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| **IN THE MATTER** | of the Resource Management Act 1991 ("RMA" or "the Act") |
| **AND** | |
| **IN THE MATTER** | of a resource consent application by **BEKON MEDIA LIMITED** to **TASMAN DISTRICT COUNCIL** to install a single sided digital billboard at 332 Queen Street, Richmond |

# SUBMISSIONS IN REPLY OF COUNSEL FOR BEKON MEDIA LIMITED

## 1. INTRODUCTION

1.1 On 5 November 2024, Commissioner Chrystal heard the submissions and evidence of Bekon Media Limited ("Bekon") in support of that company's application to the Tasman District Council ("TDC" or "Council") to authorise the establishment and operation of a single-sided, landscape-oriented digital billboard ("proposed billboard" or "proposed DBB" or "DBB") at 332 Queen Street, Richmond, Nelson ("the Site").

1.2 Bekon had filed the following expert evidence in support of its application:

(a) Russ Kern – lighting effects (videolink);

(b) David Compton-Moen - urban design and visual / amenity effects;

(c) Ian Munro – visual / urban design and amenity effects (videolink);

(d) Andy Carr - transportation and traffic safety;

(e) Brett Harries - transportation and traffic safety (videolink); and

(f) Anita Collie - planning issues.

1.3 Bekon's evidence was presented in that order followed by:

(a) Presentations by six submitters, namely:

(i) Hamish Beard (Submission 15);

(ii) Ralph Bradley for the Top of the South Dark Sky Committee (Submission 12);

(iii) Bryan McGurk (Submission 1); and

(iv) NZTA / Waka Kotahi (Submission 18);

(v) Bruce Struthers (Submission 8).

(b) The presentation by TDC's experts:

(i) Ari Fon – traffic safety;

(ii) Tony Milne – urban design / visual amenity; and

(iii) Victoria Woodbridge – planning.

1.4 We did not present an oral reply and these submissions in reply are filed at the direction of Commissioner Chrystal to set out Bekon's position on the issues raised as a result of questions from the commissioner throughout the hearing or by submitters or TDC representatives.

1.5 Also filed with these submissions is a second supplementary statement from Ms Collie which contains a final set of conditions as Attachment A2. This set of conditions reflects a significant degree of agreement between the planners for Bekon, TDC and NZTA. There are only two conditions in respect of which agreement has not been reached, being:

(a) Condition 5 – whether a definition of "height' should be included in the consent in relation to the parapet; and

(b) Condition 31 – relating to the wording of the review condition.

1.6 Both are addressed in Ms Collie's second supplementary statement and, briefly, in Section 7 below.

**Scope of Reply submission**

1.7 Bekon and its expert team have considered very closely the questions asked, comments made, and issues raised by the commissioner and submitters. This reply addresses those issues under the effects-related topic headings used in our Opening. Our perception is that many of the matters raised during the hearing were adequately addressed and, where that is so, they are not addressed in this reply. However, if there are matters that the commissioner considers needs to be addressed and have not been, we would be happy to do so.

1.8 As Commissioner Chrystal pointed out to Mr Struthers, his jurisdiction is confined to the matters that TDC has restricted its discretion to under 16.1.4.2 of the TRMP – traffic safety and amenity effects on the surrounding area. To the extent that Mr Struthers' presentation related directly to these issues, they are addressed under the appropriate heading below – the rest of his presentation in relation to the collection of information without his consent, etc., do not raise any additional issues relevant to the commissioner's assessment of the merits of the application and, therefore, are not addressed further in these submissions.

1.9 Against that background, these submissions address the following matters:

(a) Legal issues raised by Commissioner Chrystal (Section 2);

(b) Principles of sound decision-making – the weight to be accorded to the evidence presented (Section 3);

(c) Lighting (Section 4);

(d) Urban design / visual amenity (Section 5);

(e) Traffic safety (Section 6);

(f) Planning issues and conditions (Section 7); and

(g) Concluding remarks (Section 8).

## 2. LEGAL ISSUES

**Does the full parapet 'significantly alter' the character of the proposal?**

2.1 In terms of whether the amended proposal fell within the scope of the original application, we set out the legal tests arising from the *Darroch* line of authority in our Opening Submissions as follows:

> *"2.12 The well-known line of authority that commenced with the Environment Court's decision Darroch v Whangarei District Council*[1] *established the proposition that sensible modifications may be made to a proposal after notification and the lodging of submissions,*[2] *provided that they are within the scope of the original application but that a fresh application will be necessary if the amendments have the result of:*[3]
>
> > *"…increasing the scale or intensity of the activity…or by significantly altering the character or effects of the proposal".*
>
> *2.13 The extent of modifications that will be acceptable will turn on the facts and be a question of degree,*[4] *with the court considering whether the changes are:*[5]
>
> > *" … significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:*
> >
> > *The scale or intensity of the proposed activity, or*
> >
> > *The altered character or effects/impacts of the proposal."*

2.2 In this context, Commissioner Chrystal raised the issue of whether the amendments made had altered "the character of the proposal". Our response was that the character of the proposal has not changed to the extent that a DBB of the same character and dimensions as applied for is before the commissioner.

1 DC A018/93.
2 *Kaiuma Farm Ltd v Marlborough District Council* [2024] NZEnvC 150 at [65].
3 *Darroch*, above n 3, at 27.
4 *Kaiuma Farm Ltd*, above n 4, at [66].
5 *Atkins v Napier City Council* [2009] NZRMA 429 (HC) at [19]—[46]; endorsed by the High Court in *Collins v Northland Regional Council* [2013] NZHC 3039 at [24]-[25].

2.3 To the extent that it could be argued that the new full height parapet has arguably changed the "character" of the effects, or the "scale", of the proposal it is submitted that that issue is addressed by the permitted baseline established by the Tasman Resource Management Plan ("TRMP") which enables either of the parapet proposals to be established as a permitted activity ("PA").

2.4 Even if that were not the case, it is submitted that the amended proposal comfortably meets the *Darroch* tests in that the amendments reduce (or arguably eliminate) the potential adverse traffic safety and urban design effects of the proposal such that there is no theoretical third party that would have lodged a submission on the amended proposal who had not lodged on the original application.

