

**IN THE ENVIRONMENT COURT
AUCKLAND**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the direct referral of an application for resource consent by **Progressive Enterprises Limited** to the Environment Court under section 87G of the Resource Management Act 1991

**NOTICE OF MOTION BY PROGRESSIVE ENTERPRISES LIMITED
SEEKING DIRECT REFERRAL AND OTHER ORDERS**

19 FEBRUARY 2010

RUSSELL MOVEAGH

J D K Gardner-Hopkins/L A Hardacre
Phone 64 4 499 9555
Fax 64 4 499 9556
PO Box 10-214
DX SX11189
Wellington

TO: The Registrar
Environment Court
Auckland

AND TO: The Rodney District Council

AND TO: Submitters on Progressive's consent application (55743)

PROGRESSIVE ENTERPRISES LIMITED ("Progressive") applies under sections 87G(2), 269, 270 of the Resource Management Act 1991 ("Act") for the following orders.

- A. That the Environment Court accepts Progressive's consent application (55743) ("Application") for direct referral under section 87G(2) of the Act.
- B. That the Application be case managed and heard with appeals on Variation 125 and Plan Change 110 to the Rodney District Plan ("Variation appeals").
- C. That the following timetable orders be made (consistent with the orders already made in respect of the Variation appeals):
 - (a) Evidence in chief to be exchanged by **9 April 2010**.
 - (b) Rebuttal evidence by **23 April 2010**.
 - (c) Four copies of all evidence to be lodged with the Council, assembled by it into A4 lever-arch folders with dividers and indexing, and filed with the Court by **30 April 2010**.
 - (d) Hearing to be set down on, or after, **10 May 2010**

UPON THE GROUNDS that:

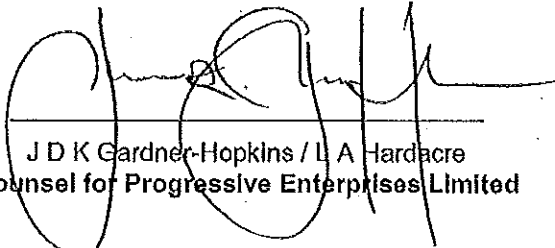
1. The Rodney District Council has agreed to directly refer the matter to the Environment Court in accordance with section 87E of the Act.
2. It is appropriate for the Environment Court to determine the Application instead of the Rodney District Council as:
 - (a) the likely involvement of trade competitors, notwithstanding the recent amendments to the Act, means that the Application would ultimately have been determined by the Environment Court in any event;
 - (b) direct referral of the Application is consistent with the purposes of the recent amendments to the Act, intended to streamline consent processing and enable developers to secure resource consents faster with minimal delays arising from the involvement of trade competitors; and
 - (c) direct referral will enable the efficient determination of the issues.

3. Direct referral will also enable the Environment Court to consider the application contemporaneously or immediately following its consideration of the Variation appeals.
4. There is no prejudice to any party, the Application having been publically notified with submitters being served a copy of this notice of motion and having the ability to join the proceedings as section 274 parties.
5. The proposed evidence timetable (consistent with that already ordered in respect of the Variation appeals) is reasonable and will enable the Application to be heard without undue delay, which could result if a longer timetable for evidence exchange were to be ordered.

AND UPON THE FURTHER GROUNDS as set out in the accompanying affidavits of Brady Ross Nixon and Michael John Foster.

A memorandum of counsel is also attached in support of this application.

DATED 19 February 2010



J D K Gardner-Hopkins / L A Hardacre
Counsel for Progressive Enterprises Limited

Advice to recipients of copy of direct referral documents

How to become a party to proceedings

If you wish to be a party to the direct referral proceedings, you must lodge a notice in form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003 with the Environment Court within 15 working days after the proceedings are commenced.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003).

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Ministry of Justice in Auckland, Wellington, or Christchurch.

IN THE ENVIRONMENT COURT
AUCKLAND

ENV-2010-AKL-059

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the direct referral of an application for resource consent by **Progressive Enterprises Limited** to the Environment Court under section 87G of the Resource Management Act 1991

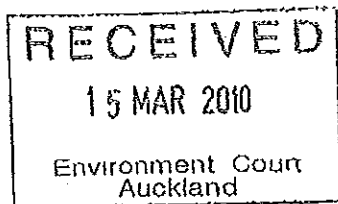
BETWEEN **PROGRESSIVE ENTERPRISES LIMITED**

Applicant

AND

RODNEY DISTRICT COUNCIL

Respondent



AFFIDAVIT OF HORIANA KATHLEEN IRWIN
IN SUPPORT OF NOTICE OF MOTION FOR DIRECT REFERRAL

SWORN 12 MARCH 2010

RUSSELL McVEAGH

J D K Gardner-Hopkins / L A Hardacre
Phone 64 4 499 9555
Fax 64 4 499 9556
PO Box 10-214
DX SX11189
Wellington

I, HORIZANA KATHLEEN IRWIN of Wellington, Solicitor, swear:

1. INTRODUCTION

1.1 My full name is Horiana Kathleen Irwin. I am a Solicitor employed by Russell McVeagh, solicitors for Progressive Enterprises Limited ("Progressive").

1.2 I have personal knowledge of the matters set out in this affidavit and its contents are true to the best of my knowledge and belief.¹

1.3 The purpose of this affidavit is to formally respond to the Court's directions of 3 March 2010 in the matter of Progressive's directly referred resource consent application. The Court has requested a further affidavit confirming compliance with new sections 87C - 87F of the Resource Management Act 1991 ("RMA").

1.4 By way of summary, I can confirm that Progressive has complied with the requirements of sections 87C - 87F of the RMA (for ease of reference please see the table attached as Schedule 1).

