

**IN THE MATTER OF  
AND  
IN THE MATTER OF**

the Resource Management Act 1991

a resource consent application by Darryl Berwyn Ellis to Porirua City Council for Land Use Consent for retrospective extensions to an existing cafe, including increasing the maximum number of patrons to 65, as well as further increases to the building and expanding the car park at 15 Paekakariki Hill Road, Pauatahanui, Porirua

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**DECISION OF THE HEARING COMMISSIONER APPOINTED BY  
PORIRUA CITY COUNCIL PURSUANT TO SECTION 34A OF  
THE RESOURCE MANAGEMENT ACT 1991**

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**Independent Commissioner:**

Mark St.Clair

**08 January 2015**

## APPOINTMENTS

- [1] Pursuant to section 34A of the Resource Management Act 1991 (RMA), independent commissioner Mark St Clair was appointed as a commissioner by the Porirua City Council (PCC) to hear and determine the application lodged by the “Applicant” Darryl Berywn Ellis for Resource Consent RC6516 – LU0075/13 for land use consent for retrospective extensions to an existing cafe, including increasing the maximum number of patrons to 65, as well as further increases to the building and expanding the car park.

## PROCEDURAL MATTERS

### Scope

- [2] Ms Grimmatt, (planning consultant for Pauatahanui Residents Association (PRA) and L & G Frederikson), in her evidence<sup>1</sup> and Ms Hannah Gray (Submission #286) in her presentation at the hearing raised issues as to the scope of the application. In particular Ms Grimmatt referred to the difference between the application as notified and the Applicant’s response to the officers hearing report regarding change in number of car parking spaces. Ms Gray, drew my attention to the changes made to the proposal since notification, noting that the submitters were over this same time period were unable to change their submissions to address the changes to the proposal. This latter point going to fairness of the process.
- [3] Mr Quinn (counsel for the applicant) referred to case law regarding the scope of applications<sup>2</sup> and mitigatory aspect of the change to the car parking layout which he submitted was in response to concerns of a majority of submitters<sup>3</sup>. I accept Mr Quinn’s submission and consider the amendments to be within the scope of the application.
- [4] In regard to Ms Gray’s point, I note that Mr Smith, in response to matters raised in the hearing, noted that the application was notified without all the information (notably signage details and traffic assessment), in line with section 95C(2)(a) of the RMA, which requires an application to be notified if an applicant does not provide that requested information within a set timeframe. I note that this information was provided later. In addition I note that changes to an application after notification are not unusual where an applicant responds to concerns raised by submitters. In addition, submitters can raise at the hearing any further matters in regard to changes to the application and the opportunity for submitters to do so was provided.

### Late Submissions

- [5] Two submissions to the proposal were received after the close of the submission period. These were submissions from Mrs Jo & Mr Eric Thomson (Submission #2) and Mr Timothy Handscomb (Submission #5). Both submissions were in opposition to the proposal. The submissions were received one and four days after the close of the submission period, respectively.

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<sup>1</sup> Planning Evidence of Ms J Grimmatt for Frederikson Submission, 12 Nov 2014, Page 8, Para 41 and Planning Evidence of Ms J Grimmatt for Pauatahanui Residents Association Submission, 12 Nov 2014, Page 8, Para 43

<sup>2</sup> Darroch v Whangarei District, Planning Tribunal A 18/93 at p 27 and Shell New Zealand v Porirua City Council, High Court, [2005] BCL 292 at [36]

<sup>3</sup> Opening Submissions of Mr Quinn for Applicant, 17 November 2014, Page12, para 42

[6] As noted in the Hearing Report, Section 37A of the Resource Management Act 1991 sets out the matters that should be taken into account when considering whether the time for receiving submissions should be waived:

*(1) A consent authority or local authority must not extend a time limit or waive compliance with a time limit, a method of service, or the service of a document in accordance with section 37 unless it has taken into account—*

- (a) the interests of any person who, in its opinion, may be directly affected by the extension or waiver; and*
- (b) the interests of the community in achieving adequate assessment of the effects of a proposal, policy statement, or plan; and*
- (c) its duty under section 21 to avoid unreasonable delay.*

[7] The report goes on to note that the sole person affected by the late submissions is the applicant and that while the submissions do not raise any new issues not addressed in the submissions of others, no unreasonable delay has occurred and the officer recommends that the late submission be received. At the commencement of the hearing I gave Mr Quinn, counsel for the Applicant, the opportunity to respond to this matter. Mr Quinn had no objection to receiving the late submissions. Therefore I accept the submissions of Mrs Jo & Mr Eric Thomson (Submission #2) and Mr Timothy Handscomb (Submission #5).

### **Directions**

[8] I issued initial directions on 12 September 2014 providing hearing details and procedures. This included timeframes for the pre-circulation of evidence from all parties.

[9] I issued a further minute (Minute #2 dated 23 October) amending the timetable for pre-circulation of expert evidence for the applicant and submitters, due to a request by the applicant's planner for a delay in submitting evidence. This minute also included a later date for the provision of expert evidence for the submitters.

[10] I note that those directions were complied with and the material distributed to all parties prior to the hearing.

[11] On 11 November 2014, I also issued a minute (Minute #3) providing a specific time for Mr Frazer (Submission #22) to speak to his submission at the hearing due to Mr Frazer leaving for overseas later that day.

[12] Following the applicant's right of reply I issued Minute #4 dated 20 November 2014 seeking a legal opinion regarding issues of giving effect to any granted consent and an associated condition (I address the details of this matter later in the decision). That opinion was distributed to the parties with a request for the parties to indicate if they wished to address any matters raised in that opinion by 5pm Friday 28 November 2014. Three parties, the applicant, Mr Bevan for Mr And Mrs Patel (Submission #224) Mr Tizard for the Pauatahanui Residents Association (Submission #48) wished to address this matter. I issued a minute (Minute #5 dated 1 December 2014) requesting that the issues be put in writing and lodged with Council by 5pm Wednesday 3 December 2014 for the submitters and 5pm Friday 5 December 2014 for the applicant. These minutes were complied with.

[13] On 4 December 2014 I issued a minute requesting from the applicant identification on a plan of the area of the legal site that is subject to this application, to be shown in

square metres. This plan was received from the applicant on 5 December 2014, in line with the time table recorded in the minute.

- [14] Copies of all the information requested by the minutes were made available to all parties by Council officers.

### Site visit

- [15] I undertook a site visit on the morning of the 15<sup>th</sup> November 2014 to familiarise myself with the subject site and the surrounding environment prior to the hearing. I undertook an additional site visit on the 1<sup>st</sup> December 2014.

### Decision format

- [16] I have had regard to the requirements of section 113 of the RMA when preparing this decision. In particular I note and have acted in accordance with section 113(3) which states:

*“A decision prepared under subsection (1) may, -*

*(a) instead of repeating material, cross-refer to all or a part of -*

*(i) the assessment of environmental effects provided by the applicant concerned;*

*(ii) any report prepared under section 41 C, 42A, or 92; or*

*(b) adopt all or a part of the assessment or report, and cross-refer to the material accordingly.”*

- [17] During the course of the hearing it became apparent that there were particular resource management issues in regard to parking/traffic, noise, amenity and stormwater effects. I therefore focused my questions on these matters that related to the overall appropriateness of the proposal. I have consequently focused my decision on those same matters.

- [18] I also note that both in the submissions and in the matters raised at the hearing, there were numerous requests made for me to make decisions that are not within my jurisdiction. I made the point of advising a number of parties as such at the hearing. These include disputed leases, health regulations, potential future expansion, water supply and wastewater discharges. I note that in regard to these last two matters that the Café is on reticulated water supply (supplemented by a bore), and wastewater is now connected to a reticulated system (the septic tank having been removed). In addition, in regard to these two matters, Mr Hopman, an engineer from Wellington Water, involved in the water/sewerage reticulation project for the Pauatahanui area confirmed that the café as proposed was within the design capacity of the water supply and sewerage systems. As noted above, my focus is on the resource management issues of the application before me.

- [19] In addition, I was also requested by some submitters to consider imposing some form of penalty on the applicant when granting or declining the application, given that this is a retrospective application. As Mr Quinn (counsel for the Applicant) pointed out in his submissions, there is case law<sup>4</sup> directing me not to do so. I record that I have not done so. I do not address these matters any further in the decision.

### Legal Opinion

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<sup>4</sup> Mr Quinn, Synopsis of Applicant's Right of Reply, Para 18

- [20] As noted in paragraph 12 above, I sought a legal opinion asking two questions and the parties were provided the opportunity to respond to that opinion. The questions were as follows;
- Is it lawful to grant a resource consent that relies on car parking requirement that may not be able to be given effect to?
  - If consent were to be granted, would there be any issues with a condition of consent requiring a reduction in maximum patronage or seat numbers to reflect a reduction in car parking able to be provided?
- [21] I do not replicate the legal arguments put forward in the opinion or the responses from the parties. Rather, having considered those submissions and the case law cited, I have concluded that it is possible to grant a resource consent that relies on car parking requirement that may not be able to be given effect to and that a condition reducing maximum patronage or seating numbers relative to the parking spaces provided is a valid approach. In reaching this conclusion I have relied on *Maclaurin v Hexton Holdings Limited [2008] NZCA 570 (CA)*.