**Environment Court decisions in which the issue of 'precedent' was addressed in the context of an RDA application**

2.5 Some of the submissions opposing the proposed DBB expressed a concern that a grant of consent would create a precedent for similar applications to be granted consent in the future. We cited *Dye v Auckland Council*[6] as authority for the proposition that the granting of resource consents does not create a precedent in a strict sense because, in factual terms, no two applications are ever likely to be the same.

2.6 Commissioner Chrystal raised the question of whether the issue of effects had ever been considered by the Environment Court in the context of an application for a restricted discretionary activity ("RDA").

2.7 This issue has been considered by that Court on two occasions (as far as we were able to ascertain).

2.8 The first is *Campbell v Napier City Council*.[7] That case involved an application for a resource consent to subdivide a 2.3 ha property into six lots, which required consent as a non-complying activity under the Transitional District Plan and as an RDA under the Proposed District Plan. Counsel agreed that very little weight should be accorded to the provisions of the Transitional Plan.

2.9 In response to a submission that there were other properties in the area that would be indistinguishable from the Applicant's property, such that it would be difficult to decline consent if the proposal was consented to, the Court (Judge Newhook presiding) stated:

> *"[59] <u>We struggle with the introduction of the concept of precedent to cases involving applications for (restricted) discretionary activity consents.</u> That concept, together with other concepts that are occasionally described as related, namely integrity of planning instruments, coherence, and public confidence in the administration of plans, have caused enough difficulty in relation to non-complying activity applications."*
>
> (Emphasis ours.)

6 [2001] 1 NZLR 337 (CA); opening submissions paragraphs 4.10-4.13.
7 ENC Wellington W67/05, 8 August 2005.

2.10 The Court went on to note a passage from *Rodney District Council v Gould*[8] that the RMA does not contain reference to the integrity of planning instruments, coherence, etc., and then went on to consider cases in which a potential precedent effect has been held to be relevant in the context of 'full' discretionary activity applications.[9]

2.11 The Court then considered the provisions of the District Plan which may raise issues of plan integrity and concluded:

> *"[65] Our finding is that 'precedent' or 'District Plan integrity' or 'consistent administration of the District Plans' are not raised by the relevant provisions of the District Plans."*

2.12 Given that a non-complying activity ("NCA") consent was required in that case, the Court was in that case was required to consider the broader provisions of the Transitional District Plan. Had it been considering an RDA application alone, it can probably be safely assumed that the Court would simply have recorded that precedent effects (or the other effects outlined above) had not been listed in the matters of discretion relevant to that RDA and dealt with the issue in that way.

2.13 That is precisely what happened *Kirton v Napier City Council*[10] which followed *Campbell.* That case involved an appeal against a decision by the Council to decline consent to an RDA application for a subdivision consent.

2.14 One of the issues that had been raised in opposing the proposal was precedent and district plan integrity. In that regard, the Court (Judge Dwyer presiding) made the following observations:

> *"[69] <u>The third determinative issue identified in the planner's statement is that of precedent.</u> This issue was principally articulated in the evidence of Mr Drury for the Council. He acknowledged that effects of precedent are not usually associated with applications for restricted discretionary activity, but contended that because this particular District Plan does not include any non-complying activities "… it should not be discounted that a restricted discretionary activity, in this case, could lead to such issues." (i.e. precedent). Mr Drury went on to contend that the effects in issue in this case were cumulative effects on rural character and amenity values and on safety and efficiency of the roading network.*
>
> *[70] Mr Holder* [the first instance hearing commissioner] *rejected Mr Drury's contentions in this regard in both his evidence in chief and his rebuttal evidence. Both he and Mr Williams (in his submissions) referred to the finding of this Court in Campbell v Napier City Council that:* [Quoting paragraph [65] from *Campbell* as set out in paragraph 2.11 above.]

8 HC Auckland CIV2003-485-2182, 11 October 2004 at [99]. .
9 *Manos v Waitakere City Council* [1994] NZRMA 353 at 356 (HC); [1996] NZRMA 145 at 148 per Gault J (CA).
10 [2013] NZEnvC 66.

> Our finding is that 'precedent' or 'district Plan integrity' or 'consistent administration of the District Plans' are not raised by the relevant provisions of the District Plans."
>
> *[71] Put another way, __the Court in Campbell found that the precedent effect of granting consent was not one of the matters over which Council had retained discretion in this District Plan and we concur with that. Mr Williams submitted that as a matter of jurisdiction there is no power to refuse consent to this proposal arising out of precedent concerns. We accept the evidence of Mr Drury and the submissions of Mr Williams in this regard.__"*
>
> (Emphasis ours.)

2.15 The reality is that the Court's reasoning in *Campbell* was not as straightforward as that due to the need to look at broader provisions of the plan due to the NCA application, but the logic and approach applied in *Kirton* is appropriate and should be applied in relation to the Bekon application.

2.16 The *Campbell* and *Kirton* cases were referred to by the High Court (per Gordon J) in *Auckland Council v Cabra Rural Developments Limited*[11] where it stated:

> *"[168] The Council also referred to case law which indicates that issues of precedent effect are unlikely to be able to be taken into account in the assessment of restricted discretionary activities unless this is a matter in respect of which discretion is restricted. This issue of precedent effect indicates that different considerations may apply to the assessment of rural subdivision applications for restricted discretionary activities as opposed to applications for non-complying activities."*

2.17 That issue was not explored any further in that decision, so it does not advance the matter beyond what was established in *Campbell* and *Kirton*.

2.18 Nevertheless, it is submitted that *Kirton*, at least, represents sufficient authority for Commissioner Chrystal to conclude that there is no jurisdiction, in the context of Bekon's application, to consider the issue of "precedent" (or related issues relating to plan integrity etc.) because this potential effect has not been specified as one of the two matters of discretion (traffic safety and local amenity) that needs to be assessed under Rule 16.1.4.2 of the TRMP.