2. COMPLIANCE WITH SECTIONS 87C - 87F OF THE RMA

2.1 Section 87C establishes that sections 87D - 87I apply when an applicant wishes a notified resource consent application to be determined by the Environment Court instead of by a consent authority in the first instance.²

2.2 On 29 October 2009, Progressive lodged its revised resource consent application for a Countdown supermarket in the Warkworth Town Centre ("Fresh Application") (refer letter on Russell McVeagh letterhead attached as Exhibit HK1 - 1). In this letter Progressive formally requested that the Rodney District Council ("Council") refer the Fresh Application to the Environment Court.³ Progressive was prepared to request full notification of the Fresh Application if the Council agreed to directly refer this application to the Environment Court.⁴

2.3 On 30 October 2009 in response to a request from the Council, Progressive confirmed that it requested full notification of the Fresh Application (refer letter on Russell McVeagh letterhead attached as Exhibit HK1 - 2),⁵ on the basis that:

(a) the request enabled the Council to resolve whether or not to agree to directly refer the Fresh Application; but

(b) if the Council did not resolve to directly refer the Fresh Application to the Environment Court (or if it subsequently retracted any resolution to directly refer) the request for full notification was to be deemed withdrawn.

¹ I have been the junior on this file since May 2009.
² Sections 87D-87I also apply to an application to change or cancel a condition of a resource consent that has been notified however this does not apply in this case.
³ In accordance with section 87D(1), 87D(2)(a) and 87D(3).
⁴ As stated in Brady Ross Nixon's affidavit in support of Progressive's application for direct referral at paragraph 3.13, Progressive lodged this new consent application in order to take the benefits from the recent amendments to the RMA.
⁵ Therefore fulfilling the requirement that the application be notified (although Progressive accepts that the application need not be fully notified in order to qualify for direct referral).


- 2.4 On 5 November 2009, the Council resolved to directly refer Progressive's Fresh Application to the Environment Court (refer Council resolution attached as Exhibit HKI - 3).⁶ On 12 November 2009 the Council publically notified Progressive's Fresh Application with submissions closing on 11 December 2009 (refer Council notification attached as Exhibit HKI - 4).
- 2.5 The Council then began processing the Fresh Application in accordance with sections 87F(3) - (5). Section 87F(3) requires the consent authority to prepare a report on the application within the period that ends 20 working days after the date on which the period for submissions on the application closes.⁷ The Council's section 87F report was therefore due on 4 February 2010.⁸
- 2.6 On 16 February 2010, the Council provided the section 87F report to Russell McVeagh (8 working days late).⁹ Progressive then lodged the following direct referral papers with the Environment Court on 19 February 2010:
- (a) a Notice of Motion seeking direct referral and other orders;
 - (b) a supporting affidavit from Brady Ross Nixon;
 - (c) a supporting affidavit from Michael John Foster; and
 - (d) an accompanying memorandum of counsel.¹⁰
- 2.7 Progressive also served the direct referral documents on all submitters (see list of submitters attached as Schedule 2) and the Rodney District Council on 16 February 2010.¹¹ Progressive stated in its filing letter to the Environment Court dated 19 February 2010 that all submitters were being served by mail on that day (attached as Exhibit HKI - 5).¹² Progressive is happy to provide the Court with copies of the letters sent to these submitters if the Court requires proof of service.
- 2.8 In summary, Progressive confirms that it has complied with all the procedural requirements under sections 87C - 87F as required by the RMA.

SWORN at Wellington this 12th day of March
2010 before me

Katherine Mary Porter
Solicitor of the High Court of New Zealand
Wellington



A solicitor of the High Court of New Zealand



Horiana Kathleen Irwin

⁶ In accordance with section 87E(5).

⁷ As the Council agreed to directly refer the consent application before it was notified, this was the longer of the periods available under section 87F(3).

⁸ In accordance with section 87F(3)(a). This is 20 working days after 11 December 2009 (the date in which submissions on the Fresh Application closed) taking into account the RMA close down period.

⁹ See page 97 of the section 87F report provided to the Environment Court by the Council.

¹⁰ Although section 87F(2)(a) only requires one supporting affidavit and no accompanying memorandum of counsel, we decided this level of detail was necessary.

¹¹ In accordance with section 87G(2)(b).

¹² In accordance with section 87G(2)(c).

Schedule 1

Timeline showing compliance with sections 87C - 87F of the RMA

Requirement	Section/s	Date complied	Evidence
That Progressive request the Fresh Application be referred to the Environment Court	s87D(1) s87D(2)(a) s87D(3)	29 October 2009	HKI - 1
That the application be notified	s87C	30 October 2009	HKI- 2
That the Council resolve to directly refer Progressive's Fresh Application to the Environment Court	s87E(5)	6 November 2009	HKI - 3
That the Council publicly notify Progressive's Fresh Application	s87C ¹³	12 November 2009	HKI - 4
That Progressive lodge a notice of motion and supporting affidavit in the Environment Court	S87G(2)	16 February 2009	Filed with the Court
That Progressive serve direct referral documents on all submitters and the Rodney District Council	s87G(2)(b)	16 February 2010	Schedule 2
That Progressive notify the Court that all submitters were being served by mail on that day	s87G(2)(c)	19 February 2010	HKI - 5

¹³ In accordance with the requirement that the application be notified in order to qualify for direct referral.