## THE APPLICATION PROCESS

- [22] CGM+Foster Architects Ltd (CGM+Foster) lodged on behalf of Darryl Berwyn Ellis a resource consent application with the Porirua City Council for retrospective extensions to an existing cafe, including increasing the maximum number of patrons to 65, as well as further increases to the building and expanding the car park at 15 Paekakariki Hill Road, Pauatahanui (the subject site) in 1 August 2013.
- [23] PCC requested further information and clarification on the information that was provided. The Council considered that there was insufficient information provided to process the application and the applicant agreed to notification.
- [24] The application was publicly notified on the 28 January 2014 with the submission period closing on the 27 February 2014.
- [25] PCC received 285 submissions (Numbered 2 – 286), of which 224 were in support and 61 in opposition (or partial opposition). Two of those submissions were received after the closing period and I have dealt with those above.
- [26] A summary of the submissions was detailed on pages 9-11 of the section 42A Resource Management Act (“**RMA**”) report (“**the Hearing Report**”) prepared by Mr Stuart Smith, Planning Officer at PCC, for the hearing and is not repeated here.
- [27] I record that I have read the submissions in full and that I have had regard to them as part of my evaluation of the application.

## THE HEARING and ATTENDANCES

- [28] The hearing was held in the Council Chamber, PCC, Hagley Street, Porirua from Monday 17<sup>th</sup> November 2014 through to Wednesday the 19<sup>th</sup> November 2014. At this stage I adjourned the hearing until I had received a legal opinion (See paras 20 – 21 above).
- [29] Having received that legal opinion, comments on the legal opinion from any of the parties, and a plan showing the area of the “application site” I determined that no further information was required. I then closed the hearing on the 8<sup>th</sup> December 2014 by way of a minute.
- [30] The following parties and witnesses appeared.

### **Applicant**

[31] The following presented at the hearing on behalf of applicant:

- Mr Stephen Quinn, Legal Counsel.
- Ms Angela Fletcher, Architect.
- Mr David Wanty, Traffic Engineer.
- Mr Ian Leary, Planning Consultant.

### **Submitters**

[32] The following submitters presented at the hearing:

- Mr Andrew Frazer, 6 Paekakariki Hill Road (Submission #22)
- Mr Stephen Lowe, 3 Lodestar Lane, Whitby (Submission #34)
- Letter on behalf of Pauatahanui Pre-School (Submission #30) – read out at hearing by Miss Mika – Committee Secretary
- Mr Paul Nation, 264A Paremata/Haywards Road (Submission #6)
- Mr Allan Bloomfield, 51 Bradley Road (Submission # 169)
- Mrs Nancy Brown, 7 Jones Deviation, (Submission # 52)
- Mrs Diane Strugnell, 805 Moonshine Road, (Submission #10)
- Mrs Sharon Daly – Evans, 319 Belmont Road (Submission #32)
- Mrs Jill Wild, Grays Road, (Submission #35)
- Mr Ken McAdam (Chairperson – Pauatahanui Residents Association (PRA), Submission # 48) Mr Alan Gray, 352 Grays Road (Submission #26) and Mr Bradley Roberts – Principal of Pauatahanui School
- Dr Lesley Frederikson, 19 Paekakariki Hill Road (Submission #51)
- Mrs Anna Dellow, 21 Paekakariki Hill Road (Submission #42)
- Mr Robin Chesterfield (on behalf of Royal Forest and Bird Society), (Submission #7)
- Mr Stuart Clark – Civil Engineer for Pauatahanui Residents Association
- Mr Mark Georgeson – Traffic Engineer for Pauatahanui Residents Association
- Ms Jennifer Grimmett – planning consultant for Pauatahanui Residents Association and Lesley and Grant Frederikson
- Mr William Bevan – for Mr and Mrs Patel
- Mr Hasmukh Lal Patel - on behalf of Mr and Mrs Patel (including translation for Mrs Patel)
- Mrs Gita Patel, General Store, Paekakariki Hill Road, (Submission #224)
- Ms Hannah Gray, (Submission #286)
- My Youssef Mourra, 171 Belmont Road (Submission #21)

- Mr Paul and Mrs Dianne Boyack, Rural Trading Post, Paekakariki Hill Road (Submission #223)
- Ms Deborah Harris, 247c Paekakariki Hill Road (Submission #24)

### **Council officers**

[33] The following council officers were in attendance and responded to matters raised:

- Mr Stuart Smith – Resource Consents Planner, PCC
- Ms Harriet Fraser – Traffic Planning Consultant for PCC
- Mr Jim Sutton - Manager Environmental Standards for PCC
- Mr Chris Hopman - Special Projects Manager for Wellington Water
- Mr Nick McDonald – Senior Environmental Health Officer for PCC
- Mr Geoff Marshall – Roading Manager for PCC
- Mr Andrew Gray – Landscape Architect for PCC
- Mr Adrian Ramage – Manager Resource Consents for PCC
- Mr Phillip Rhodes – Manager Land Use & Subdivision Engineering for PCC

[34] As noted above, a hearing report was prepared by Mr Smith. I was assisted in an administrative capacity by Miss Seraphina Mika, Committee Secretary, PCC.

[35] All of the material presented by the above parties is held on file at the PCC. I took my own notes of the verbal presentations and any answers to my questions. For the sake of brevity I do not repeat that material in the decision. I do however refer to relevant matters raised in the material in subsequent parts of the decision.

### **LEGAL DESCRIPTION AND ZONING**

[36] The property (“**the application site**”) is legally described as follows:

**Legal Description:** Part of Lot 1 DP 73163

**Application Site Area:** 0.109Ha plus common access way of 136m<sup>2</sup>

**District Plan Zone:** Rural Zone

[37] The District Plan became operative in 1 November 1999. I have referenced the Operative District Plan as the “ODP” throughout the decision.

### **THE APPLICATION AND EXISTING CONSENT**

[38] Details of the proposal are contained in the AEE and the hearing report. In addition further details of what is proposed were clarified during the hearing. I therefore only recite the key elements here.

[39] Mr Darryl Berwyn Ellis has applied to PCC for resource consent for retrospective extensions to an existing cafe, including increasing the maximum number of patrons

to 65, as well as further increases to the building and expanding the car park at 15 Paekakariki Road, Pauatahanui, Porirua.

[40] The applicant's proposal at the hearing was that:

- Expand and operate a Café for a maximum of 65 patrons, including 50m<sup>2</sup> indoor seating area, an alfresco dining area (roofed with louvers, but open to the car parking area), toilet and food storage prefabs.
- Hours of operation Monday to Friday 8.00am to 6pm and Saturday and Sunday 7.30am to 6pm.
- Signage (Exhibit 1 – information presented at the hearing)
- Earthworks associated with the removal of the septic tank and car park area.
- Provision of 22 car parking spaces of which two spaces proposed are access (disabled) car parks.
- Asphalting of the car parking area and stormwater detention.
- Installation, operation and maintenance of a rain garden (Exhibit 2 – indicative diagram of rain garden presented at the hearing)
- The existing woodshed is to be relocated to the northern corner of the application site. The shed is less than 5m<sup>2</sup> in area and while currently greater than 1.5m in height, the height would be reduced to no more than 1.5m in height.

[41] The Plan showing the details of the proposal is "*cgm+foster, Parking Layout – 22 carparks, 18 Novmeber (sic) 2014: a2010r11*". In response to questions, Mr Quinn confirmed that proposal for the car parking lay out was to maintain continued access to the rear of the General Store. In addition, the applicant, through Mr Quinn, offered that staff would not use the proposed car parks on the application site.

[42] I note that there is an existing resource consent in place on the site for a café and design gallery granted in 16 Match 2001. This consent required ten car parking spaces at the rear of the café and a maximum number of 35 seats.

[43] I also record that Mr Smith, in the hearing report, provided background as to expansion of the café and the details of the monitoring and enforcement matters undertaken by the Council, which in part led to the application.

## ACTIVITY STATUS

[44] All three of the planning witnesses, Mr Leary, Ms Grimmatt and Mr Smith were of the view that the application overall, was a discretionary activity under the Operative District Plan (ODP).