**Whether positive effects can be considered in the context of an RDA application if such effects are not specified**

2.19 Commissioner Chrystal raised the issue of whether positive effects (benefits) can be considered in the context of an application for an RDA application if positive effects have not been specified in the matters of discretion – being a view that he had heard expressed.

2.20 This issue arose because, in answer to questions, Mr Munro expressed the view that the full parapet option represents a positive effect on the basis that

11 [2019] NZHC 1892.

it will enhance the corner, the building on which it will be placed, and the adjacent intersection. Ms Collie made a similar comment.

2.21 We are not familiar with any written commentaries that have expressed the proposition that positive effects cannot be assessed in the context of an application for an RDA application unless such effects have been specified. However, we submit that this proposition must, as a matter of principle, be incorrect, and that positive effects must be assessed if they arise, subject to the wording of the relevant criteria.

2.22 The basic propositions of our argument in support of that position are as follows:

(a) The first relevant factor is that, in terms of section 5(2)(c) of the RMA, the RMA is effects-based legislation. The definition of the term "effects" is deliberately broad:

> *"3 Meaning of effect*
>
> *In this Act, <u>unless the context otherwise requires</u>, the term effect includes—*
>
> *(a) <u>any positive</u> or adverse <u>effect</u>; and*
>
> *(b) any temporary or permanent effect; and*
>
> *(c) any past, present, or future effect; and*
>
> *(d) any cumulative effect which arises over time or in combination with other effects—*
>
> *regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*
>
> *(e) any potential effect of high probability; and*
>
> *(f) any potential effect of low probability which has a high potential impact."*

(b) Thus, prima facie, the starting proposition is that if positive effects arise in the context of a proposal, then those effects must be assessed "unless the context otherwise requires".

(c) There is nothing inherent in the context of RDAs that suggests that positive effects should not be 'on the table'. The RDA activity status is simply a mechanism by which a consent authority restricts the matters it can consider when assessing an RDA application; there is nothing in section 87A(3) that suggests or implies that this discretion reserved relates only to adverse effects.

(d) Rule 16.1.4.2(2) of the TRMP provides that the:

> *"…Council has restricted its discretion [to]…*
>
> *(2) Any amenity effect on the surrounding area…"*

(e) There is therefore nothing in "the context" created by that rule that suggests or implies that the consent authority is restricted only to assessing potential adverse effects. If one interpreted Rule 16.1.4.2(2) as excluding positive effects, one could just as equally

ask why adverse effects were also not excluded (both being unjustifiable), by virtue of the absence of any qualifier that might limit what effects are open for consideration other than that they must relate to amenity.

(f) That position would (or might) be different if the formulation in the rule stated "any potential adverse amenity effect on the surrounding area"; however, it does not do that. The TRMP contains many examples whereby 'adverse effects' is the specific type of effects to be considered – for example, Rule 17.1.2.5:

> *A community activity that does not comply with the conditions of rule 17.1.2.1 is a restricted discretionary activity. A resource consent is required. Consent may be refused or conditions imposed, only in respect of the following matters to which the Council has restricted its discretion:*
>
> *(1) The extent to which the activity will result in loss of residential character.*
>
> *(2) The ability to mitigate adverse noise and visual effects by screening of activities from adjoining roads and sites.*
>
> *(3) The scale of any building, structures and car parking compared to existing permitted development.*
>
> *(4) Adverse effects of the activity in terms of traffic and parking congestion on site and safety and efficiency of roads giving access to the site.*
>
> *(5) The duration of the consent and the timing of reviews of conditions.*
>
> *(6) Financial contributions, bonds and covenants in respect of performance of conditions.*
>
> (Emphasis ours.)

2.23 In our submission, the upshot of the above is that, as a general proposition, it is appropriate to consider positive effects that fall within the scope of the matters to which the consent authority has restricted its discretion. To do otherwise would be to fail to properly apply section 5(2)(c) of the RMA unless the wording of the relevant plan creates a context to the contrary.

2.24 This position is supported by the decisions of the Environment Court in *The John Woolley Trust v Auckland City Council*[12] and the High Court in *Auckland City Council v John Woolley Trust*[13], in which it was held that a consent authority may have regard to Part 2 matters in determining whether consent to an RDA should be granted, but not in determining whether consent should be refused. In that case, the High Court held that the Environment Court had been correct to conclude that matters relevant to the well-being and health

12 ENC Auckland A049/07, 12 June 2007.
13 HC Auckland CIV-2004-404-3787, 31 January 2008.

of the inhabitants of a house threatened by a large tree close to their property was relevant in determining an RDA application to remove the tree.

2.25 In deciding to grant resource consent to establish a primary school in a rural residential zone, the Environment Court in *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council*[14] followed *The John Woolley Trust* in taking into account, under Part 2 of the RMA, the benefits of increased social and cultural wellbeing and the enabling of people and the community of the provision of access to education.

2.26 This decision was appealed to the High Court, which was dismissed. The commentary explaining the High Court's decision from Salmon[15] states (case citations omitted):

> *"In dismissing the appeal against Ayrburn Farms Estates Ltd v Queenstown Lakes DC, the High Court considered that what the John Woolley Trust decision prohibited was the use of a matter under Part 2 of the RMA as an additional ground to decline consent, ie additional to the matters reserved for discretion. Part 2 could not extend the range of grounds for declining a consent beyond those specified in the plan; it could not bring additional matters into play, except when it came to granting a consent. However, Woolley was not authority for the proposition that a consent authority was prevented from looking at Part 2 to assist in interpretation of the matters reserved for discretion and to guide its interpretation of such matters. In the present case the Environment Court was obliged to have regard to any Part 2 matters which related to the matters over which the council had reserved its discretion, and its view that Part 2 was relevant only for the sole purpose of identifying benefit was wrong. However, as the error was not considered to be material, the appeal was dismissed."*
>
> (Emphasis ours.)

2.27 The upshot of the above analysis is that:

(a) Positive effects are able to be assessed under Part 2 of the RMA in deciding whether consent should be granted (although adverse effects cannot be used to extend the RDA criteria as a basis for declining consent); and

(b) In the context of the Bekon application, it is appropriate for Commissioner Chrystal to consider the positive effects of the parapet on the application site building and adjacent intersection, if that evidence is accepted.