Schedule 2

List of Responses for Application LAN-55743

Name	Address
Peter Kawe Simons	2 Ashmore Crescent, Warkworth 0910
Warwick Edward Massey	91 Perry Road, RD 3, Warkworth 0983
Hueline Frances Massey	91 Perry Road, RD 3, Warkworth 0983
The Tree Council	91 Perry Road, RD 3, Warkworth 0983
Vic Shankland	1/10 Pound Street, Warkworth 0910
New Zealand Transport Agency	PO Box 1459, Shortland Street, Auckland 1140
New Zealand Historic Places Trust Pouhere Taonga	PO Box 105291, Auckland City, Auckland 1143
Insight Legal	PO Box 333, Warkworth 0941
Ian Anderson	47 Queen Street, Warkworth 0910
Grant Stephenson Blackburn	11 Lett Road, Snells Beach, Warkworth 0920
Summerset Management Group Limited	C/- Minter Ellison Rudd Watts, Attn Shannan Mills, PO Box 3798, Shortland Street, Auckland 1140
Robin Anne Dixon	PO Box 206, Warkworth 0941
Perrendale Holdings Limited	C/- Terra Nova Planning Limited, PO Box 466, Orewa 0946
Donna Te Huna Wylie	23 Rivendell Place, Warkworth 0910
New Zealand Fire Service Commission	C/- Beca Carter Hollings & Ferner Limited, PO Box 6345, Wellesley Street, Auckland 1141
Alexander Owen Parton	441 Mahurangi West Road, RD 3, Warkworth 0983
Diane Catherine Parton	441 Mahurangi West Road, RD 3, Warkworth 0983
Andrea Janet Hinchco	C/- La Pineta Vineyards Limited, PO Box 609, Warkworth 0941
Bowls Warkworth Incorporated	9-11 Mill Lane, Warkworth 0910
Bruce Allan Manson	PO Box 139, Warkworth 0941
Heather Margaret Manson	PO Box 139, Warkworth 0941
Michael Smith	401 Hibiscus Coast Highway, Orewa 0931
The National Trading Company Of NZ Limited	C/- Ellis Gould Solicitors, PO Box 1509, Shortland Street, Auckland 1140
Wilmot Motors Limited	PO Box 29, Warkworth 0941
Angela Louise Fillery	1152 Woodcocks Road, RD 1, Warkworth 0981
Ronald Owen Mabbett	3/35C Haulti Drive, Warkworth 0910
John Northcott	5 Wainoni Place, Warkworth 0910
Kawau Island Access Organisation Inc	Counter Delivery, C/- H R Coleman, Warkworth Post Office, Warkworth 0941
Joy Emily Anderson	7 Coquette Street, Warkworth 0910
Hinau Developments Limited	PO Box 18, Christchurch 8140
Arthur Waller	17A Bertram Street, Warkworth 0910
Dennis Frederick Brown	77 Kaipara Flats Road, RD 1, Warkworth 0981
Dawn Ferguson	326 Falls Road, RD 4, Warkworth 0984
Elizabeth Jennifer McClean	8 Falls Street, Warkworth 0910
Robert Bradley Sutcliffe	C/- 47A Victoria Street, Warkworth 0910
David Arthur Crump Hanson	PO Box 28008, Remuera, Auckland 1541

"HKI-1"

RUSSELL McVEAGH

29 October 2009

PARTNERS

CAMERON FLEMING
PATRICK BOWLER
DEREK NOLAN
JEFF MORRISON
DEREK JOHNSTON
GREG THOMPSON
GRAEME QUIGLEY
ALAN PATERSON
GARTH SINCLAIR
FREDERICK WARD
RICHARD MCILRATH
GRAIT KEMBLE
HAMISH MCINTOSH
PIP GREENWOOD
CHRISTIAN WHATA
JAMES EVERY-PALMER
DAVID CLARKE
RICHARD SCOLAR
BRENDAN BROWN
SARAH KATZ
MALCOLM CROTTY
JOE WINDMEYER
ANDREW PETERSON
GUY LETHBRIDGE
JOHN POWELL
ROSS PENNINGTON
ED CROOK
TIM CLARKE
CAMPBELL ROSE
BALTHAZAR MATHESON
MATTHEW WALLETT
SARAH KEENE
MICHAEL HERON
SALLY FITZGERALD
ANDREW BUTLER
SARAH ARUSTRONG
ADRIAN OLMSY
DAVID HOARE
CHRISTOPHER BARGERY
GEOFF BUSCH
SHAUN COBKOLLY

CONSULTANTS

JOHN KING
GEOFFREY RICKETS
ALAN ACOURT
PRUDENCE FLACKS
NICOLA PURVIS

Anne Hessel
Senior Planner - Consents
Rodney District Council
Private Bag 500
OREWA

Dear Ms Hessel

REVISED RESOURCE CONSENT APPLICATION BY PROGRESSIVE FOR A
COUNTDOWN SUPERMARKET IN THE WARKWORTH TOWN CENTRE

1. We act for Progressive Enterprises Limited ("Progressive").
2. This letter accompanies an application to The Rodney District Council ("RDC") for resource consent by Progressive for a supermarket on its site between Mill Lane and Neville Street ("Fresh Application"). It is for the same activity as the existing application referenced by the Council as RMA 55082 ("Earlier Application"), and is identical to the Earlier Application, except that the branding of the supermarket has been updated to reflect the next generation of Countdown branding.
3. The supporting assessment of environmental effects and other technical reports accompanying the Fresh Application have been updated, to reflect in particular:
 - (a) *The recent changes to the Resource Management Act 1991 ("RMA")*: Importantly, these raise the threshold for notification and reinforce that the proposal should proceed non-notified but, should limited notification of adjacent neighbours occur, this should exclude trade competitors or their surrogates from participation. However, without prejudice to its position that its proposal need not be notified (or only be limited notified), Progressive is prepared to seek full notification on the basis that the Fresh Application is processed swiftly, and, importantly, that the RDC agrees to direct referral of the Fresh Application to the Environment Court. It is understood that a decision on the processing of the Fresh Application by way of direct referral will be made at the next RDC meeting, on Thursday 5 November 2009. Progressive reserves its position on notification if the decision at that meeting does not support direct referral.
 - (b) *The decisions version of the Variation 125 and Plan Change 110 ("Plan Changes")*: Although Progressive maintains that the Plan Changes are invalid (as evidenced by the judicial review proceedings) it has completed an assessment of its proposal against the decisions version of

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2055267 v6

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the Plan Changes. Under the decisions version, the Fresh Application is a restricted discretionary activity (rather than non-complying).

- (c) *The s92 requests in respect of the Earlier Application:* additional information has been included in this Fresh Application to address matters raised in RDC's earlier s92 requests (apart from that information that was specifically refused through the letter of 6 October 2009).
4. A list of the major text changes to the AEE can be provided should you wish.
 5. This letter also records Progressive's challenge to the validity of certain assessment criteria,² on the basis that they purport to require consideration of a prohibited (and irrelevant) matter, being trade competition or the effects of trade competition. We understand that Progressive and the RDC have been in without prejudice discussions and that these criteria may be amended by agreement (and consent orders) to reflect the fact that no regard may be had to trade competition or its effects under the RMA. (Progressive has sought to have these provisions amended through an appeal lodged with the Environment Court on 9 October 2009).
 6. In any event, through the doctrine of *collateral challenge* the RDC should ignore the unlawful criteria in its consideration of the Fresh Application. The doctrine of collateral challenge³ gives the RDC the power to disregard these criteria when considering the Fresh Application, given Progressive's challenge to their validity. However, in this case, the power to disregard an unlawful rule⁴ should be exercised by RDC, as otherwise RDC will itself be acting unlawfully, as it will be considering trade competition or the effects of trade competition.
 7. As with the Earlier Application, seven copies of the consent documentation are provided. A Zomac cheque for \$7,000.00 is also included along with the completed application form. We would expect, given the RDC and its officers have already reviewed the proposal, that the processing could be efficiently and swiftly processed. There should be no need for any s92 requests (as Progressive has already received those in respect of the Earlier Application and incorporated its responses in the materials supporting the Fresh Application). Nor does Progressive expect the RDC to need to extend any of the statutory timeframes (which can now only be extended with Progressive's consent (as applicant)), given that RDC's officers will already be very familiar with the proposal.
 8. Please contact us if this is not clear. Otherwise, we understand that the Fresh Application will be lodged with this letter on Thursday 29 October 2009, and that a decision will be made by RDC on notification at the RDC meeting on 5 November 2009.⁵

¹ If the Plan Changes were set aside as invalid, as Progressive considers they should be, the application would be permitted, save for having restricted discretionary status as to car parking.