[45] The officer's hearing report sets<sup>5</sup> out that the proposal is not provided for as a Permitted Activity in the Rural Zone of the ODP and therefore it must be considered as a Discretionary activity pursuant to Rule D4.1.4 which states:

### *D4.1.4 Discretionary activities*

*Any one or more of the following are discretionary activities:*

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<sup>5</sup> Hearing Report, Section 3.2



*All activities which are not a permitted, controlled, limited discretionary, or prohibited activity, and are not specified in D4.1.5 (ii), (iii), (iv), (v) or (vi) as a non-complying activity.*

[46] I accept the advice of the planning witnesses and find that overall, the activity applied for is to be considered a discretionary activity under rule D4.1.1 of the ODP.

## **STATUTORY PROVISIONS**

[47] This application falls to be considered as a discretionary activity under Part 2 and sections 104, 104B, and 108 of the RMA.

## **SECTION 104B OF THE RMA**

[48] As a discretionary activity, the application must be considered against the requirements of Section 104B, which states that:

*“After considering an application for a discretionary activity or non-complying activity, a consent authority –*

- May grant or refuse the application; and*
- If it grants the application, may impose conditions under section 108.”*

## **PRINCIPAL ISSUES IN CONTENTION**

[49] The principal issues in contention, as I have determined them, revolve around traffic/parking effects, noise, amenity and stormwater effects. These issues are discussed in the following sections.

### **Parking/ Traffic**

[50] Parking and traffic effects were the predominant resource management issue of contention raised in submissions and reinforced by the submitters at the hearing. In particular the submissions opposed to the application cited the lack of on-site parking relative to the number of patrons as a major concern.<sup>6</sup> In summary, the main parking and traffic issues raised at the hearing relate to:

- Number parking spaces to be provided
- Parking conflicts with other businesses on-site and wider village
- Staff parking
- Conflicts with school bus bay; and
- Traffic/Pedestrian safety

[51] Before addressing these matters I note that the applicant prepared a revised parking lay out plan and presented this at the hearing, “*cgm+foster, Parking Layout – 22 carparks, 18 Novmeber (sic) 2014: a2010r11*” and it is that plan that I have considered in regard to the issues of contention regarding parking/traffic effects.

#### Number parking spaces to be provided

[52] In terms of the calculation of the number of car parking spaces required for the proposed 65 patron cafe, I note the provision of 22 car parking spaces was agreed by the three traffic experts in evidence or in response to questions. This was based

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<sup>6</sup> Hearing Report, Page 15, Para 6.1.15.

on Mr Wanty's parking surveys<sup>7</sup> and on recognition that the original consent for the café and design store allowed for overspill parking on the street of eight vehicles<sup>8</sup>. As a starting point, I accept that view. The issue in contention was whether that number of car parking spaces can physically be provided.

- [53] Access to the rear of the General Store I deal with below [Para 58] and I note that "*cgm+foster, Parking Layout – 22 carparks, 18 Novmeber (sic) 2014: a2010r11*" provides sufficient space for access for delivery trucks a matter agreed by Mr Wanty and Ms Fraser. The nub of the issue is whether or not the access (disabled) parking spaces should be counted as car parks for establishing effectively a limit on patron numbers. There was a difference of opinion between Mr Wanty and Ms Fraser on this matter. Mr Wanty, in his oral presentation at the hearing, considered that 16 car parking spaces met the week day and summer peaks of café patronage, noting that the applicant had voluntarily increased this to 22 spaces of which two are access (disabled spaces) and provision is also made for motorcycles and bicycles. Whereas, Ms Fraser, in response to matters raised in the hearing, was of the view that 22 on site spaces, with no mobility spaces, would result in similar parking effects to those anticipated by the existing consent.
- [54] On balance, I prefer the evidence of Mr Wanty noting that the peaks of patronage are met through the provision of 22 car park spaces of which two are disabled spaces. I also find that with the conditions requiring parking spaces, which include a reduction in the patron/seating number should the spaces be unable to be provided, are appropriate.
- [55] As an aside, I record that the Mr Wanty and Ms Fraser agreed that the first on-street car parking space north of the entry to the Rural Trading Post and Café, should be made into an access (disabled) parking space. While I agree that this proposal has merit, it is not within my jurisdiction. Nonetheless, the Council may wish to pursue this suggestion outside of this consent process.

#### Parking conflicts with other businesses on-site and in the wider village

- [56] I have referred to parking conflict issues with the three businesses at 15 Paekakariki Hill Road (The Café, the Rural Trading Post and the General Store). In regard to other businesses and activities in the village where people use on-street parking, I have addressed the issues relating to the Pauatahanui School and Pre-School, in the sections on Conflicts with the Bus bay and Safety below. I note that Ms Fraser, addressed other businesses and activities such as the Lighthouse cinema and Church in her evidence and concluded that the cinema patrons would park in the public car park adjacent to the Taylor Stace Cottage and the Church has 20 spaces, but during large events potentially some six vehicles using on-street parking<sup>9</sup>.
- [57] In regard to the General Store, I firstly note that this application is not for the General Store and hence on-site parking provision for the General Store is not a matter before me. The General Store relies on on-street parking and I have taken account of this fact when considering parking for the Café. In regard to service deliveries to the General Store these have already been addressed in paragraph 53.
- [58] Finally, in regard to the General Store is the issue of access to the carport at the rear of the General Store and the distance from the western end of the carport to proposed car parking space #18 (as shown on Plan "*cgm+foster, Parking Layout – 22 carparks, 18 Novmeber (sic) 2014: a2010r11*"). The distance between these two points shown on this plan is 4.4 metres. Ms Fraser advised that a distance of 6

<sup>7</sup> Mr Wanty, EIC, Pages 7 – 12, Paras 7.1 – 7.26

<sup>8</sup> Ms Fraser, Hearing Report Appendix 3, Page 6, Point (v)

<sup>9</sup> Ms Fraser, Hearing Report, Appendix 3, Pages 8- 9, Paras 27 - 33

metres, based on AUS/NZS 2890 was required in order for a vehicle to turn in and out of the carport without making multiple turns<sup>10</sup>. Mr Georgeson was also of the same view. I concur with Ms Fraser and Mr Georgeson and find that sufficient access to the carport should be provided to the distance of 6m. This may result in the reduction of car parks from 22 to 21. I note that the applicant, through Mr Quinn advised that Condition 20 (as per the hearing report), which provides for a reduction in the patrons/seats from the 65 maximum by 2.5 patrons seats for every car parking space not able to be provided; was acceptable and find a condition to this effect appropriate.

- [59] There is a common motor vehicle entry to Rural Trading Post (RTP) and the proposed car park area to the rear of the Cafe. At the hearing Mr and Mrs Boyack (Submission #223) and Mr Nation (Submission #6) described parking and manoeuvring conflicts between the RTP and Café customers. I note that the resource consent for the RTP identifies shared parking with the Café. However, I concur with Ms Fraser that no reliance should be placed on shared car parking between the two activities<sup>11</sup>. Ms Fraser's also advised that in her view the RTP was self-sufficient in terms of on-site parking and access<sup>12</sup>. In regard to this matter I find that with the provision of the car parking spaces at the rear of the Café and General Store, required by way of conditions; that the adverse effects would be no more than minor.
- [60] During the hearing, there was a suggestion that an additional carpark/s could be located within the common access-way, against the wall of café. I record that this suggestion is not part of the application and in any case, based on the traffic experts' evidence, I find against it.

#### Staff parking

- [61] A number of submitters were concerned that on-site parking for staff was not proposed. This would result in staff parking on street and reducing the on-street parking for persons visiting the village and affecting access to adjacent properties. PRA<sup>13</sup> and Mr Bloomfield further addressed this matter in their presentations at the hearing.
- [62] Mr Wanty, in evidence advised that the applicant currently requires staff to park off site and Mr Quinn, in closing, advised that no staff parking would occur in the proposed 22 car parking spaces.<sup>14</sup>
- [63] Ms Fraser, advised in her response to matters raised in the hearing, that in her view the adverse effects of parking associated with the café is best minimised by maximising the on-site customer parking provision. In addition, Ms Fraser pointed out that existing consent for the café excludes staff parking on site and therefore some level of off-site parking is accepted.
- [64] I concur with Ms Fraser's reasoning and find that the staff parking off-site is the best mitigation of the adverse effects from customer parking. I record that the applicant has offered as part of the proposal that no staff parking is to occur in the proposed 22 parking spaces and that for ease of reference I have included this in a condition of consent.