2.28 Be that as it may, the point may be seen as somewhat moot in any event given our submissions that the amended proposal mitigates any potential adverse amenity effects to such a significant degree that a grant of consent is warranted in any event.

14 [2011] NZEnvC 98.

15 Salmon Resource Management Act 1991 (looseleaf ed., Thomson Reuters), Volume 1 at [1-788].

**Is Condition 17(b) (now Condition 18(b)) lawful?**

2.29 Commissioner Chrystal raised the issue of whether proposed Condition 17(b), relating to the assessment to be made as to whether a DBB image resembles a traffic light, is lawful. The relevant portion of the proposed condition states:

> *"17. Each image displayed shall:*
>
> *(a) …*
>
> *(b) Not use graphics, colours or shapes in combinations or in such a way that would cause the image to resemble or cause confusion with a traffic control device.*
>
> *(c)* etc. *…"*

2.30 There was discussion in relation to whether it was necessary for a TDC Team Leader or traffic expert to make the judgement as to whether an image complies with this requirement. The agreement reached, following further discussions between Ms Collie and Ms Woodbridge, is that the condition (now Condition 18) should remain in that form. Mr Talbot of NZTA is content with that.

2.31 The commissioner will be well aware that the classic tests for the validity of conditions following *Newbury*[16] and other authorities require that conditions must:

(a) Be for a resource management purpose, not an ulterior one.

(b) Fairly and reasonably relate to the development authorised by the consent to which the condition will be attached.

(c) Be reasonable in a *Wednesbury* sense.

(d) Be certain and enforceable.

2.32 It is submitted that the only requirements above that may call into question the validity of the condition relates to whether it is sufficiently certain to be monitored and enforced.

2.33 It is submitted that it is relevant in that regard that the intent of the condition is clear – it is intended to ensure that a driver will not mistake it for a traffic light or other type of traffic signal. The difficulties that can arise in making such a judgement were highlighted by Mr Carr. That does not change the fact, however, that the imposition of such a condition (along with others designed to minimise driver distraction, etc.) is commonplace throughout New Zealand.

2.34 To the extent that the intent is abundantly clear, it is submitted that it is not so uncertain as to be unenforceable – rather, it may simply give rise to some difficulties as to who is the appropriate person to monitor and enforce this condition, as raised by Mr Carr.

16 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

2.35 If the commissioner's concern as regards validity was the requirement that the determination about resemblance with traffic signals was "in the opinion of the Team Leader", that wording has now been removed from Condition 18(b) as it has been agreed.

2.36 The more important point to note is that TDC and NZTA both consider this condition to be important and want it imposed on the consent. Bekon readily acknowledges the need for a control of that nature and does not oppose it being proposed. On that basis, given the issue that has arisen as to the validity of the condition, Bekon is prepared to signal that it puts the condition forward under the principle in *Augier*[17] and is therefore precluded from later arguing that the condition is not valid and enforceable. At that point, the issue of validity becomes moot and need not be considered by the commissioner.

## 3. PRINCIPLES OF SOUND DECISION-MAKING – THE WEIGHT TO BE ACCORDED TO THE EVIDENCE PRESENTED

3.1 As the commissioner is well aware, the amendments that Bekon made to its application resulted in a situation in which there is no disagreement between any of the duly qualified experts regarding potential adverse effects in terms of traffic safety or local amenity – the matters of discretion in the context of Bekon's RDA application – have been satisfactorily addressed and that the effects are now such that a grant of consent is warranted.

3.2 Several issues were raised by lay local submitters in relation to:

(a) Urban design / visual amenity that needs to be weighed against the evidence of Messrs Moen-Compton, Munro and Milne;

(b) Traffic safety that needs to be weighed against the evidence of Messrs Carr, Harries and Fon; and

(c) Planning matters that need to be weighed against the evidence of Ms Collie, Ms Woodbridge and Mr Talbot.

3.3 This throws into bold relief the principles of sound decision-making that we are taught through the Making Good Decisions programme which, in turn, references relevant case law.

3.4 Counsel are well aware that the commissioner is completely au fait with these principles but, given the circumstances, they are addressed here for completeness and to assist submitters to understand the legal constraints that Commissioner Chrystal is working within.

### Criteria to be applied in assessing the weight to be accorded to expert evidence

3.5 In *Shirley Primary School v Christchurch City Council*[18], the Environment Court listed a range of criteria for determining the weight to be given to expert evidence.

17 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD), as followed in New Zealand in a number of cases.
18 ENC C136/98, 14 December 1998.

3.6 Relevant considerations included:[19]

(a) The strength of the witness' qualifications and experience;

(b) The reasons for their opinion;

(c) The objectivity and independence of the witness; and

(d) Whether there is a general acceptance of the science and methodology involved.

3.7 The following passage from the Making Good Decisions Workbook is to a similar effect and provides the following guidance:[20]

> *"The role of the committee is to reach a decision based on the evidence before it and planning matters at hand rather than disputes between the parties. In a hearing, the committee:*
>
> - *should be satisfied that any person submitting information or evidence who purports to be an independent expert witness is both independent and properly qualified and/or experienced in their area of expertise…*
>
> - *must take into account any expert opinion presented, although it:*
>   - *may reject expert evidence (even if it is not contradicted), such as where it is irrelevant to the case in hand*
>   - *<u>must give very good reasons for rejecting expert evidence that is central to the case</u>*
>   - *must identify areas, and the nature, of disputes between experts*
>   - *should resolve evidential and evaluative disputes through questioning*
>   - *<u>must form a judgement on the weight to be attached to particular evidence.</u>*

**Application of principles to the Bekon application**

3.8 In the *Shirley* case, these criteria were used to weigh competing evidence given by expert witnesses. In the context of this application the experts have agreed on all key matters in contention and such a comparative exercise is not necessary.