² Contained in Rule 9.12.5(k) and (m)(iii) under the decisions version of the Plan Changes.

³ *Bryant Holdings v Marlborough District Council* [2008] NZRMA 485 (HC), paragraph [62].

⁴ It is prohibited under the RMA for a Council to have regard to trade competition when considering an application for resource consent. Rule 9.12.5(k) and (m)(iii) specifically purports to require the RDC to take into trade competition or the effects of trade competition. It is therefore invalid or *ultra vires*, and no regard should be had to its requirements.

⁵ In accordance with section 95 of the RMA, a decision must be made by 12 November 2009.

9. Finally, we confirm that the Earlier Application is not withdrawn but is to remain on hold for the meantime pending further notice from Progressive. Once it is beyond doubt that the Fresh Application will be progressed by way of direct referral to the Environment Court, it may be appropriate to then withdraw the Earlier Application.

Yours faithfully
RUSSELL McVEAGH

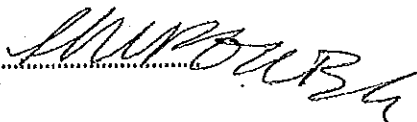


James Gardner-Hopkins
Associate

Direct phone: 04 819 7870
Direct fax: 04 819 7579
Email: james.gardner-hopkins@russellmcveagh.com

This is the annexure marked "HKI - 1" referred to in the affidavit of Horiana Kathleen Irwin sworn at Wellington this 12th day of March 2010 before me

Signature
A Solicitor of The High Court of New Zealand
(Solicitor to sign in part on Exhibit)



Katherine Mary Porter
Solicitor of the High Court of New Zealand
Wellington

"HKI-2"

RUSSELL McVEAGH

30 October 2009

By email and post

Anne Hessel
Senior Planner - Consents
Rodney District Council
Private Bag 500
OREWA

Dear Ms Hessel

REQUEST FOR FULL NOTIFICATION

1. As you are aware, we act for Progressive Enterprises Limited ("Progressive").
2. This letter is to clarify, following a call from the Council's Solicitors, one aspect of the letter that accompanied the resource consent by Progressive for a supermarket on its site between Mill Lane and Neville Street ("Fresh Application") lodged yesterday (29 October 2009).
3. With respect to full notification and direct referral to the Environment Court, we hereby confirm that Progressive:
 - (a) Requests full notification of the Fresh Application.
 - (b) This is on the basis that:
 - (i) the request enables the Rodney District Council ("RDC") to resolve whether or not to agree to directly refer the Fresh Application to the Environment Court; but
 - (ii) If the RDC does not resolve to directly refer the Fresh Application to the Environment Court (or if it rescinds any resolution to directly refer it), the request for full notification is to be deemed withdrawn, in which case a decision on notification will need to be made by the RDC in accordance with the normal statutory requirements.
4. Please contact us if you have any further queries.

Yours faithfully
RUSSELL McVEAGH

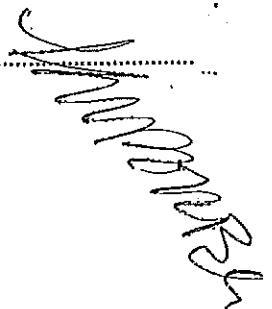


James Gardner-Hopkins
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This is the annexure marked "HKI - 2" referred to in the affidavit of Horiana Kathleen Irwin sworn at Wellington this 12th day of March 2010 before me

Signature
A Solicitor of the High Court of New Zealand
(Solicitor to sign in part on Exhibit)



Katherine Mary Porter
Solicitor of the High Court of New Zealand
Wellington

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 - CHRISTOPHER BANSERY
 - GEOFF BUSH
 - SHAWN CONNOLLY
- CONSULTANTS**
- JOHN KING
 - GEOFFREY RICKETS
 - ALAN ALCOURT
 - FRUENDE FLACKS
 - IRCOLA FURYS

"HKI-3"

ITEM NO: 19

REPORT



TO Council
ON 5 November 2009
FROM Ian Dobson – Manager: Resource Consents
APPROVED BY Lloyd Barton – Director: Customer Service
SIGNATURE

SUBJECT REQUEST BY PROGRESSIVE ENTERPRISES LTD FOR THE PUBLIC NOTIFICATION AND DIRECT REFERRAL TO THE ENVIRONMENT COURT OF AN APPLICATION TO CONSTRUCT A SUPERMARKET, FIVE RETAIL SHOPS, ASSOCIATED CAR PARKING AND EARTHWORKS AT 20-28 NEVILLE STREET AND 3-7 MILL LANE, WARKWORTH

FILE REF L65743; TP/1/10

PURPOSE OF REPORT:

<input type="checkbox"/> Information only	<input type="checkbox"/> Strategic decision	<input type="checkbox"/> Policy decision	<input checked="" type="checkbox"/> Statutory process
<input type="checkbox"/> Community issue	<input type="checkbox"/> Contract decision	<input type="checkbox"/> Delegation	<input type="checkbox"/> Appointment
<input type="checkbox"/> Administrative matter			

IMPLICATIONS:

(i)	Is this matter significant in terms of Council's Policy on Significance? No
(ii)	Implications in terms of Vision Rodney? No
(iii)	Implications in terms of Long Term Council Community Plan / Annual Plan? No
(iv)	Implications in terms of other Council Strategic documents or Council Policy? No
(v)	Is a budget amendment required? No
(vi)	Have the views of affected or interested persons been obtained and is any further public consultation required? Yes

Handwritten initials: DJL JRP

(vii)	Does a decision on this matter require Auckland Transition Agency approval? (yes / no / advice being sought?)
	No

FINANCIAL IMPLICATIONS:

Capital cost implications	Nil
Is it currently budgeted for?	Yes
Funding source of capital costs	Not applicable
Ongoing operational cost implications	Not applicable
Is it currently budgeted for?	Yes
Funding and rating impact (whether resulting from capital expenditure or arising directly)	Not applicable

SUMMARY:

Progressive Enterprises has lodged an application with the Council for the construction of a supermarket, five speciality retail shops, associated car parking and earthworks at 20-26 Neville Street and 3-7 Mill Lane, Warkworth.