#### Conflicts with school bus bay

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<sup>10</sup> Ms Fraser, Response to matters arise din the hearing, Page 2, para 6

<sup>11</sup> Ms Fraser, Hearing Report Appendix 3, Page 21, Para 79

<sup>12</sup> Ms Fraser, Report, Appendix 3, Page 19, Para 72

<sup>13</sup> PRA, Evidence, Page 6, Section 1.2

<sup>14</sup> Mr Quinn, Synopsis of Right of Reply , Page 1, Para 1.5

- [65] This issue raised by a number of submitters relates to not only to north bound school buses making a right hand turn into the school bus stop but also the use of the bus stop for car parking by customers of the Café and other businesses and the resulting traffic effects. At the hearing these issues were addressed in particular by the PRA, and Mrs Dellow. In addition, I also heard from Mr Roberts, principal of the Pauatahanui School (as part of the PRA submission) regarding the frequency and use of the bus bay. I also note that the bus bay is in part on land owned by the school (I assume the Ministry for the Education).
- [66] Adding to the picture, Mr Wanty noted in evidence that the bus bay is often used for short term parking and PRA noted that in such situations the bus continues north and turns at the Paekakariki Hill Road/ Grays Road intersection. PRA also note that the bus-company and PCC consider this a safe manoeuvre while PRA do not.<sup>15</sup>
- [67] Ms Fraser, in response to matters raised in the hearing, made an assessment of the turning circles required for the school bus. In conclusion, Ms Fraser was of the view that, *“the managing of the overspill parking from the café to a level that can be comfortably accommodated within the short stay spaces (P30 or less) along with the parking demands of the other activities and in particular the General Store, then the existing disruption to bus access to the bus bay can be minimised”*.<sup>16</sup>
- [68] I concur with Ms Fraser’s view for the reasons set out above.

#### Traffic and Pedestrian safety

- [69] Pedestrian and traffic safety, particularly in relation to the café’s operation relative to the pick-up and drop off times associated with the Pauatahanui School and Preschool and pedestrian use of the crossing. These matters were expanded on at the hearing by many submitters mentioned above but also PRA, Mrs Harris (Submission #24), Mrs Brown (Submission #52), Mrs Strugnell (Submission #10) and Mrs Dellow. In addition a letter from the Pauatahanui Preschool setting its concerns was tabled and read aloud at the hearing.
- [70] Mr Wanty and Ms Fraser agreed that the road safety record in regard to traffic through the village is good<sup>17,18</sup>.
- [71] In regard to pedestrian safety Mr Georgeson speaking to his evidence at the hearing, was of the view that safety was an issue as the on-street practices such as double parking and illegal parking in front of the Café and General Store and in the bus bay across the road were not normal practices. On the other hand Ms Fraser, responded to matters raised in the hearing, and noted that area around the village was low speed environment and that effects associated with the café were only a small proportion. Ms Fraser went on to note that the addition of more off-street parking would result in fewer conflicts associated with illegal parking behaviours and manoeuvres. Finally, I note that Ms Fraser was of the view that the Café was operating within the current resource consent during the time of school pick-up and drop-off times. On this matter I am persuaded by the evidence of Ms Fraser, for the reasons outlined above.
- [72] Overall I find the effects on traffic and pedestrian safety, with conditions imposed requiring on-site parking, will be minor.

#### Traffic/Parking Conclusion

<sup>15</sup> PRA, Evidence, Page 11, Section 2.3

<sup>16</sup> Ms Fraser, Response to Matters Raised in hearing Page 3, Bus turning

<sup>17</sup> Mr Wanty, EIC, Page 16, Paras 9.1 – 9.5

<sup>18</sup> Ms Fraser, Appendix 3 of Hearing Report, Page 22, Para 82

[73] Having reviewed all of the evidence provided on the matters of traffic and parking, I find that the effects will be minor subject to the conditions imposed.

### Noise

[74] The issue of adverse noise effects was raised by G and L Frederikson of 19 Paekakariki Hill Road in their submission. The noise issues relate to the use of the car parking area and from the café alfresco dining area. Dr L Frederikson, provided written evidence and clarified at the hearing that her expertise was as a social scientist in health matters. Dr Frederikson's evidence addressed the health effects of noise<sup>19</sup> which Dr Frederikson's also reinforced and expanded on at the hearing. In summary, Dr Frederikson considered the levels of effects to be significant<sup>20</sup> and sought a minimum setback back of any car parking of 5 metres from the joint boundary and that the area be planted<sup>21</sup>. I also note that the Frederikson's have a consented swimming pool and pool house proposed, but as yet not constructed on their property adjacent to the café car parking area.

[75] Ms Foster (architect for the applicant) suggested that the proposed 1m planting would assist in mitigating the noise effects. This was challenged by Ms Grimmatt in her evidence<sup>22</sup>. Mr Smith, in response to matters raised in the hearing, advised that he had spoken to Mr Nigel Lloyd, a Wellington based acoustic consultant who advised that vegetation would have little effect in the reduction of noise and that requiring car parks to be set back 5m from the boundary would similarly have little effect. On this particular aspect I prefer the views of Ms Grimmatt and Mr Smith.

[76] Mr Smith addressed other issues of noise effects in the hearing report<sup>23</sup>. In summary, Mr Smith was of the view that predominantly closing in of the alfresco area along with a condition for an acoustic fence would mitigate noise from the café. Ms Grimmatt, noted in her evidence that such a condition was missing from the recommended conditions in the hearing report. Ms Grimmatt also noted in evidence that Dr Frederikson had a preference for the existing fence to be added to for acoustic mitigation purposes, rather than a replacement fence be constructed. During the hearing Mr Smith provided a draft condition for an acoustic fence as follows:

*“Within 2 months of the commencement of consent, the consent holder shall replace or modify the northern fence, adjoining 19 Paekakariki Hill Road into an acoustic barrier fence. The fence shall be:*

- *No less than 1.8 meters high;*
- *Solid (without any gaps);*
- *Constructed with material that has a density of no less than 10kg per square metre, if the fence is replaced; and*
- *Battens placed over all holes from the top of the fence down to ground levels, if the fence is (sic) modified from the existing fence.*

[77] I record that Mr Quinn agreed to this condition<sup>24</sup> on behalf of the applicant.

[78] Mr Smith, noted that the extension of the hours of operation (opening time) would not result in noise effects that were more than minor and addressed the noise effects of the car parking area in response to matters raised in the hearing. Mr Smith, taking

<sup>19</sup> Dr L Frederikson, Statement, 12 November 2014, Paras 39-55

<sup>20</sup> Dr L Frederikson, Statement, 12 November 2014, Para 65

<sup>21</sup> Dr L Frederikson, Statement, 12 November 2014, Para 66

<sup>22</sup> Ms Grimmatt, EIC for G and L Frederikson, Page 17, Para 80

<sup>23</sup> Hearing Report, Page 18 – 19, Paras 6.1.32 – 6.1.37

<sup>24</sup> Mr Quinn, Synopsis of Applicant's right of reply, Page 1, Para 1.2

account of the car parking being 1m from the boundary, noted that the provision of car parking at the rear of the Café was already in place and required by current consent for the café.

[79] I note that no evidence from an acoustic engineer as to the levels of noise expected from the proposal was presented. That said, in this case I prefer the evidence of Mr Smith. I find that assessment of the experts and concur that the conditions recommended are appropriate.

### **Amenity**

[80] Amenity effects including visual, dust and village character were raised by submitters.

[81] Mr Frazer (Submission #6) in his submission and in his presentation at the hearing was, in summary, of the view that the signage proposed was out of portion with signage of other business in the area and also out of character. Mr and Mrs Boyack (Submission #223), at the hearing, also referred to the signage being larger than specified in the District Plan.

[82] By contrast, Ms Foster architect for the applicant was of the view that signage *"link(ed) the style and aesthetic of the café from to the adjacent building. The signage colour is subdued, it does not dominate and it is in keeping with the village aesthetic."*<sup>25</sup>

[83] Mr Gray, landscape architect for the Council undertook an assessment of the proposed signage as part of visual amenity assessment which is appended to the hearing report. In conclusion, Mr Gray's assessment was that the visual effects of the proposed signage are minor.<sup>26</sup>

[84] Visual effects were also raised by G and L Frederikson (Submission #51) in regard to parking area and café extension. Dr Frederikson expanded on this issue at the hearing. In summary Dr Frederikson drew my attention to;

- Deciduous trees on her property that should not be relied on by the applicant for screening;
- Proposed swimming pool;
- Direct views to car park area from upper levels of dwelling; and
- Resultant substantial loss of amenity.

[85] Ms Foster, in evidence noted the existing 1.8m fence, the dense poplar grove and expressed the view that the property (19 Paekakariki Road) has no view of the car park area<sup>27</sup>.

