

**BEFORE AN EXPERT CONSENTING PANEL**

**UNDER** the COVID-19 Recovery (Fast-track Consenting) Act 2020

**IN THE MATTER** of an application by Silk Road Management Limited,  
Pudong Housing Development Company Limited and  
Foodstuffs North Island Limited in relation to the Dominion  
Road Mixed-use Development

---

**MEMORANDUM OF COUNSEL RESPONDING TO MINUTES 8 AND 9  
REGARDING LAWFULNESS OF CONDITIONS**

**22 August 2021**

---

---

**ELLIS GOULD  
LAWYERS  
AUCKLAND**

**REF: D A Allan / D J Sadlier**

**Level 17 Vero Centre  
48 Shortland Street, Auckland  
Tel: 09 307 2172 / Fax: 09 358 5215  
PO Box 1509  
DX CP22003  
AUCKLAND**

## MEMORANDUM OF COUNSEL ON BEHALF OF THE APPLICANT

May it please the Panel:

### ***Introduction***

1. In paragraph 4 of Minute 9, the Expert Consenting Panel:

*... requests the applicants to respond to the tentative view expressed by the Panel in Minute 8 on the lawfulness of the condition referenced in paragraph 10 of the Memorandum of Counsel on behalf of the applicants dated 13 August 2021, and provide proposed wording of such a condition.*

2. The relevant part of the Panel's Minute 8 (para 6(g)) reads as follows:

*... the Panel is of the tentative view that it should not address this issue by way of condition. Without mitigation, the traffic safety effects are not acceptable. It may be possible to mitigate those effects by signalling the intersections. However, that is not yet known. Therefore this is not a situation where the prior establishment of known mitigation can be listed as a condition precedent. The issue here is whether the traffic safety effects can be appropriately avoided, remedied or mitigated. The Panel must determine this issue, and cannot delegate this decision to another person via a condition of consent.*

3. The Panel referenced the decisions in *Westfield (New Zealand) Limited v Hamilton City Council* [2004] NZRMA 556, and *Turner v Allison* [1971] NZLR 833 as authority for the tentative view expressed in Minute 8 and set out above.

### ***Proposed condition of consent***

4. Paragraph 10 of the applicants' 13 August memorandum of counsel reads as follows:

*... Given the work undertaken by the applicant confirms that there is at least one appropriate mitigation option available, if the Panel were minded to, it could condition any consent it grants to the application to require further collaboration between the applicant and Auckland Transport to determine which of the options (signalisation of Grange, Prospect or less likely both intersections) should be preferred and implemented.*

5. Paragraph 10 (set out above) was intended to convey that:

- (a) The additional modelling and refinement undertaken by the applicant's consultant team (TPC, Beca and Flow) demonstrates that Scenario D (refined) will appropriately mitigate traffic and pedestrian safety effects identified as the crucial issue by the Panel in para 6(g) of Minute 8, while continuing to have acceptable traffic effects overall.

- (b) Accordingly, the prior establishment of known mitigation is able to be listed as a condition precedent of any consent that the Expert Consent Panel chooses to grant to the application.
- (c) Further, although Scenario D (refined) is identified as an appropriate mitigation package, the Panel may still provide through condition of consent for ongoing dialogue between the applicant and Auckland Transport (which is required in relation to the engineering approval process in any event) which might lead to an improved mitigation package.

6. Such a condition might be worded as follows:

A. *Prior to the opening of the supermarket activity on the site either:*

(a) *Signalisation of the Prospect Terrace/Burnley Ave/Dominion Road intersection, and the associated works to the Prospect Terrace/Burnley Terrace/Dominion Road and Grange Road/Dominion Road intersections, shall be implemented, as described in, and illustrated on the plans attached as Attachment 5 to, the evidence of Todd Langwell, dated 13 August 2021; or*

(b) *An alternative mitigation package, agreed in consultation with Auckland Transport, shall be implemented which will achieve, to the satisfaction of the Council's Development Engineer, the same or better standard of mitigation of traffic and pedestrian safety effects as the mitigation measures described in (a) above.*

7. Alternatively, in the event that the Panel does not agree that condition A(b) above is lawful, but is nonetheless persuaded by the applicant's evidence that the Scenario D (refined) mitigation package will appropriately mitigate traffic and pedestrian safety effects, clause A(a) could be consolidated and reworded as follows:

X. *Prior to the opening of the supermarket activity on the site, signalisation of the Prospect Terrace/Burnley Ave/Dominion Road intersection, and the associated works to the Prospect Terrace/Burnley Terrace/Dominion Road and Grange Road/Dominion Road intersections, shall be implemented, as described in, and illustrated on the plans attached as Attachment 5 to, the evidence of Todd Langwell, dated 13 August 2021.*

***Legal principle – unlawful delegation of judicial power***

8. The applicant submits that condition A set out in paragraph 6, including clause (b), comprises an appropriate and lawful condition:
- (a) Pursuant to section 108AA of the RMA, the condition is connected to an adverse effect of the activity on the environment (s108AA(1)(b)) and in any event, the applicant agrees to the condition (s108AA(1)(a)).
  - (b) In terms of the *Newbury* tests, the condition:<sup>1</sup>
    - (i) Serves a resource management purpose, not an ulterior one;
    - (ii) Fairly and reasonably relates to the development for which the applicant seeks consent, and to which the condition attaches; and
    - (iii) Is reasonable in a *Wednesbury* sense.
9. Furthermore, proposed condition A does not amount to an unlawful delegation of the Expert Consenting Panel's decision:
- (a) It provides certainty as to the appropriate standard of mitigation that is required and does not delegate to a third party a discretion to set the relevant standard or resolve any dispute.
  - (b) It enables continued engagement with the asset owner and operator to develop alternative mitigation options, with an independent Council officer able to exercise his or her skill and experience to certify whether such mitigation option(s) will result in the same or better standard of effects mitigation.
10. In the applicant's submission, this approach is consistent with the principle in *Turner v Allison* referred to in the Panel's Minute 8, and how that principle has been applied by the Courts. For example, see:

---

<sup>1</sup> *Newbury DC v Secretary of State for the Environment* [1981] AC 578.

- (a) *Olsen v Auckland City Council* [1998] NZRMA 66 – The High Court dealt directly with the applicability of the principles set out in *Turner v Allison*. *Olsen* related to a condition of a designation enabling excavation and construction of the Britomart transport centre in downtown Auckland. The particular condition challenged provided that “*The maximum allowable horizontal and vertical ground movements shall be approved by the Manager prior to the commencement of construction.*” The Court held that delegation to an officer considered to have the necessary skills to make decisions regarding ground movement did not offend the principle in *Turner v Allison*, as the condition required the exercise of judgement, not the resolution of a dispute. The relevant council officer was held to have the necessary skill and experience to make such a judgment, notwithstanding that he would take appropriate professional advice before giving any approval.
- (b) *Pinetree Park Ltd v North Shore City Council* [1996] NZRMA 401 – the High Court held that a condition requiring the North Shore City’s manager to be “*satisfied that an intersection had been constructed so as to provide a safe traffic environment for a service station*” was appropriate and did not comprise an unlawful delegation of judicial functions.
- (c) *Aspros v Wellington City Council* [2019] NZHC 1684 – The High Court held that conditions allowing for the design approval, and construction of earthworks, to be provided by a professional engineer and approved by the Council, were lawful. The Court held that (at [117]) “*a consent authority is not required to settle every detail of the conditions imposed. A condition may leave the certifying details to a delegate, using that person’s skill and expertise, but a council cannot delegate the making of substantive or arbitrate decisions.*”

### **Conclusion**

11. In the applicant’s submission, proposed condition A provides a specific, appropriate standard for the mitigation of pedestrian and traffic safety effects, which provides certainty to the Panel in terms of its judicial or arbitral functions in the present case. To the extent that clause (b) of Condition A allows a departure from that specific mitigation package, the

condition is clearly in the nature of a “certifier” condition that does not involve an unlawful delegation of the Panel’s functions. The Council’s Development Engineer will have the skill and experience necessary to determine whether an alternative mitigation package will have improved traffic and safety effects, albeit he or she may need appropriate specialist advice to inform that decision.

12. Accordingly, the applicant respectfully requests that the Expert Consenting Panel grant consent to its application, subject to proposed condition A set out above. However, in the event the Panel were not persuaded as to the legality of clause (b) of proposed condition A, the Panel is able to grant consent subject to condition X, which would provide certainty in the form of a condition precedent that will ensure effects are appropriately mitigated.

**DATED** this 22<sup>nd</sup> day of August 2021



---

**Douglas Allan / Daniel Sadlier**

Counsel for Silk Road Management Limited,  
Pudong Housing Development Company  
Incorporated and Foodstuffs North Island Limited