The application has been lodged with a request that it proceed on a publicly notified basis and that, having proceeded to notify the application, the Council refer consideration of the proposal directly to the Environment Court, in accordance with s87 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

RECOMMENDATION:

- (a) That pursuant to s94(c) of the Resource Management Act 1991, the application for construction of a supermarket, five speciality retail shops, associated car parking and earthworks at 20-26 Neville Street and 3-7 Mill Lane, Warkworth, be publicly notified as requested by the applicant.
- (b) That following the public notification of the application and pursuant to s87(e) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the application be determined by the Environment Court and not Rodney District Council.

1.0 Background

Sections 87(c) to 87(l) of the Resource Management Act (RMA) (Simplifying and Streamlining) Amendment Act 2009 allow applicants to make a request to the Council for resource consent applications to be decided by the Environment Court instead of by the Council. This process is known as Direct Referral and applies to notified applications only.

Progressive Enterprises has lodged an application with Rodney District Council seeking resource consent for the construction of a retail development at 20-26 Neville Street and 3-7 Mill Lane, Warkworth. It has been requested that the application be publicly notified and referred directly to the Environment Court under the provisions of the new RMA (Simplifying and Streamlining) Amendment Act.

2.0 Issues

When a request is made to refer a notified application to the Environment Court, the Council may agree or decline the request. If a request is declined, the Council must give its reason and notify the applicant of its decision. The applicant then has a right of objection to this decision.

However, should the Consent Authority agree to the referral, it must continue to process the application and prepare a report on the assessment of the proposal, to be sent to the applicant and all submitters. The applicant, should it wish to proceed with the referral, must then lodge a notice of motion with the Environment Court. Of course, if the Council notifies the application and there are no submitters, the applicant can decide not to lodge the notice of motion with the Court, in which case the application falls to be determined by the Consent Authority again.

The application to construct a new supermarket within Warkworth has already generated much public debate. On that basis, should an application be notified, the Council could reasonably expect a number of submissions and, potentially, an appeal to the Environment Court. Having regard to the key aims of the new RMA (Simplifying and Streamlining) Amendment Act to improve the efficiency in which applications are considered, it would seem prudent to refer consideration of this proposal directly to the Environment Court. The amendment to the Act, which specifically enables applications such as this to be referred directly to the Court, is intended to reduce duplication of process, costs and time delays as a result of applications going through a council hearing process and then being heard again in the Environment Court. Thus, a direct referral would enable all interested parties to debate the application before the Court without the usual time delays and costs associated with first proceeding through a council hearing process.

3.0 Options

The Council has the following two options before it at this time:

1. Agree to the public notification and direct referral of the application to the Environment Court where the applicant, the Council and all submitters can be heard either in support or opposition to the application. The Court will then make the final decision relating to the proposal.
2. Decline to refer the application to the Environment Court, which then enables the applicant to object to this decision under the provisions of s357A(1)(e).

4.0 Conclusion

As stated earlier in this report, the RMA (Simplifying and Streamlining) Amendment Act 2009 introduced specific provisions to increase the speed and efficiency of potentially controversial applications by allowing them to be referred directly to the Environment Court for determination. Having regard to the nature of the current proposal and the interest likely to be generated from potentially affected parties, it is considered appropriate for the Council to notify the application, dispense with a Council hearing into the merits or otherwise of the proposal, and defer to consideration of the application by the Environment Court.

This is the annexure marked "HK1 - 3" referred to in the affidavit of Horiana Kathleen Irwin sworn at Wellington this 12th day of March 2010 before me

Signature
A Solicitor of The High Court of New Zealand
(Solicitor to sign in part on Exhibit)



Katherine Mary Porter
Solicitor of the High Court of New Zealand
Wellington

"HKI-4"



Rodney District Council > About the Rodney Region > News & Notices > Resource Consent Application For Supermarket

Resource Consent Application For Supermarket In Warkworth - RMA 55743

12 Nov 2009

Public Notification of an Application for Resource Consent Under Section 93 of The Resource Management Act 1991

The Rodney District Council has received an application for Resource Consent as listed below:

Public Notification of an Application for Resource Consent Under Section 93 of The Resource Management Act 1991

The Rodney District Council has received an application for Resource Consent as listed below:

Description of Proposal

To construct and operate a supermarket with a total gross floor area of 3,494 m², with a total of 154 associated carparks the majority of which will be provided in an undercroft parking area, needing earthworks over an area of 5,200 m² and volume of 13,000 m³ cut to waste and the removal of a Rimu and Jacaranda tree both of more than 6 metres in height, plus the construction of five speciality retail shops on the Neville Street frontage with a total combined gross floor area of 403 m².

Location of Proposal and Application No

20-26 Neville Street
Warkworth
Lot 1 & 2 DP 36090
Pt Lot 20 DP 27353
Lot 2 DP 160337
RMA 55743

Applicant and Address for Service

Progressive Enterprises Limited
C/- Zomac Planning Solutions Ltd
PO Box 103
Whangaparaoa 0943
Attention: Mike Foster

Submissions

If you wish to make a submission on the application, you may do so by sending a written submission to the Chief Executive Officer, Rodney District Council, Private Bag 500, Orewa, no later than ~~Friday, 11 December 2009~~.

The submission must be dated, signed by you, and include the following information:

- (a) Your name and postal address and telephone number and fax number (if applicable).
- (b) Details of the application in respect of which the submission is being made, including location.
- (c) Whether you support or oppose the application, in whole or in part.

ALL
LAP

- (d) Reasons for your submission.
- (e) The decision you wish the Council to make.
- (f) Whether you wish to be heard in support of the submission.