[86] Mr Gray noted in the Appendix to the hearing report that the vegetation on 19 Paekakariki Hill Road does screen the café extension when viewed from the north and noted the proposal to plant griselina along the boundary to supplement the existing vegetation.<sup>28</sup> Mr Gray's conclusion is that the effects of the extension to the café are less than minor. Mr Smith is of a similar view and noted that:

*"the proposed planting, along with the close boarded fence will act as adequate mitigation of the visual effects from increased vehicles and these*

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<sup>25</sup> A Foster, Evidence, 3 November 2014, Page 3 Para 16

<sup>26</sup> A Gray, Hearing Report Appendix 4, Pages 4 - 5

<sup>27</sup> A Foster, Evidence, 3 November 2014, Page 3 Para 18

<sup>28</sup> A Gray, Hearing Report Appendix 4, Page 11

*vehicles being parked closer to the boundary than prior to the Wisconsin mound being removed. With this mitigation it is considered that the visual effects on the occupants of 19 Paekakariki Hill Road will be no more than minor considering the existing situation with the smaller car park at the rear of the site.*<sup>29</sup>

- [87] At the hearing, Mrs Patel (Submission #224) raised the issue of the proposed car park and the amenity effects on her residence that is part of the General Store. Mr Smith advised that the issue of amenity effects was not included in the submission of Mr and Mrs Patel, and therefore they could not be taken into account. Nonetheless, in response to questions both Mr Gray and Mr Smith provided a verbal assessment of the potential effects noting, amongst other things, that the residence had no windows facing the car park area and that the Patels wanted car parks to the rear, concluding that there was no difference between the two.

#### *Dust*

- [88] In pre-circulated evidence, the applicant amended the proposal to provide for the sealing of the proposed car park area. This was confirmed at the hearing and in response to my request, a plan showing the area was prepared and tabled. That plan being “*cgm+foster, Parking Layout – 22 carparks, 18 Novmeber (sic) 2014: a2010r11*”. In addition, the applicant confirmed the physical works to construct the car park would occur within 9 months of the consent being granted.<sup>30</sup> Mr Smith, suggested a 3 month time frame. I address the issue of time for implementing the physical works later in the decision. For present purposes, I find the sealing of the proposed car park area will mitigate the potential dust effects and that a condition requiring this to be undertaken is appropriate.

#### **Stormwater**

- [89] A number of submitters raised concerns regarding the effects of stormwater from the building extension and the car parking area. In considering this matter I note that the applicant has proposed to seal the car park area and proposes to install a rain garden<sup>31</sup>. It is within this context that I considered the stormwater issue.
- [90] At the hearing stormwater issues regarding overflow to neighbouring properties were drawn to my attention by PRA, Mr Lowe, Mr and Mrs Boyack, Dr Frederikson, Mr Mourra (Submission #21), and Mr Chesterfield of behalf of Forest and Bird (Submission #7). Particular concern was raised to the potential effects on Wildlife Reserve.
- [91] Evidence was prepared by Mr S Clark on behalf PRA that critiqued the stormwater proposal of the applicant<sup>32</sup>. Mr Clark expressed concern at the effectiveness of the applicant's proposed measures in particularly in regard to the car park area.
- [92] At the hearing, in response to the pre-circulated evidence, Mr Leary provided calculations as to potential stormwater runoff from car park area.<sup>33</sup> Mr Leary concluded that, based on his calculations a rain garden was a suitable retention structure which could be appropriately addressed through conditions.
- [93] Mr Clark, responding to matters raised during the hearing, reviewed the calculation of Mr Leary and provided a different volume of level of stormwater runoff yield, as well

<sup>29</sup> Hearing Report, Page 14, Para 6.1.8

<sup>30</sup> Synopsis of Applicant's right of reply, 19 November 2-14, Page 1, Para

<sup>31</sup> Exhibit 2, 18 November 2014, Day 2 of Hearing

<sup>32</sup> Mr S Clark, EIC, Page 6 – 8 Paras 13 - 19

<sup>33</sup> Mr Leary, Second Statement of Evidence, 17 November 2014, Page 5, paras 44 - 46

as raising issues with the rain garden design. In summary, Mr Clark concluded that the design of the system should be by qualified persons. I also note that Mr Quinn in right of reply submitted that Mr Clark had used a 72 hour timeframe for the rainfall component of the stormwater runoff yield calculation which is not consistent with Council's Code of Land Development and Subdivision Engineering, where the timeframe of 20 minutes is required. I also note that Mr Chesterfield of Forest and Bird offered connection of stormwater from the proposed rain garden to the drain on the Forest and Bird land (5 Paekakariki Hill Road, Lot 7 DP 52599).

[94] In response to matters raised in the hearing, Mr Gray's advice was that based on Mr Clark's calculations, that flexibility should be provided in any conditions that might attach to a consent regarding the landscaping suitability for the rain garden and for screening. A number of parties also raised the potential issue of cars intruding into the rain garden/planting area and the need for some form of barrier to prevent this occurring. In response to questions Mr Rhodes, Manager Land Use & Subdivision Engineering for the Council, advised that specific stormwater design would be required to meet the Council's Code of Land Development and Subdivision Engineering. Mr Rhodes further noted that specific design was usually a matter addressed post any consent and required by way of conditions. I note that Mr Smith in the hearing report, recommended a condition in regard to the stormwater runoff from the additional roof area. I was not provided with a draft condition by the parties in regard to stormwater from the car park area.

[95] Having reviewed all evidence and material presented to me regarding stormwater, I am not convinced by evidence of Mr Clark in regard to the stormwater yield calculation using a 72 hour timeframe. I do agree that it is a matter of expert assessment and the appropriate time for that assessment is in detailed design, and conditions to that effect should be imposed. Mr Gray's comments regarding the suitability of the proposed planting in light of this finding are in part put aside, and I rely on Mr Gray's original report appended to the hearing report, subject to allowing flexibility in the type of vegetation to be used. In conclusion, I find that the effects of stormwater, subject to conditions which I have imposed, will be no more than minor.

## **Section 104 RMA**

[96] Section 104 (1) of the RMA requires that a consent authority:

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—*
  - (a) any actual and potential effects on the environment of allowing the activity;*
  - and*
  - (b) any relevant provisions of—*
    - (i) a national environmental standard;*
    - (ii) other regulations;*
    - (iii) a national policy statement;*
    - (iv) a New Zealand coastal policy statement;*
    - (v) a regional policy statement or proposed regional policy statement;*
    - (vi) a plan or proposed plan, and*
  - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

[97] I have discussed the significance of any actual or potential effects on the environment of allowing the activity in the above sections, and turn now to the statutory provisions requirement of section 104(1) (b).

## **National instruments**



[98] Firstly, it was Mr Leary's view that there were no National Environmental Standards (104(1) (b) (i))<sup>34</sup>, other regulations (104(1) (b) (ii))<sup>35</sup> or national policy statements (104(1) (b) (iii))<sup>36</sup> relevant to the proposal. I heard no views to the contrary, so I accept that view.

[99] Mr Leary was of a similar view<sup>37</sup> in regard to consideration of the New Zealand Coastal Policy Statement (NZCPS) (104(1)(b)(iv)). Ms Grimmitt, in response to my questions proffered the view that the NZCPS was relevant by way of the area of significant conservation value for the Pauatahanui Inlet being identified in the Greater Wellington Regional Coastal Plan. No further explanation as to the relevance of the NZCPS was provided. I note that the proposed activity is not within the coastal marine area being the area that the Regional Coastal Plan covers. In addition, I note that I have already addressed the potential effects on the inlet from stormwater discharge from the proposed activity and found this to be no more than minor. In addition any wastewater discharge issues have been addressed through the connection to the reticulated sewerage system. Therefore, I find that the NZCSP is of little relevance in regard to this proposal.

#### **Greater Wellington Regional Policy Statement ("the RPS")**

[100] In the hearings report Mr Smith identified Policy 6 of the RPS as being of relevant consideration to the proposal. As the wastewater is now discharged to a reticulated system and that a condition of consent is recommended to address stormwater run-off, Mr Smith concluded that the proposal is not inconsistent with Policy 6 or the RPS.<sup>38</sup>

[101] Mr Leary, in response to questions was of the view that the scale of the proposal, with particular reference to stormwater did not trigger the provisions of the RPS.

[102] In this case I concur with the view and reasoning of Mr Smith and find that the proposal is not inconsistent with relevant policy of the RPS.

#### **Greater Wellington Regional Plans**

[103] Mr Leary in his evidence recorded that the proposal does not breach any Regional Plan rules and that a consent from the Greater Wellington Regional Council is not necessary.<sup>39</sup>

[104] In the hearing report Mr Smith noted that soil removed from the location of the previous Wisconsin mound was potentially contaminated and that this matter was outside the scope of the consent; Greater Wellington Regional Council now investigating the matter.<sup>40</sup>

[105] No other matters regarding any requirements for consents under Regional Plans were identified by the parties. I accept that evidence.

#### **Operative Porirua City District Plan (104(1)(b)(vi))**

[106] As noted in paragraph 37 above, the ODP became operative in November 1999.