3.9 In the context of the Bekon application, the weighting exercise does not involve assessing the weight to be accorded to competing expert evidence but rather the credibility and weight to be accorded to the lay evidence

19 At [144].
20 Making Good Decisions: A resource for RMA decision-makers (5th ed., Ministry for the Environment) at [167].

presented over the expert evidence before the commissioner. The following passage from Making Good Decisions[21] may be helpful:

> *"Local submitters will often provide you with an understanding of the locality and an insight into what happens in that particular area, such as the frequency of flooding, the location of a pā site, the recreational value of a space or the dangers of a particular intersection. Submitters do not need to be experts in order to make a valuable contribution to the process. This may well have a bearing on interpreting professional expertise, such as expert evidence on the effects of traffic, water usage, wildlife or noise. However, hearings committee members may need to view such evidence with caution if it is not accompanied by objectively verifiable facts or supported by expert opinion."*

3.10 It is acknowledged that there are many cases in which lay witnesses from the local area can add significant value as a result of their insights and experience through their long experience of an area. That can particularly be the case in relation to the matters outlined in the passage above. However, it is submitted that this local experience is of lesser relevance in the context of the present application, given the clarity of the issues arising and the ability for Bekon's experts to express opinions in relation to the matters in issue.

**Bekon submission**

3.11 Before turning to the issues raised in relation to each relevant issue, it is submitted that in light of the expert evidence in support of the proposal and the complete absence of suitably qualified expert evidence opposing it, application of the of the principles of sound decision-making suggest that the commissioner has little choice but to grant consent to the DBB as now proposed, with the only outstanding issues being:

(a) Whether the 'full' or 'half' parapet is to be preferred. (We return to this issue below.)

(b) Conditions 5 and 31 that Ms Collie and Ms Woodbridge are apart on.

3.12 On that basis, the outstanding matters in relation to the key issues are essentially confined to issues raised during the hearing, primarily by the commissioner.

## 4. LIGHTING ISSUES

**Submitters' concerns – 'dark sky' issues**

4.1 Submitters' concerns in relation to amenity considerations were not particularly focussed on lighting effects, as opposed to the visual appearance of the billboard.

4.2 The two submitters who raised lighting as an issue and who attended the hearing - Mr Bradley for the Top of the South Dark Sky Committee, and Mr Struthers - raised issues in relation to the maintenance of the dark sky in the area. Both noted concerns that the increasing light emitting from the town of Richmond and other urban areas are adversely affecting the ability

21 *Making Good Decisions: A Resource for RMA Decision-Makers* (5th ed., Ministry for the Environment) at [167].

to view the night sky as a result of the glow being projected into the night sky.

4.3 The first point to note in this regard is that, predictably, one of the two matters that TDC has restricted its discretion to is local amenity – Rule 16.1.4.2(2) of the TRMP operates to restrict TDC's discretion to:

> *"(2) Any amenity effect on the surrounding area, including size and duration."*

4.4 The adjective "surrounding" is defined in the Oxford Learner's Dictionaries[22] as "that is near or around something."

4.5 On that basis, it is submitted that the WDSP or the general countryside outside Richmond, i.e., where Mr Struthers lives, does not form part of the "surrounding area" for the purpose of the above rule so that issues raised in relation to that area are beyond the scope of the commissioner's power to consider as relevant. Despite that, Bekon extended dark sky submitters the courtesy of engaging in "an objective, science-based" conversation with Mr Kern in order to allay their concerns and Mr Kern produced two reports to address the issues raised.

4.6 Mr Bradley noted that a perfect dark sky is 21.6 pixels per arc second of light. He is concerned that if the light in the night sky at Wai-iti drops below 21 pixels per arc second of light, the accreditation obtained by the Wai-iti Dark Sky Park ("WDSP") may be lost unless positive measures are adopted to address the increasing intensity of night time lighting.

4.7 To that extent, it is clear that Mr Bradley's presentation was a call for TDC to "step up" and honour a memorandum of understanding relating to dark sky issues. In that regard, Mr Bradley's submission states:

> *"2. The Council has promised in the MOU that created the Dark Sky Park, to put in lighting management plans that will protect the park. In the past four years it has not done so. Now is a clear opportunity for the TDC to step up and help meet its commitment to the community and not allow the increase in Light pollution this board will create."*

4.8 Mr Bradley was one of the submitters that Bekon reached out to, offering an objective, science-based conversation in relation to the technical issues arising. However, he did not take up that opportunity on behalf of WDSP on the basis that they are volunteers and they did not consider that any such discussions "would be effective". Bekon acknowledges that volunteer workers may have limited time but is disappointed that, after making this approach, WDSP did not have the courtesy to even reply to any of Bekon's communications.

4.9 Paradoxically, Ms Pollock, who lodged a submission as President of the Nelson Science Society also did not respond to Bekon's invitation to engage in an objective, science-based conversation.

4.10 Mr Struthers produced a number of photographs showing the night glow and expressing concerns similar to Mr Bradley. In that regard, Mr Struthers appropriately acknowledged that "one billboard will not make an appreciable difference - I admit that - it's the aggregate effect I am concerned about."

22 https://www.oxfordlearnersdictionaries.com/definition/english/surrounding

4.11 The only other 'dark sky' submitter was Mr Wilson. It is quite clear that Mr Wilson's concerns are philosophical in nature and suffer from the flawed assumption that an applicant for resource consent is required to prove some public benefit in order for a consent to be granted. His submission can safely be disregarded.

**The 'eyebrows' on the LED billboard face**

4.12 Mr Struthers directed a significant number of questions through the Chair which were designed to test the effectiveness of the 'eyebrows' which are placed on the DBB to limit upwards light and the effectiveness of the sensors that are that are installed in the DBBs to alter the luminance of the image to take account of ambient light.

4.13 It is sufficient to say that Mr Kern acquitted himself very well in dealing with Mr Struthers' questions and it is not proposed to address that issue any further. The short point is that these digital billboards are highly sophisticated pieces of equipment that now exist all over the world. The sensor in the DBB is a key element of that equipment. It is calibrated and tested at the outset and, once that occurs, cannot and does not alter. Mr Kern gave very clear evidence that this was the case as a result of the monitoring he undertakes for local authorities throughout New Zealand.