A form for submissions is available at Council offices and on the website here.

A summary of the application may be viewed at the Council's Service Centres at Baxter Street - Warkworth, State Highway 16 - Huapai, Commercial Road - Helensville and at Centreway Road, Orewa.

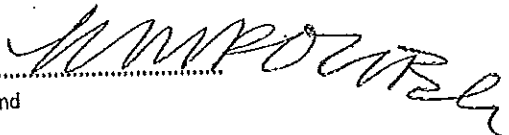
Please phone 0800 426 5169 or if you are calling within HBC area 09 426 5169 if you have any questions about the application(s).

Supporting information and reports may be viewed at the Council's Head Office at Centreway Road, Orewa.

A copy of your submission **MUST BE SERVED** as soon as reasonably practicable on the applicant at their Address for Service.

This is the annexure marked "HK1 - 4" referred to in the affidavit of Horiana Kathleen Irwin sworn at Wellington this 12th day of March 2010 before me

Signature
A Solicitor of The High Court of New Zealand
(Solicitor to sign in part on Exhibit)



Katherine Mary Porter
Solicitor of the High Court of New Zealand
Wellington

"HKI-5"

RUSSELL McVEAGH

19 February 2010

By hand

The Environment Court
8th Floor, Justice Building
3 Kingston Street
AUCKLAND 1010

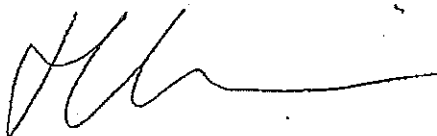
For: The Registrar

**DIRECT REFERRAL OF RESOURCE CONSENT APPLICATION (55743) BY
PROGRESSIVE ENTERPRISES LIMITED**

- PARTNERS**
- CAMERON FLEMING
 - PATRICK BOWLER
 - DEREK HOLLAN
 - JEFF MORRISON
 - DEREK JOHNSTON
 - GREG THOMPSON
 - GRAEME QUIGLEY
 - ALAN PATERSON
 - GARTH SINCLAIR
 - FREDERICK WARD
 - RICHARD McILRAITH
 - HAMISH MCHINTOSH
 - PIP GREENWOOD
 - CHRISTIAN WHATA
 - JAMES EVERY-PALMER
 - DAVID CLARKE
 - BRENDAN BROWN
 - SARAH KATZ
 - MALCOLM CROTTY
 - JOE WANDMEYER
 - ANDREW PETERSON
 - GUY LETHBRIDGE
 - JOHN POWELL
 - ROSS PENNINGTON
 - ED CROOK
 - TIM CLARKE
 - CAMPBELL ROSE
 - BALTHAZAR HATHESON
 - MATTHEW MALLETT
 - SARAH KEENE
 - MICHAEL HERON
 - SALLY FITZGERALD
 - ANDREW BUTLER
 - SARAH ARMSTRONG
 - ADRIAN OLNEY
 - DAVID HOARE
 - CHRISTOPHER BARGERY
 - GEOFF BUSCH
 - SHAUN CONNOLLY
 - MATTHEW KERSEY
 - JAMES GARDNER-HOPKINS
- CONSULTANTS**
- JOHN KING
 - GEOFFREY RICKETTS
 - ALAN ACCOURT
 - PRUDEICIA FLACKS
 - NICOLA PURVIS

1. We act for Progressive Enterprises Limited ("Progressive").
2. Please find enclosed, for filing, the following:
 - (a) Notice of Motion on behalf of Progressive seeking direct referral and other orders;
 - (b) Memorandum of Counsel for Progressive regarding direct referral and other orders;
 - (c) Affidavit of Brady Ross Nixon in support of Notice of Motion for direct referral sworn 19 February 2010; and
 - (d) Affidavit of Mike John Foster in support of Notice of Motion for direct referral sworn 19 February 2010.
3. Please also find enclosed a cheque for \$55 (the filing fee for a Notice of Motion). (As we understand it, the regulations have not been updated to accommodate direct referral, so the filing fee remains \$55.)
4. Progressive has served all submitters today by mail (please also find enclosed a schedule of submitters and addresses sourced from the Rodney District Council).
5. Please contact us if you have any queries.

Yours faithfully
RUSSELL McVEAGH

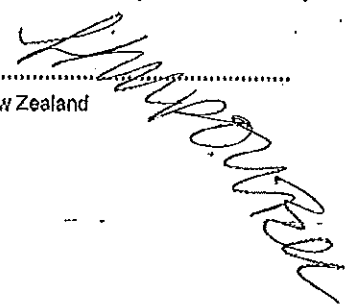


James Gardner-Hopkins / Horiana Irwin
Partner / Solicitor

Direct phone: 04 819 7870 / 04 819 7857
Direct fax: 04 819 7579 / 04 819 7578
Email: james.gardner-hopkins@russellmcveagh.com
horiana.irwin@russellmcveagh.com

This is the annexure marked "HKI - 5" referred to in the affidavit of Horiana Kathleen Irwin sworn at Wellington this 12th day of March 2010 before me

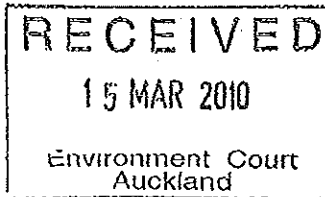
Signature
A Solicitor of The High Court of New Zealand
(Solicitor to sign in part on Exhibit)



Katherine Mary Porter
Solicitor of the High Court of New Zealand
Wellington

RUSSELL McVEAGH

15 March 2010



By hand

The Environment Court
8th Floor, Justice Building
3 Kingston Street
AUCKLAND 1010

For: The Registrar

**DIRECT REFERRAL OF RESOURCE CONSENT APPLICATION (55743) BY
PROGRESSIVE ENTERPRISES LIMITED (ENV-2009-AKL-059)**

1. Please find enclosed, for filing, an original affidavit of Hortana Kathleen Irwin in support of Progressive's Notice of Motion for direct referral sworn 12 March 2010 (a copy of which was filed with the Court on 12 March 2010).
2. Please contact us if you have any queries.

Yours faithfully
RUSSELL McVEAGH

A handwritten signature in black ink, appearing to read "James Gardner-Hopkins". The signature is fluid and cursive, with a large initial 'J' and 'G'.

