

**IN THE MATTER** of the Whangarei District Plan and the Resource Management Act 1991 (RMA)

**A N D**

**IN THE MATTER** of the following Urban, Services & Open Space plan changes to the Whangarei District Plan:  
Plan changes 88, 88A, 88B, 88C, 88D, 88E, 88F, 88G, 88H, 88I, 88J, 143, 144, 145, 115, 148, 109, 136, 147, 82A, 82B

**BEFORE** **THE HEARING PANEL**  
**WHANGAREI DISTRICT COUNCIL**  
**URBAN, SERVICES & OPEN SPACE PLAN CHANGES**

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**SUBMISSIONS OF COUNSEL FOR WHANGAREI DISTRICT COUNCIL  
ON TRADE COMPETITION  
(SECOND SUPPLEMENTARY)**

**DATED: 29<sup>th</sup> November 2019**

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**MAY IT PLEASE THE COMMISSIONERS**

1. The Panel have asked for legal submissions with respect to trade competition and the submission made by Southpark Corporation Limited (“Southpark”) (#154 and X359).
2. Southpark is a major landowner of land in Ruakaka zoned as Marsden Primary Centre, the zoning of which is not addressed by the plan changes. Southpark’s submission seeks, with respect to the nearby Ruakaka Shops, to:
  - (a) Change the zoning for the Ruakaka Shops from notified Local Commercial to Neighbourhood Commercial Zone;
  - (b) Decrease the extent of the zone to the existing footprint of the Ruakaka Shops to avoid the further development of this area; and
  - (c) Consequentially delete reference to the Ruakaka Shops within the Local Commercial Zone overview.
3. Ruakaka Shops is owned by Town Centre Properties Limited (“TCPL”).
4. Clause 6 of the First Schedule to the RMA provides:
  - (1) *Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.*
  - (2) *The local authority in its own area may make a submission.*
  - (3) *Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person’s right to make a submission is limited by subclause (4).*
  - (4) *A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that—*
    - (a) *adversely affects the environment; and*
    - (b) *does not relate to trade competition or the effects of trade competition.*

**Is Southpark a trade competitor to TCPL?**

5. The RMA does not define “trade competitor” or “trade competition”, although trade competition has been described as “the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share”<sup>1</sup>.
6. In *Queenstown Central*<sup>2</sup> Fogarty J concluded that property developers who disagreed on the appropriate zoning of their respective land at Frankton Flats in Queenstown were competing for the best use of limited land supply, which did not amount to trade competition.
7. In *Kapiti Coast Airport Holdings Ltd v Alpha Corporation Ltd*<sup>3</sup> the Environment Court considered *Queenstown Central*, in the context of proposed zoning for commercial development at Kapiti Airport which was opposed by commercial land owners, developers and lessors at Paraparaumu Town Centre. The Environment Court stated:

[19] “We are well aware that *Queenstown Central* is binding on this Court, however the real issue is, what is the decision which was made in that case which is binding? We do not perceive the finding to be that commercial lessors cannot ever be trade competitors with other commercial lessors...

[22] ... the competition being considered in *Queenstown Central* was competition for the use and enjoyment of the limited resource of flat land at Frankton Flats, that is, the parties were resource use competitors. ... That is not the situation in Paraparaumu. The Respondents (who are unquestionably in competition with the Applicants as commercial lessors) seek to restrict the commercial activities which the Applicant may apply to undertake on its land. That is not competition for a resource but trade competition related directly to the competing uses which they undertake on their respective areas of land at the Airport and Town Centre.”
8. The Environment Court concluded that three of the Respondents were trade competitors of the Airport. One of those Respondents, Sheffield, subsequently sought judicial review of the Council’s decision to approve the Airport plan change. In the High Court Sheffield accepted that it was a trade competitor to the Airport.<sup>4</sup>

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<sup>1</sup> *Queenstown Central Limited v QLDC* [2013] NZRMA 239 (HC)