**Daytime and nighttime luminance limits**

4.14 In the conditions recommended as part of her section 42A Report and Addendum, Ms Woodbridge was keen to include specified timeframes for identifying "daytime" and "night time". This is understandable given the desire of planners to ensure that, in accordance with the principles outlined above, conditions are certain and enforceable.

4.15 However, as explained by Mr Kern during the hearing, the specification of particular time can result in situations in which the luminance of a billboard could either be too bright or too dim by reference to the timeframes specified in the conditions. In summary, due to the manner in which the sensors within the DBBs operate, the terms "daytime" and nighttime" are appropriate as they stand.

4.16 As it happens, the outcome of this conversation is that Condition 13 and its relevant Advice Note, as now agreed between Ms Collie and Ms Woodbridge states:

> *"13 The daytime and night time luminance of the signage shall not exceed:*
>
> *5000 CD/m$^2$ during daytime bracket (between sunrise and sunset).*
>
> *125 CD/m$^2$ during night time (between sunset and sunrise).*
>
> *…*
>
> *Advice Note: In terms of the lighting conditions:*
>
> *(a) For the purpose of defining and identifying day time, night time, sunrise and sunset please refer to LINZ Astronomical Data.*
>
> *A three-to-five minute lag in adjustment of brightness to changes in ambient levels is acceptable."*

4.17 On that basis, it is submitted that it is appropriate for the condition to simply refer to "daytime and night time" with the advice note providing sufficient guidance in the unlikely event that any dispute in that regard arises.

**Impact on Parkside motel**

4.18 Mr Kern confirmed that the lighting associated with the DBB would have no adverse effects in terms of sleep disturbance or amenity on occupants of the Parkside Motel at 42 Gladstone Road.

**Ability to monitor**

4.19 Mr Kern confirmed that monitoring of DBBs to confirm compliance with conditions is a straightforward matter and that that is a matter for TDC.

**Bekon submission - lighting**

4.20 For the reasons outlined above, the very clear evidence presented by Mr Kern demonstrates that the lighting associated with the proposed digital billboard will have no effect on the WDSP, even if that were relevant to the commissioner's assessment, in which they are not.

4.21 In light of the above, it is submitted that lighting issues do not represent an impediment to a grant of consent.

## 5. URBAN DESIGN ISSUES

5.1 Issues relevant to visual amenity and urban design were well canvassed at the hearing by reference to the expert evidence presented in relation to the parapet option. To our mind, none of the issues raised by submitters at the hearing directly addressed urban design issues other than to express a dislike for DBBs.

5.2 Based on the submissions made in Section 3, the commissioner can be satisfied that there is no evidence, lay or expert, that suggest that a grant of consent is not appropriate. However, a number of issues were traversed at the hearing that call for brief comment here (in no particular order).

**Positive effects**

5.3 In response to questions from the commissioner, both Mr Munro and Ms Collie considered that the full parapet would have positive effects of the amenity of the area. For the reasons outlined in Section 2 above, it is appropriate for these positive effects to be weighed in the balance in considering the merits of this proposal.

**'Full' or 'half' parapet?**

5.4 Bekon has put the full parapet as its preferred option on the basis of the traffic safety and urban design evidence it has received and accepted. That said, the 'half' parapet has significantly less significant financial implications for Bekon. On that basis, we have been instructed to advise that Bekon's Managing Director, Mr Jerard, that his preference, from that perspective is that the 'half' parapet option be approved if Commissioner Chrystal is prepared to do so. In that regard, the commissioner is reminded that:

(a) Messrs Compton-Moen and Munro were able to support the 'half' parapet option, whereas Mr Milne opposes it; and

(b) Per Ms Collie's comment, 'we are not striving' for perfection – in that regard, it is worth bearing in mind the degraded amenity of the area that enables Mr Compton-Moen to support a 'no parapet' option (which, to be clear, is no longer proposed).

5.5 Beyond that, we take the matter no further and can indicate that Bekon will abide the commissioner's decision in that regard.

**Visual clutter / cumulative effects / 'tipping point'**

5.6 Commissioner Chrystal explored with Mr Munro and Ms Woodbridge whether, given the existing signage in the area, a tipping point has been reached or passed in terms of cumulative effects.

5.7 Mr Munro described a scenario in which that had occurred and expressed the view that that scenario has not been reached and is not being approached by this proposal. Under questioning from the commissioner, Ms Woodbridge agreed.

**Views to the Richmond Hills**

5.8 As discussed at the hearing, views to the Richmond Hills are not protected in any away by the TRMP and would be obscured by a building that could be established as a permitted activity.

**Significance of the proposed State Highway bypass**

5.9 The issue arose as to whether the proposed Hope Bypass will this change the sensitivity of this location.

5.10 Mr Munro described, and Mr Carr confirmed, that the layout and function of the intersection would unlikely change following future completion of the Hope Bypass. The only implication would be a reduction in through traffic at the intersection. Consequently, there will unlikely be any change to the sensitivity of this location.

**Bekon submission – urban design and visual amenity**

5.11 In light of the above, Bekon submits that when the application is objectively assessed in light of the urban character and visual amenity of the surrounding environment, the Commissioner can safely and confidently conclude that these effects do not preclude a grant of consent.

## 6. TRAFFIC SAFETY

6.1 Again, issues relevant to traffic safety were extensively canvassed at the hearing by reference to the expert evidence of Messrs Carr, Harries and Fon. Given that there is no expert evidence to contradict that evidence, the commissioner can be satisfied that any issues that arise in this regard have been satisfactorily addressed by the amendments made to the proposal and now enshrined in the proposed conditions, namely:

(a) The re-orientation of the DBB so that it will not affect the attention of drivers using the left-turn slip lane onto the Richmond deviation;

(b) The increase in dwell time from 8 seconds to 30 seconds, thus significantly reducing the number of drivers who will view a change of image; and

(c) The stipulations relating to lettering height.

6.2 We will nevertheless briefly traverse issues raised during the hearing.

**Potential driver distraction**

6.3 The issues raised by lay submitters in relation to the DBB are all related to the poor safety record of the intersection and the potential for driver distraction. This issue was raised by Messrs Struthers, Beard and Ferguson.