[107] The application is a discretionary activity under the ODP. Mr Smith identified in the hearing report his view of the provisions of the ODP relevant to this application<sup>41</sup>. Mr Leary provided his assessment of the relevant objectives and policies in his

<sup>34</sup> Mr Leary – Evidence in Chief, Page 13, Para 91

<sup>35</sup> Mr Leary – EIC, Page 13, Para 93

<sup>36</sup> Mr Leary – EIC, Page 13, Para 93

<sup>37</sup> Mr Leary – EIC, Page 13, Para 93

<sup>38</sup> Hearings Report, Pages 25-26, Para 6.3.1

<sup>39</sup> Mr Leary, EIC, Page 13, Para 95

<sup>40</sup> Hearing Report, Page 19, Para 6.1.39

<sup>41</sup> Hearing Report, Pages 22 – 25, Para 6.2.1 – 6.2.2

evidence<sup>42</sup>. The provisions identified by these planning experts were not identical. By way of example Mr Leary considered Policy C4.1.3 and Policy C4.2.4 relevant, Mr Smith did not. Mr Smith included objectives and policies relating to Landscape and Ecological, and Signage, which Mr Leary did not.

[108] For the record I find the following provisions relevant:

- C4 Rural Zone - Objectives and Policies, Objectives C4.1, C4.2 and policies C.4.1.1, C4.1.2, C4.1.3, C4.1.6, C4.2.1, C4.2.2, C4.2.3, C4.2.4;
- C7 Transport - Objectives and Policies, Objective C7.1, and policies C.7.1.1, C.7.1.6, C.7.1.7, C7.1.6;
- C9 Landscape and Ecology - Objectives and Policies, Objective C9.1, and policies C.9.1.5, C.9.1.6, C.9.1.14;
- C13 Signs - Objectives and Policies, Objectives C13.1 and policies C.13.1.1; and
- Rules D4.1.4

[109] A number of submitters identified that the site was zoned Rural and that it was not a Commercial zone. In addition a number of submitters in opposition also referred to the inconsistency with the Village Plan and the Pauatahinui Judgeford Structure Plan. I address those matters later in the decision.

[110] Mr Smith undertook an assessment of the objectives and policies in the hearings report<sup>43</sup> and concluded that that the proposal was not inconsistent with the objectives and policies in the District Plan. Mr Leary also undertook a similar assessment in his evidence and reached the same conclusion.

[111] In assessing the Rural zone Mr Smith, in summary, noted:

- that the site is unlikely to be used for primary production;
- the village is a unique setting;
- the village serves the purpose of providing a semi-rural environment; and
- the village provides servicing for the rural community.

In regard to the Transport objective and policies Mr Smith relied on Ms Fraser's recommended conditions in regard to Policy C7.1.9 relating to visitor parking. I note that at the time of writing the hearing report the number of car parks proposed was 17 in number. Mr Leary in his evidence relied on the amended proposal to provide 22 car parking spaces in his assessment of this policy and also noted that a number of patrons used motorcycles or bicycles. I have addressed the number of car parks in paragraphs 52 - 55 above. In response to matters raised during the hearing, Mr Smith confirmed that the revised car parking number of 22 spaces, in his view was consistent with Policy C7.1.9.

[112] I concur with the assessment of the two expert planners in regard to this matter, noting that Ms Grimmitt's evidence relates more to the assessment of the PJSP. The context here is that of rural village with a number of businesses and houses that has a Rural zoning. I find that, to the extent that the effects of the proposed activities are knowable noting that café already exists and appropriate conditions are able to be imposed, the proposal is not inconsistent with the provisions of the ODP.

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<sup>42</sup> Mr Leary, EIC, Pages 23- 25, Paras 200 - 221

<sup>43</sup> Hearing Report, Pages 23 – 25, Para 6.2.1

### **Other Matters (section 104(1)(c))**

- [113] Rather than the District Plan objectives and policies, it was the proposals inconsistency with the Pauatahanui Village Plan<sup>44</sup>, the Pauatahanui-Judgeford Structure Plan<sup>45</sup> (PJSP) and/or the Pauatahanui Village Sewerage Scheme (PVSS) that was raised in many submissions. These inconsistencies were reinforced in presentations at the hearing (e.g. Pauatahanui Residents Association, Mr Frazer).
- [114] This was supported by Ms Grimmett, in her evidence where she expressed the view that “doubling the size of the café as retrospectively proposed is not consistent with the PJSP or consistent with the community aspirations to preserve the unique character of their village”.
- [115] In the hearing report Mr Smith was of the opinion that no weight should be given to the PJSP under 104(1)(b) as the Structure Plan had not been tested through a Plan Change process. Similarly Mr Smith was of the view that no weight should be given to PJSP under s104(1)(C) as the Structure Plan is not presently consistent with the District Plan framework. Mr Smith goes on to note that even if weight were to be attributed to the structure plan, the consent granted with conditions imposed would not be inconsistent with the structure plan document. Mr Leary essentially concurred with the views of Mr Smith<sup>46</sup>. I also note that in response to questions, Ms Grimmett opined that the structure plan should be taken account of, but be given little weight.
- [116] On this matter the planning experts agree that little or no weight should be attributed to the structure plan. I record that I have had regard to the structure plan, but find that for the reasons set out by Mr Smith, I have given it little weight.
- [117] On a similar note, submitters drew my attention to the proposal's inconsistency with the Pauatahanui Village Plan<sup>47</sup>. Again this document has not been tested through a Plan Change process and I find that little weight can be attributed to it.
- [118] Finally in regard to other documents, the proposal's inconsistency with the PVSS was also a matter raised by submitters, in that the wastewater from the café would be beyond the capacity sewerage system. I note that the café is now connected to this system which is also operational. In reaching a finding on this aspect, I note that the connection to sewerage system is not part of the application before me, and also that Mr Hopman an engineer at Wellington Water confirmed in response to matters raised in the hearing that the sewerage system did have the required capacity for the proposed café expansion. I therefore find that no weight should be given to this document.

### **Conditions s108**

- [119] Mr Smith recommended a suite of conditions in the hearing report, and these were variously opposed and supported by the applicant and submitters. The conditions themselves I have dealt with under the appropriate effects section above and I record that the conditions are imposed under section 108 of the RMA.
- [120] Both in submissions and reinforced at the hearing, a number of submitters expressed concern that any conditions of consent would not be complied with by the applicant. Similar issues were raised in regard to the Council's monitoring and enforcement of conditions.
- [121] I have already signalled in paragraph 19 above, that I have not taken into account the previous behaviour of the applicant in determining this new application. In regard to

<sup>44</sup> Future Focus – A framework for the development of Pauatahanui Village 2009, Porirua City Council , March 2009

<sup>45</sup> Pauatahanui Judgeford Structure Plan, Porirua City Council, November 2012

<sup>46</sup> Mr Leary, EIC Page 13, paras 98 - 100

<sup>47</sup> Pauatahanui Residents Association , Evidence 18 Nov 2014, Page 14 Section 3.1

the matter of conditions, I note that at the hearing Mr Quinn (on behalf of the applicant) identified conditions that were accepted and during the course of the hearing offered amendments to conditions and revised plans to address some of the issues raised. I accept those submissions in manner they were offered and in any event, I note that I am entitled to rely on the applicant to comply with any conditions imposed.

[122] In response to matters raised in the hearing, Council officers explained the procedures that the Council undertook when monitoring resource consent conditions and what compliance and enforcement action had been undertaken in regard to Café. I am satisfied that the Council undertakes these functions as a responsible public body and that the conditions contained in this decision will be enforced.

[123] Turning to specific conditions the first issue I deal with is the whether the restriction on maximum number for the café should be in regard to the number of seats or the number of patrons. The applicant proposes that the limit be on the number of patrons rather than the number of seats.

[124] In the hearing report Mr Smith put forward the view that the number of seats was the most efficient way of restricting numbers<sup>48</sup>. I set out in full Mr Smith's reasons for reaching this conclusion,

*Patrons will be more satisfied to be turned away if there are no seats left in the café, rather than if there are vacant seats but a staff member is telling patrons they may not enter the café. With an entrance at the rear and one at the front of the café, enforcing numbers on busy days could be challenging for the staff members. While it could be argued that a number of seats in different areas of the café may suit different groups of people and weather conditions, seats can easily be moved from one part of the café to another. One difficulty with limiting the number of seats at Groundup café is that much of the seating is made up in the form of picnic tables that include attached bench seating. These seats are not able to be easily moved to suit the size of groups who enter the café. I recommend that each picnic table be counted as four seats. Although it is possible to fit more around these, I would suggest that no more than four would be more common and comfortable to patrons. Although some picnic tables may end up with more than four seated around them, some could easily end up with a group smaller than four. Placing a restriction on the number of seats rather than the number of patrons will enable easier monitoring and enforcement.<sup>49</sup>*

[125] In response to matters raised in the hearing, Mr Smith reiterated his view that the monitoring of seat numbers rather than patrons would be easier to enforce.