<sup>2</sup> *Ibid* at paras 155-160

<sup>3</sup> [2016] NZEnvC 137

<sup>4</sup> *Sheffield Properties Ltd v Kapiti Coast District Council* [2018] NZHC 3290 (HC)

9. Southpark's submission asserts that Southpark could not gain advantage by trade competition. The 42A report raises the possibility of trade competition. Mr Roberts' planning evidence for Southpark is silent on the issue, but Mr Heath's economic evidence for Southpark addresses trade competition at sections 15-18.
10. I submit that Southpark is a trade competitor of TCPL for the following reasons:
  - (a) With reference to the language in *Kapiti Airport*, Southpark seeks to restrict the commercial activities which TCPL may undertake on TPCL's land. This is not competition for a resource, but trade competition related directly to the competing uses on their respective areas of land.
  - (b) Mr Heath appears to accept that Southpark and TCPL are trade competitors, as his evidence focuses on whether retail effects 'go beyond' trade competition (clause 6(4) of Schedule 1) rather than asserting that there is no trade competition (clause 6(3) of Schedule 1).
  - (c) When the private plan change for Marsden Primary Centre (PC83) was initiated by its proponent North Holdings Limited ("NHL"), TCPL made a submission in opposition to PC83. NHL sought a finding from the PC83 hearing panel that "TCPL is a trade competitor of NHL and presented no evidence identifying how it may be directly affected by an effect of PC83 on it". (emphasis added). (The panel found it unnecessary to do so).

**Is Southpark directly affected?**

11. A trade competitor is not barred from making a submission. Their submission however must meet the test in clause 6(4) of the First Schedule:
  - (4) *A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that—*
    - (a) *adversely affects the environment; and*
    - (b) *does not relate to trade competition or the effects of trade competition.*
12. Mr Heath at paragraph 15.5 refers to Environment Court case law providing that retail distributional effects must be "significant before they could properly be regarded as going beyond the effects ordinarily associated with trade competition". No cases are cited however.

13. The statutory test in Clause 6(4)(b) is “*does not relate to trade competition or the effects of trade competition*”.
14. Southpark’s submission refers to future development of the Ruakaka Shops as having “significant implications on the vitality and viability of Marsden Primary Centre”. The evidence of Mr Roberts and Mr Heath also refers to the vitality and viability of Marsden Primary Centre, and to the hierarchy of centres anticipated in the Plan.
15. In *General Distributors Ltd v Foodstuffs*<sup>5</sup>, dealing with competing supermarkets, the Environment Court found that the submission’s claim of adverse effects on the viability and vitality of a centre “relates to (ie has a connection with) an effect of trade competition”<sup>6</sup> and was therefore not in accordance with the statutory test<sup>7</sup>.
16. I submit that, however significant the retail distributional effects described by Mr Heath may be, they relate to the effects of trade competition<sup>8</sup>.

**Other matters**

17. Mr Heath states at paragraph 17.4 of his evidence:  
“This envisaged role and function for Marsden Primary Centre is already established in the District Plan so any adverse distributional ‘effects’ on other (e.g. existing) centres from Marsden Primary Centre playing this role in the market have already been considered and accepted.”
18. I submit that this statement must be viewed alongside the history of PC83 - and specifically the argument by the plan change proponent NHL that TCPL was a trade competitor of NHL, and that distributional effects on the existing centre owned by TCPL were trade competition effects which could not be considered.

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**Sarah Shaw**

Counsel for Whangarei District Council

Date: 29<sup>th</sup> November 2019

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<sup>5</sup> *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd* [2011] NZEnvC 212

<sup>6</sup> *Ibid*, para 19

<sup>7</sup> In *General Distributors*, the test in s308B, expressed in the same terms as that in clause 6(4)(b)

<sup>8</sup> (as opposed to, for example, traffic effects which do not relate to trade competition).