6.4 Mr Struthers asserted that DBBs are "designed to detract" which we submit is a misleading proposition; granted, DBBs are designed to attract attention in order, as a legitimate form of media, to pass information to drivers and pedestrians who view it.

6.5 But the fundamental reality of the situation is that just because a particular object or feature (be it a DBB, an interesting building, a historic or geological feature, or whatever) is visible, it does not axiomatically that it is a source of driver distraction and therefore a traffic hazard. That has been proven by the fact that, despite the several hundred DBBs that have been established in New Zealand since the first DBB was established in Auckland in 2012, no crashes whatsoever have been attributable to a DBB, as demonstrated by the evidence presented by Messrs Carr and Harries.

6.6 Mr Beard underpinned the credibility of his evidence by indicating that he has been a driving instructor for 24 years which provides him with a somewhat greater insight into the complexities of the driving task, particularly for new drivers. The relevance of his experience in that regard is acknowledged. It falls into a category of expertise known as "human factors", experts who (claim to) have a particular insight into the manner in which human beings react to different stimuli in different situations.

6.7 It is noted in that regard that Mr Harries is more qualified than Mr Beard to present expert evidence in relation to 'human factors' issues as a result of his specialist training as a crash investigator. In that regard, Section 1 of Mr Harries' evidence notes the following:

> *"1.8 As part of this broader experience, I have gained significant experience and expertise in human factors associated with driver behaviour, and the safety related driver responses to various traffic environments. Much of this expertise has been obtained through my involvement as an expert forensic vehicle crash analyst. I have qualifications in vehicle crash analysis from Northwestern University in Chicago and am one of a small handful of professional engineers in New Zealand who, through qualifications and experience, has been accepted as an expert vehicle crash analyst in the High Court of New Zealand.*
>
> *1.9 I describe this background in crash analysis because it is directly relevant to the assessments I routinely undertake in relation to the driver behavioural and performance responses to potential visual stimuli that make up the traffic environment, including those that are directly related to the driving task (for example, traffic control devices, other road users, road layout, etc.), and those that form part of the fabric of the wider driving environment (such as surrounding activities, people, scenery, buildings, and of course advertising signs and billboards)."*

(Emphasis ours.)

6.8 And if the commissioner needs any reminding of the level of experience / expertise before him, Mr Harries' evidence goes on to say:

> *"1.10 With regard to experience that is particular to the assessment of the road safety effects of signs and billboards, I estimate that over the past 13 years I have undertaken or contributed to the formal assessment of over 350 digital signs and billboards throughout New Zealand.*
>
> *1.11 In addition to the assessments undertaken for consenting purposes, I have also been involved in numerous post-consent reviews of road safety performance at operating digital sign and digital billboard sites, typically as part of monitoring conditions of consent."*

6.9 Mr Carr's credentials are similarly impressive. More importantly, Mr Carr is the only person who has undertaken independent 'zero-based' research, as discussed at the hearing.

6.10 In dealing with allegations of driver distraction, the commissioner may not be aware that we are in a 'brave new world' in terms of NZTA's approach to this issue. In that regard, NZTA has routinely raised driver distraction as an issue of traffic safety at hearings in relation to DBBs. NZTA's approach in terms of its interest in this issue varied – there are examples where, after forcing the need for notification, NZTA did not attend the resulting hearing.

6.11 For a period in 2022-2023, NZTA attended hearings to oppose DBBs on the basis of driver distraction and called a "human factors" expert, Hamish Mackie, to support their case. Senior counsel for Bekon represented the unfortunate applicants on both occasions, being:

(a) An application to establish a DBB in Te Aro, Wellington where the applicant called expert evidence from Mr Harries and Graham Norman of Commute Transportation Consultants.

(b) An application to establish a DBB at 180-184 Hilton Highway, Timaru where the applicant called expert evidence from Mr Harries and Mr Carr.

6.12 In both cases, NZTA mounted a comprehensive case focussing on driver distraction based in large measure on human factors issues and in both cases NZTA failed to make its case before respected hearing commissioners.

6.13 In that regard, in response to a question asked by the commissioner, although Mr Carr's independent zero-based research has not been tested before the Environment Court, it was the subject of close scrutiny by Commissioner Allan Cubitt in the *Anstar* case. In making his findings as between NZTA's expert evidence and the expert evidence of Messrs Harries and Carr, Commissioner Cubitt's decision states:

> *[51] Mr Berry equated, correctly in my view, 'intuition' with 'suspicion' and submitted that the WK experts are "relying on intuition rather than objectively verifiable evidence" so "we are in, or very close to, a 'mere suspicion' scenario that the Court warned decision-makers against."*
>
> *[52] I agree with Mr Berry that in terms of the evidentiary tests set out in McIntyre v*

*Christchurch City Council … <u>the WK evidence is not of 'sufficient probative value'. This contrasts with evidence presented by Mr Carr and Mr Harries, which relies on empirically based international research, relevant to how the proposed digital billboards will operate. They have also 'ground-truthed' this evidence through their own research within New Zealand and their first-hand experience in monitoring the safety effects of billboards around New Zealand</u>."*

(Our emphasis.)

6.14 In an equivalent finding by Commissioner Angela Jones in relation to a DBB in Miramar, Wellington, Commissioner Jones found that the evidence of the applicant's traffic experts was based on a significant body of national and international research whereas Waka Kotahi's position was premised on a 'theory' of distraction and correlation, based on the simplistic reasoning that digital billboards are designed to attract attention, ergo are distracting to drivers, ergo are a traffic safety hazard.

6.15 Commissioner Jones found that the RMA is not a 'no risk' statute and that, while relevant, NZTA's Road to Zero and Vision Zero strategies are not an appropriate benchmark for assessing risk in the context of resource consent applications.

6.16 It would appear that, in light of these outcomes and findings, NZTA has abandoned its approach of opposing DBBs based solely on driver distraction in favour of an objective consideration of the merits of each application. In the context of this application, this has resulted in the engagement of Mr Church and an outcome in which potential distraction issues were acknowledged and addressed by mitigation measures specifically designed to address the circumstances arising.