[126] Mr Quinn in opening submitted that it was inappropriate to set the number of seats as opposed to the numbers of patrons. Mr Quinn went on to submit:

*In a normal environment there will be surplus seats due to the group size and the number of seats available at a table. For example three patrons at a four person table. As a result if the Café was operating at capacity under the proposed conditions, then the Café may only be able to service less than 50 patrons due to unoccupied seats.<sup>50</sup>*

[127] In considering this matter I note that the existing consent for the café has a restriction of 35 seats rather than patrons and that there has been associated monitoring and enforcement issues.

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<sup>48</sup> Hearing Report, Page 15, Para 6.1.19

<sup>49</sup> Hearing Report,

<sup>50</sup> Mr Quinn, Submission on behalf of Applicant, Page 14, Para 45.3

[128] Having considered this matter carefully, I am not persuaded that a limit on the number of seats rather than patrons is appropriate. The limit of seats in the existing consent does not appear to have made monitoring easier and I have also taken account of the seating configuration to number of patrons issue as put forward by Mr Quinn. On balance, I find that the appropriate limit in the conditions of consent should be a maximum number of patrons.

[129] In the suite of conditions recommended by Mr Smith two conditions relate to the proposed on-site car parking area. Those recommended conditions state:

9. *Within 2 months of the commencement of the resource consent, the consent holder shall submit to the General Manager of Environment and Regulatory Services for certification, a design for the rear car park area that includes measures to clearly mark out the car parks. These markings shall be similar to plan cgm+foster, Parking Layout – 17 carparks with a 1m buffer, June 2014: a2012r6, with the exception that only 16 car parks are required to be provided and each car park shall have a minimum width of 2.5 metres.*

10. *Within 3 months of the commencement of the resource consent, the consent holder shall put in place the design and the car park marking measures in accordance with the plan, certified under condition 9, above.*

[130] In responding to matters raised in the hearing, Mr Smith explained that his reason for recommending 3 months for the completion of the physical works for the car park area was that this application is for a retrospective consent and that the applicant has been operating beyond any authorised requirements for some time.

[131] Mr Quinn, during the hearing, offered on behalf of the applicant, the sealing of the car park within 9 months of the granting of the consent. Mr Smith, response to matters raised in the hearing was of the view that the 3 months was more appropriate as the applicant had been operating beyond what was originally consented for some time and that 9 months was excessive.

[132] Mr Quinn, in the right of reply, confirmed that the applicant would undertake the physical works to construct the car park within 9 months of consent being granted<sup>51</sup>. Mr Quinn further explained that the *Augier principle*<sup>52</sup> applied in this case and therefore I had no jurisdiction to impose a condition requiring construction of the car park within 3 months.

[133] In considering this matter I note that car parking area has already been levelled by the applicant and any potential effects such as dust or uncontrolled sediment run-off are already potentially occurring. This is despite the fact that the consent has not been granted. I have trouble reconciling these effects with the principle of law Mr Quinn drew my attention to, particularly when it is an application for a retrospective consent and condition appears valid in terms of addressing adverse effects. As such I find that the 3 month term for the undertaking the physical works to construct the car park from the granting of the consent is appropriate, subject to a 2 month period to allow for preparation of appropriate detailed plans, which is therefore in effect a 5 month period.

[134] Condition 21 as recommended in the hearing report, states,

*Within 1 month of issuing the consent the consent holder shall pay a fee of \$1450.00 which is equivalent of 10 monitoring visits. The consent holder shall*

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<sup>51</sup> Mr Quinn, Synopsis of Applicant's Right of Reply, Page 1, para 1.6.

<sup>52</sup> *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD)

*be liable for any future monitoring visits required as part of monitoring of this resource consent.*

[135] Mr Quinn in opening submissions considered this condition unusual and inappropriate.<sup>53</sup> Mr Leary considered the condition unreasonable and opined that while there were “*issues of non-compliance in the past, the applicant has spent a considerable amount of money on authorising the existing situation which has come about on the basis of growing a successful business*”.<sup>54</sup>

[136] In response to matters raised in the hearing, Mr Smith explained the reasons for the proposed condition including the history of the applicant ignoring Councils instruction and legal requirements.<sup>55</sup> Mr Smith was also of the view that more than ten monitoring visits would be required.

[137] Mr Quinn, in opening drew my attention to the *Walker v Warren Fowler Quarries Limited* case which states;

*Past conduct of an applicant is a matter of enforcement and does not provide a legitimate ground for refusing to grant a resource consent. It may become relevant in deciding the adequacy of conditions if there is evidence that earlier conditions have not proved to be satisfactory...*

[138] I have already noted that I have not considered the applicant’s past conduct in considering granting or declining the application (See paragraph 121 above). However, I find that that conduct is relevant in regard to adequacy of conditions. I am not persuaded by Mr Leary’s opinion which is set out in paragraph 135 above. I note that the application was lodged in August 2013 and that abatement notices and infringement fines were issued as recently as October 2014. I therefore find this recommended condition to be appropriate.

## **PART 2 – RMA**

[139] This application is to be considered under section 104 of the RMA, which sets out the matters that consent authorities shall have regard to when considering resource consent applications, subject to Part 2 of the RMA, as discussed above.

[140] In coming to an overall broad judgement as to whether the proposal is likely to promote the sustainable management of natural and physical resources, as defined in section 5 of the RMA, I have carefully considered the submissions and evidence presented.

[141] With respect to the seven section 6 RMA matters of national importance which must be recognised and provided for in decisions, I find that none of the stated matters are relevant.

[142] With respect to the eleven section 7 RMA other matters to which decision makers must have particular regard, I find that sections 7(b), (c) and (f) have some relevance to the Decision. These provisions state:

*7. Other matters---In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to---*

- a) ...
- b) *The efficient use and development of natural and physical resources;*
- c) *The maintenance and enhancement of amenity values ...*

<sup>53</sup> Mr Quinn, Submissions on behalf of Applicant, Page 14, Para 45.4

<sup>54</sup> Mr Leary, EIC, Page 27, Para 241

<sup>55</sup> Further detailed in Hearing Report, Page 3 - Section 1.2 and Page 5, Paras 1.4.6 to 1.4.7

f) *Maintenance and enhancement of the quality of the environment.*

- [143] The requirement to “have particular regard to” is a less onerous requirement than that imposed by section 6. Nonetheless these are matters to which decision makers are required to turn their minds in considering the application.
- [144] With respect to section 7(b) of the RMA, developing the subject site is an efficient use of the land. However, to suggest that any particular use is more efficient than another would be to overstate the matter. I do not find this provision particularly relevant.
- [145] With respect to section 7(c) of the RMA, the maintenance and enhancement of amenity values, *Amenity Values* is defined in section 2 of the RMA as follows:
- means 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.*
- [146] I have noted above my findings with respect to this matter.
- [147] With respect to section 7(f) of the RMA, maintenance and enhancement of the quality of the environment, I note that in this instance there is a distinct overlap between sections 7(c) and (f) and accordingly make the same findings.
- [148] With respect to Section 8 Principles of the Treaty of Waitangi, none were drawn to my attention and I find no principles relevant to the application.
- [149] The final task for decision makers is to make an overall broad judgement of the application in light of the purpose of the RMA, as stated in section 5.
- [150] Section 5 Purpose states:
- (1) *The purpose of this Act is to promote the sustainable management of natural and physical resources.*
  - (2) *In this Act, “sustainable management” means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while –*
    - (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
    - (b) *Safeguarding the life – supporting capacity of air, water, soil, and ecosystems; and*
    - (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*
- [151] The RMA requires applicants to demonstrate that their activities promote the sustainable management of natural and physical resources, and that provided the adverse effects generated by such activities fall within “acceptable” bounds – either through being avoided, remedied or mitigated – their activities are enabled.
- [152] As discussed within the body of this Decision and based on the evidence heard and the submissions received, I am satisfied that the proposed development will not result in such significant adverse effects that are unable to be dealt with by way of appropriate conditions.
- [153] I am also satisfied that the application for that activity either gives effect to or is consistent with the relevant district planning documents when read as a whole. Furthermore, and having considered all relevant requirements, I find that the purpose of the RMA is likely to be better served by granting this aspect of the application with appropriate conditions than by declining it.

## Conclusion and Decision

- [154] Acting under delegated authority pursuant to section 34A, and sections 104, 104B, and 108 of the Resource Management Act 1991, the application made by Darryl Berwyn Ellis to the Porirua City Council for a discretionary activity land use consent retrospective extensions to an existing cafe, including increasing the maximum number of patrons to 65, as well as further increases to the building and expanding the car park, at 15 Paekakariki Hill Road, Pauatahanui, is **granted**, subject to conditions.
- [155] This decision is made for the reasons discussed throughout and, in summary, because:
- The activity that is **granted** is consistent with the purpose and principles of the Resource Management Act 1991;
  - Subject to the imposition of appropriate conditions, the activity that is **granted** is generally consistent with the provisions of the operative Porirua City District Plan and Plan Changes; and
  - The activity that is **granted** is unlikely to have any significant adverse effects on the environment provided the conditions imposed are fully implemented.
- [156] The consent conditions attached as *Schedule 1 – Porirua City Council Consent Conditions* are imposed.