James Gardner-Hopkins / Liz Hardacre
Partner / Solicitor

Direct phone: 04 819 7870 / 04 819 7871
Direct fax: 04 819 7579 / 04 819 7579
Email: james.gardner-hopkins@russellmcveagh.com
liz.hardacre@russellmcveagh.com

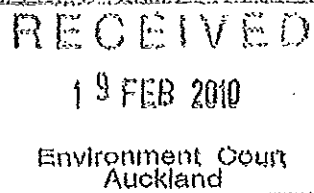
PARTNERS

CAVERON FLEMING
PATRICK BOWLER
DEREK NOLAN
JEFF MORRISON
Derek JOHNSTON
GREG THOMPSON
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DAVID HOARE
CHRISTOPHER BARGERY
GEOFF BUSCH
SHAUN CONNOLLY
MATTHEW KERSEY
JAMES GARDNER-HOPKINS

CONSULTANTS

JOHN KING
GEOFFREY RECKETTS
ALAN ACCOULT
PRUDENCE FLACKS
NICOLA PURVIS

IN THE ENVIRONMENT COURT
AUCKLAND



ENV

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of the direct referral of an application for resource consent by Progressive Enterprises Limited to the Environment Court under section 87G of the Resource Management Act 1991

AFFIDAVIT OF BRADY ROSS NIXON
IN SUPPORT OF NOTICE OF MOTION FOR DIRECT REFERRAL

SWORN 19 FEBRUARY 2010

RUSSELL McVEAGH

JDK Gardner-Hopkins / L. A Hardacre
Phone 64 4 499 9555
Fax 64 4 499 9556
PO Box 10-214
DX SX11189
Wellington

BR
A

I, BRADY ROSS NIXON of Auckland, Development Manager, swear:

1. INTRODUCTION AND EXPERIENCE

Introduction

- 1.1 My full name is Brady Ross Nixon. I am employed as a Development Manager Property for the Applicant, Progressive Enterprises Limited ("Progressive"), and am authorised to make this affidavit on its behalf.
- 1.2 I have personal knowledge of the matters set out in this affidavit and its contents are true to the best of my knowledge and belief.
- 1.3 I make this affidavit in support of the application by Progressive to directly refer resource consent application 55743 ("Application") to the Environment Court. The Application is for the development of a Countdown supermarket in the Warkworth Town Centre.

Background

- 1.4 I have been a development manager for over 10 years for various companies. I have managed the development of around 250 apartments; up to 80 warehouse units; a residential subdivision precinct; multiple terrace house developments; commercial offices; live-work warehouse apartment units; and various retail projects.
- 1.5 I have worked for Progressive as a development manager since September 2007. I am presently responsible for the development of 16 property development projects in New Zealand including Tokoroa, Te Awamutu, and Hobsonville Town Centre (the balance is made up of projects that are sensitive for commercial reasons).
- 1.6 I have been involved with Progressive's Warkworth development (the subject of these proceedings) from the outset; from the acquisition of the site in Warkworth ("Site") (for which I authorised purchase on Progressive's behalf), associated due diligence process and the financial analysis to the various other streams of negotiations that have arisen from this Application (detailed further below).
- 1.7 I have been closely involved in planning processes relating to the development of the Site, including:
- (a) Plan Change 110 and Variation 125;
 - (b) Progressive's judicial review proceedings (now discontinued) challenging the validity of the Plan Change 110 and Variation 125; and
 - (c) Progressive's proposed development in the Warkworth Town Centre and matters arising out of this development.

2. OUTLINE

2.1 The purpose of this affidavit is to detail why Progressive wishes to have its Application determined by the Environment Court instead of the Rodney District Council ("Council"). In this affidavit, I address:

- (a) Section 3: Background facts giving rise to direct referral.
- (b) Section 4: Need for direct referral.

3. BACKGROUND FACTS GIVING RISE TO DIRECT REFERRAL

3.1 This section should be read with reference to the A3 flow diagram attached as Schedule 1. The history is somewhat vexed, and is very unusual in my experience. It demonstrates, however, why Progressive has sought to have its application directly referred to the Environment Court.

Initial investigations

3.2 Progressive has been looking for an opportunity to develop a supermarket in Warkworth for some time. Progressive identified the Site between Mill Lane and Neville Streets in the Warkworth Town Centre as an appropriate Site for this development. The Site was in multiple ownership but, by chance, the individual sites became available at the same time.

3.3 Progressive undertook a careful but swift due diligence which included a planning component that identified the Site as suitable for a supermarket development (due to the relevant planning provisions). Because of the very sensitive nature of acquiring land, and the prospect of our competitors looking to block our development by purchasing "spike sites" or acquiring leases over key land, that acquisition was undertaken using names other than Progressive. (We are aware of a local developer and a competitor subsequently investigating this site for that purpose in the months prior to settlement.)

3.4 Progressive settled purchases of the sites in February and March 2008.

Agitation by competitors

3.5 Despite our care in purchasing the Site, speculation began that it was us who had secured the site for a supermarket.

3.6 A short time after we had secured the Site, on or about 7 May 2008, a group including developers and trade competitors of Progressive, the Warkworth Community Liaison Group ("Liaison Group"), sought a change to the Council's planning framework to specifically prevent the development of a supermarket on the Site. The Council also seemed to want any additional supermarket located outside the town centre in an area known as Woodcocks Road (refer statements by Councillors attached as Exhibit BRN - 1) (Perrendale Holdings Limited is the developer of the site at Woodcocks Road, and it has a representative member on the Liaison Group). Just over a week after the Rodney District Council ("Council") had been visited by the Liaison Group, on 15

May 2008, the Council notified Variation 125 and Plan Change 110 ("Plan Changes").

- 3.7 The immediate legal effect of the Plan Changes was to:
- (a) add objectives and policies to the planning framework that sought to exclude large format retailing (including supermarkets) from within the Warkworth Town Centre, including Progressive's Site; and
 - (b) change the status of supermarket activity on the Site from restricted discretionary to non-complying.

- 3.8 Progressive was not consulted as to these Plan Changes and only became aware of them through the Council's public notification notice in the local newspaper.