6.17 As counsel for the Outdoor Media Association of Aotearoa and many DBB operators, we commend NZTA for this change in stance.

6.18 Either way, it is clear that in the context of the Bekon application, traffic safety issues arising as a result of driver distraction have been well and truly canvassed and an objectively verifiable and sound outcome from a traffic safety perspective has been arrived at.

6.19 Some minor traffic-related issues, e.g., the impact of the proposed Hope Bypass, were raised, but none seemed to be of significant moment to alter the inescapable conclusion that traffic safety issues are not a reason to decline consent for the Bekon proposal.

**Bekon's submission – traffic safety**

6.20 All traffic experts both agree that potential traffic safety effects generated by the proposed DBB, as amended, will be acceptable. On that basis, it is submitted that there are no valid reasons from a traffic safety perspective for consent to be declined.

## 7. PLANNING ISSUES AND CONDITIONS

7.1 As is apparent from the evidence / reports circulated, there is no disagreement between Ms Collie, Ms Woodbridge and Mr Talbot on the key 'planning' issues arising.

7.2 There are no substantive outstanding issues between the suitably qualified planning experts in relation to this application. On that basis, it is not necessary to address a number of minor issues raised, other than out of deference to the relevant submitters to note the following.

**'Not fair' for third party advertising to compete with local signage / businesses**

7.3 Mr Ferguson owns (or controls a company that owns) a building adjacent to the application site. He expressed a concern that it was somehow "not fair" for the on-premise signage in the vicinity to be required to compete with the third party advertising that will be displayed on the DBB.

7.4 The basis for this concern was difficult to ascertain, and Mr Fergusson did not appear to be willing to concede that the local businesses, that he is the self-appointed spokesman for, could avail themselves of the opportunity to advertise on a digital billboard on this high-profile location in very close proximity to their businesses.

7.5 Either way, Mr Ferguson's philosophical concerns are not a matter that relates to any type of effect that has been recognised under the RMA, nor falls squarely within either of the matters of discretion specified in rule 16.1.4.2 of the TRMP. On that basis, it is submitted that his concerns in this regard can safely be disregarded as irrelevant.

**Monitoring of DBB content**

7.6 Mr Struthers expressed a concern about the ability of TDC to monitor the content of the Bekon DBB to ensure that its content (and presumably compliance with letter heights) need to be complied with.

7.7 First, the advice notes record that the requirements of the Advertising Standards Authority ("ASA") apply. In that regard, Bekon will only be providing 'the platform' for advertising agencies, which develop campaigns for clients to ensure that the content to be included on the DBB images comply with ASA requirements and any specific restrictions imposed by the conditions of consent for that DBB.

7.8 The short point is that other than in the most extreme places, that is not a matter for TDC and this need not be a sufficient concern for the commissioner to factor into whether consent should be forthcoming.

**Conditions**

7.9 Per the second supplementary statement of Ms Collie, agreement has been reached between Ms Collie and Ms Woodridge in relation to two conditions:

(a) Condition 5 – relating to the height of the parapet; and

(b) Condition 31 – relating to the scope of the review condition.

7.10 As regards Condition 5, Ms Woodbridge wishes to include a definition of 'height' from the TRMP, which Ms Collie opposes for the following reasons[23]:

> *"2.2 Ms Woodbridge would like to include a condition limiting the height of the parapet to 9.3m, which is the design height recorded in the DCM Plans, Revision O. I consider the condition to be*

[23] Anita Collie, Second Supplementary statement.

> *unnecessary as the plans are referenced by Condition 1.*
>
> *2.3 Further, I consider this condition potentially creates compliance uncertainty if the building owner ever wanted to put a second storey on the building, which they could do as a permitted activity under the Tasman Resource Management Plan (**TRMP**). However, this is a minor matter."*

7.11 As regards Condition 31, Ms Collie explains in her Second Supplementary Statement[24] that Ms Woodbridge prefers a broad approach to the drafting of Condition 31(b), whereas she prefers a more specific formulation for the following reasons:

> *"(a) The volume and thoroughness of evidence on traffic safety ensures that the effect is comprehensively assessed and there is a reasonable degree of certainty;*
>
> *(b) It is more consistent with the restricted discretionary activity status and matters of discretion;*
>
> *(c) That effects on traffic safety can most appropriately be adjusted through the matters listed in my preferred drafting of the review condition (i.e., dwell time or rate of transition of the image or the use of the screen); and*
>
> *(d) Conditions are proposed regarding monitoring of traffic safety, incorporating requirements for actions to be taken and further monitoring to be undertaken, and these conditions are directive to the relevant issues."*

7.12 Having said that, both formulations would be effective and Bekon will abide the commissioner's decision on this issue.

**Bekon submission – planning issues**

7.13 Given the high degree of agreement between the three planning experts and the absence of evidence to the contrary, it is submitted that the DBB as now proposed is consistent with the intent of the TRMP and sound planning principles.

## 8. CLOSING SUBMISSION

8.1 The Applicant has taken a considerable amount of care to ensure that any adverse effects arising from the proposed DBB have been identified, assessed and appropriately mitigated.

8.2 In conclusion, it is respectfully submitted that granting the consent sought represents sound resource management planning that is consistent with objectives and policies of the TRMP and would promote the sustainable management purpose of the RMA.

[24] At paragraphs 2.4 – 2.6.

8.3 Counsel and the Applicant would like to thank:

(a) Commissioner Chrystal for the manner in which the hearing was conducted which enabled a thorough canvassing of issues in an efficient and effective manner.

(b) TDC officers for facilitating the hearing and for the smooth administration of the process, and TDC advisors for their willingness to constructively engage in relation to mitigation measures.

(c) Submitters for their input, in particular NZTA for its preparedness to constructively engage in relation to traffic safety issues.

8.4 We wish Commissioner Chrystal well for his deliberations.

**DATED 12th November 2024**

**S J Berry / B S Morris**

**Counsel for Bekon Media Limited**