DATED this 8<sup>th</sup> day of January 2015



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Mark St.Clair (Independent Commissioner)



## SCHEDULE 1

That this consent be subject to the following conditions:

1. That the development be in general accordance with the information and plans submitted with the application and held on Council file RC6516 and stamped 'Approved Plans for Resource Consent RC6516' (Ref: *cgm+foster, Parking Layout – 22 carparks, Novmeber (sic) 2014: a2012r11*) with the exception of where this is modified by the conditions below. Minor alterations may be approved upon request providing the development is not materially different, the scale and intensity of adverse effects will be no greater, and no approval from affected persons is needed.
2. That the consent holder shall contact the Council's compliance monitoring officer at least 48 hours prior to any further physical work commencing on the site and advise the officer of the date upon which such works will commence.
3. The consent holder shall provide a copy of this consent and any documents referred to in this consent to each operator or contractor undertaking works authorised by this consent, before that operator or contractor starts any works.
4. The consent holder shall ensure that a copy of this consent is kept in the office on site at all times and presented to any Porirua City Council officer on request.
5. Within 2 months of the commencement of the resource consent, the consent holder shall submit to the General Manager of Asset Management and Operations, for certification, a plan and calculations prepared by a suitably qualified engineer which demonstrate that the maximum allowable rate of runoff of storm water from the additional roof area that is subject to this application shall be no more than would occur from the pre-existing development following a 1 in 10 year return period storm having a time of concentration of 20 minutes.
6. Within 3 months after the certification of the plan as part of condition 5 above, the consent holder shall ensure that the works certified under condition 5, above are installed and certified by a suitably qualified engineer.

Advice Note: These works will require a building consent.

7. The consent holder shall ensure that the approved stormwater system, as part of condition 5 above, is installed within 5 months of granting of consent.
8. Within 2 months of the commencement of the resource consent, the consent holder shall submit to the General Manager of Asset Management and Operations, for certification, a design for the rear car park area and associated rain garden. This plan shall include the following:
  - car parking layout similar to plan *cgm+foster, Parking Layout – 22 carparks, Novmeber (sic) 2014: a2012r11* addressing forming, sealing and marking.
  - a minimum 6 metre clearance from the rear of the car port at the rear of the General Store, in accordance with AUS/NZS 2890.
  - poles linked by chains along the western side of the entrance to the proposed car park (along the edge of car park 1 in plan *cgm+foster, Parking Layout – 22 carparks, 18 Novmeber (sic) 2014: a2010r11*). This shall ensure that the entranceway to the car park is at least 5.4 metres wide.

- rain garden design prepared by a suitably qualified engineer demonstrating that the maximum allowable rate of runoff of storm water from the car parking area shall be no more than would occur from the pre-existing development following a 1 in 10 year return period storm having a time of concentration of 20 minutes, and designed in accordance with the Porirua City Council Code of Land Development and Subdivision Engineering.
  - planting plan for the rain garden including species, numbers, size, spacing and layout. Species shall be chosen not only for suitability for growing in a rain garden but also for their ability to create a visual barrier to mitigate visual effects of the occupants of 19 Paekakariki Hill Road and 5 Paekakariki Hill Road (Lot 7, DP 52599 - the Royal Forest and Bird land). This garden area shall be a minimum of one metre wide strip along the boundary between the rear car park and the boundaries shared with 19 Paekakariki Hill Road and 5 Paekakariki Hill Road (Lot 7, DP 52599 - the Royal Forest and Bird land).
  - Some form of barrier to the planting area to ensure no part of any vehicle encroaches into the planting area.
9. Within 3 months of certification of the plan required by condition 8 above, the consent holder shall put in place the design certified under condition 8, above, including: forming, sealing and marking out the car parks and manoeuvring area, ensuring that the rain garden is installed and certified by a suitably qualified engineer, the completion of planting and the installation of barriers.
10. The Consent Holder shall ensure that the rain gardens required in condition 9 are regularly maintained to ensure stormwater design standards are met in perpetuity. This includes replacing any dead or dying plants.
11. If for any reason the consent holder is unable to provide all of the 22 car parks shown in plan *cgm+foster, Parking Layout – 22 carparks, November (sic) 2014: a2012r11*, the maximum number of patrons authorised at the café shall be reduced from 65 patrons by 2.5 patrons (rounded up) for every car park less than the 22.
12. The consent holder shall ensure that the café staff do not use the parking at the rear of the café.
13. That the consent holder shall ensure that any truck deliveries shall occur outside the hours of 8:30am to 9am and 2:45pm to 3:30pm, Monday to Friday.
14. The consent holder shall ensure that all servicing and deliveries shall take place from within the rear car park area and that servicing vehicles enter and exit the site in a forward direction.
15. Within 2 months of the commencement of consent, the consent holder shall modify the northern fence, adjoining 19 Paekakariki Hill Road into to an acoustic barrier fence. The fence shall:
- Be no less than 1.8 metres high;
  - Be solid (i.e. without any gaps); and
  - Have battens placed over all holes from the top of the fence down to ground level.

16. Within 3 months of the commencement of the resource consent, or prior to the commencement of additional construction, whichever comes first, the consent holder shall pay a Recreation and Civic Development Contribution of \$14.03 (incl. GST) per square metre of gross additional floor space for an 'other building' (or any rate which applies at the time of building consent application). This recreation contribution currently equates to \$2034.35 (incl. GST) for this development based on a proposed additional gross floor area of 145 m<sup>2</sup>.
17. The consent holder shall take all practicable steps to ensure that all storm water run-off from the site is treated so that sediment is retained on site and the discharge does not cause adverse effects on the environment by entering either the kerb and channel, the storm water system, or a natural watercourse.
18. Land disturbed by earthworks, trenching or building activities shall be regularly wetted to ensure that dust nuisance is maintained within the site.

The consent holder shall generally conform to the Wellington Regional Council 'Small Earthworks – Erosion and Sediment Control for small sites' (June, 2006), when designing sediment control options for the earthworks on the site.

Note: Porirua Council's minimum expectations for erosion and sediment control on all small building sites across the City can be seen at: <http://www.pcc.govt.nz/A-Z-Services/Resource-Consents/Silt-and-Sediment-Control/Small-Building-Sites-Minimum-Erosion-and-Sediment-Control-Requirements>

Please read these pages prior to commencing any works on the site.

- ~~19.~~ Within 2 weeks of the commencement of the resource consent, the consent holder shall ensure that there are no more than 65 patrons using the café at any one time.
20. Within 1 month of issuing the consent the consent holder shall pay a fee of \$1450.00 which is equivalent of 10 monitoring visits. The consent holder shall be liable for any future monitoring visits required as part of monitoring of this resource consent.
21. The consent holder shall ensure that at all times any outdoor seating/table arrangements and signage is contained within the site. The consent holder shall also ensure that any items belonging to customers or staff of the café do not encroach over the public footpath, directly in front of the café building.
22. That the hours of operation for the café are limited to 7.30am to 6.00pm Monday to Sunday.
23. Pursuant to Section 128 of the Resource Management Act 1991, the Council may 18 months after the implementation of the new parking layout in accordance with condition 9, and on any anniversary thereafter, serve notice on the consent holder of its intention to review the conditions of this resource consent. The focus of any such review will be to assess the adequacy of the car parking to meet the demands of the café. Any such review will evaluate whether there is a need to reduce the number of café patrons, should it be identified that parking demand beyond what was predicted in the application is occurring and is having adverse effects on the safety and efficiency of the roading network or on neighbouring sites.

## **THE CONSENT HOLDER IS TO NOTE:**

### **Building Act**

***This is NOT Building Consent. The Building Act 1991 contains provisions relating to the construction, alteration, and demolition of buildings. The Act requires building consents to be obtained where relevant, and for all such work to comply with the building code.***

### **Section 125**

This consent is subject to section 125 of the Resource Management Act 1991, which states that a resource consent lapses on the expiry of 5 years after the commencement of the consent.

### **Appeal**

The right and procedure for appeal can be found under Sections 120 and 121 of the Resource Management Act 1991 (hereafter called the Act) and should be received by the Environment Court, and served on the Council and any other relevant parties identified within Section 120 of the Act within 15 working days of the notice of decision being received in accordance with the Act.

### **Easements**

No structure shall be allowed over any easement.

### **Condition wording clarification**

Where conditions refer to the “commencement of the resource consent”, this should be interpreted in accordance with section 116 of the Resource Management Act.