noise limits outlined in Condition ~~12~~18 will apply at all site boundaries.

~~24~~18 That outdoor seating at the café shall be limited to operating between 0730 hours and 2000 hours.

Traffic

~~25~~19 Car parking and access shall be constructed as per shown on the approved Architectural Drawing labelled RMA_A101 (Revision 7, dated 29.06.2020) prepared by BSM Group Architects Limited and contained in Appendix C of the Approved Consent Documents.

~~26~~20 For avoidance of doubt the car park shall contain 165 car parks, including 5 accessible parks.

~~27~~21 All accessible parks and staff parks shall be permanently marked and signed on site for people with disabilities and staff.

~~28~~22 The consent holder shall at all times maintain and enforce a management plan for staff parking. The plan shall require that all staff of the supermarket, pharmacy and café shall not park on Caulfield Crescent or Makybe Terrace for the purposes of employment.

~~29~~23 Delivery vehicles shall be restricted to daytime hours of between 0700 and 1900 hours.

~~30~~24 A footpath shall be constructed on both sides of Makybe Terrace and on Birchs Road as per shown on the approved Architectural Drawing labelled RMAA101 (Revision 7, dated 29.06.2020) prepared by BSM Group Architects Limited and contained in Appendix C of the Approved Consent Documents.

3125 Detailed drawings shall be provided by the consent-holder showing layouts for access to the consented activities, and any resultant changes on Birchs Road and Makybe Terrace, that comply with the Manual of Traffic Signs and Markings. These drawings shall be submitted to the Council for approval;

- a The drawings shall be subject to a road safety audit by a suitably qualified traffic engineer independent of the Applicant's team, and the audit report provided to the Council at the same time as the detailed design drawings;
- b The consent-holder shall be responsible for all costs associated with the works identified on the detailed design drawings.

3226 With regard to the large truck crossing the centreline of Makybe Terrace:

- a Either: The Applicant shall widen the carriageway of Makybe Terrace and provide revised swept paths showing that this widening would result in trucks staying on their own side of the road;
- b Or: large vehicles shall only be permitted to exit the site at off-peak times, to minimise the potential for meeting oncoming traffic

3327 The vehicle crossing at Birchs Road shall be constructed with a 50mm high over-run area to enable large trucks to enter while also providing a clearly delineated narrower route for drivers of smaller vehicles.

3428 Space 1 within the supermarket car park shall be clearly marked as being for staff only.

3529 Where landscaping is within a required sight triangle it shall either comprise of a species that is less than 1m in height at maturity, or shall be 'limbed up' such that all branches or leaves are more than 1.5m above the level of the surrounding ground.

Waste Management

3630 Prior to the issue of a building consent, the applicant shall submit a waste management plan to the Council for approval.

Construction

3731 All construction noise on the site shall be planned and undertaken to ensure that construction noise emitted from the site does not exceed the noise limits outlined in Table 2 of NZS6803:1999 Acoustics – Construction Noise. Sound levels associated with construction activities shall be measured and assessed in accordance with the provisions of NZS 6803:1999 Acoustics – Construction Noise.

3832 The consent holder shall implement best practicable option measures to avoid or mitigate the dispersal and deposition of dust from construction and earthworks activities beyond the boundary of the property.

3933 The consent holder shall implement best practicable option measures to avoid or mitigate the discharge of sediment laden runoff beyond the boundary of the property.