Negotiations

- 3.9 Following notification of the Plan Changes, a long period of discussions between Progressive and the Council ensued. To cut a long story short, the good faith negotiations were not successful and in May 2009 Progressive filed judicial review proceedings seeking declarations that:

- (a) the Council had breached its statutory duty under section 32 of the RMA; and

that it was unreasonable in the circumstances to have notified the Plan Changes without consultation with affected landowners.

- 3.10 Later, the statement of claim was amended to include a further course of action of improper purpose, being to prevent trade competition.

- 3.11 In the meantime, Progressive had lodged a resource consent application with the Council to develop a supermarket on the Site ("Original Application") - although it was put on hold to let the Plan Changes proceed. In May 2009, the Council heard submissions on the Plan Changes and, through its hearings commissioners, declined to uphold non-complying status and changed the status of the supermarket to restricted discretionary. The commissioners' decision was released in September 2009. The decision also imposed veranda controls on the NTC site.

- 3.12 A number of appeals were lodged against the decision on the Plan Changes. Progressive's appeal was a focused one. Other trade competitors such as Perrendale sought more wide ranging relief (but still intended to make it more difficult for Progressive to develop its Site). NTC also sought amendments to some of the 'distributional impact' provisions, as well as the removal of the veranda controls on its site. Progressive now has agreement with the Council in respect of its appeal, but the s274 parties, including Perrendale and NTC have not yet agreed. These "Variation appeals" are presently before the Court.

- 3.13 Shortly after the 2009 amendments to the Resource Management Act 1991 ("RMA") came into force, Progressive lodged a fresh Application for consent. That Application addressed the decisions version of the Plan Changes and contained some minor modifications but was essentially for the same activity as in the Original Application. Having seen all of the 'trade competition' and other complicating issues surrounding the Plan Changes and the Original Application, Progressive was keen to pick up on the new prohibitions on involvement by trade competitors as well as the opportunity for direct referral. One such issue was the Council's refusal to grant a standalone consent for the removal of two trees from the site. This was appealed by Progressive, but as the fresh Application includes the removal of the same trees, there is no need to continue with the tree removal appeal. On the trade competition side, we are also aware of Perrendale's representative approaching our parent company, WoolWorths Australia, seeking for us to abandon plans for our Site and to locate in at Woodcocks Road.
- 3.14 The Council also agreed with us that the fresh Application should be referred direct to the Environment Court. Given this, the advancements in decisions on the Plan Changes, and our confidence in ultimately securing consent, we withdrew the judicial review proceedings and have proceeded to this Court with direct referral.

Recent history in respect of this application

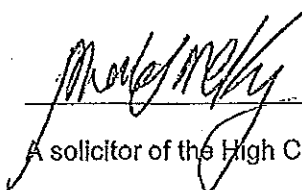
- 3.15 The Council publically notified the Fresh Application on 12 November 2009, with submissions due on 11 December 2009. There were a total of 33 submissions on the Fresh Application.
- 3.16 Of these submissions Progressive considers three to be from trade competitors or a surrogate. These submissions were from:
- (a) NTC (a trade competitor);
 - (b) Perrendale Holdings Limited (a trade competitor); and
 - (c) Summerset Management Limited (potentially a surrogate of Perrendale Holdings Limited).
- 3.17 Progressive has entered into correspondence with these submitters as to their status, and requested confirmation as to how they are entitled to submit under the new law. They maintain legitimacy in their involvement.

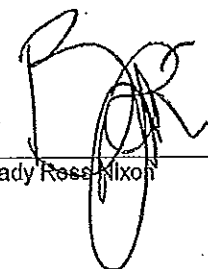
4. NEED FOR DIRECT REFERRAL

- 4.1 The need for direct referral should be evident from the above.
- 4.2 The process to date has cost Progressive significant time and money. It has taken more than two years to get to this point. Progressive has had to incur holding costs and the costs of going through the various processes described above. The latter has cost in excess of \$800,000.00. This amount does not include loss of profits for this period. As I understand it these sorts of costs and delays are what the new RMA amendments are trying to avoid.

- 4.3 If we had a Council-level hearing, that would have taken time to set down, our trade competitors would almost inevitably have participated and appealed, drawing the application to the appeal stage in any event.
- 4.4 Given all of this, Progressive saw the most appropriate forum to hear the Fresh Application was in the Environment Court and therefore seek direct referral.

SWORN at Auckland this 19th day of
February 2010 before me


A solicitor of the High Court of New Zealand


Brady Ross Nixon

Michael John McKay
Solicitor
Auckland

IN THE ENVIRONMENT COURT
AUCKLAND

19 FEB 2010

ENV

Environment Court
Auckland

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of the direct referral of an application for resource consent by **Progressive Enterprises Limited** to the Environment Court under section 87G of the Resource Management Act 1991

AFFIDAVIT OF MICHAEL JOHN FOSTER
IN SUPPORT OF NOTICE OF MOTION FOR DIRECT REFERRAL

SWORN 19 FEBRUARY 2010

RUSSELL McVEAGH

J D K Gardner-Hopkins / L A Hardacre
Phone 64 4 499 9555
Fax 64 4 499 9556
PO Box 10-214
DX SX11189
Wellington

M. J. Foster

I, MICHAEL JOHN FOSTER of Auckland, Planner, swear:

1. INTRODUCTION AND EXPERIENCE

Introduction

- 1.1 My full name is Michael John Foster. I am an Independent Planning Consultant and Director of Zomac Planning Solutions Limited ("Zomac"). I have a Bachelor of Arts (Massey), Diploma in Town Planning (Auckland), am a fellow of the New Zealand Planning Institute (NZPI) and a member of the Planning Institute of Australia (PIA). For 16 years from 1985 to 2001 I was Director of Planning at Beca Carter Hollings & Ferner Ltd, consulting engineers and planners. I am currently the chair of the Infrastructure Technical Advisory Group advising the Minister for the Environment with respect to the phase two reforms under the Resource Management Act 1991 ("RMA").
- 1.2 I have personal knowledge of the matters set out in this affidavit and its contents are true to the best of my knowledge and belief.
- 1.3 I make this affidavit in support of Progressive's application to directly refer resource consent application 55743 ("Fresh Application") to the Environment Court.
- 1.4 In preparing this affidavit, I acknowledge that I have read the code of conduct for Expert Witnesses in the Environment Court Consolidated Practice Note (2006). I agree to comply with this Code of Conduct. This evidence is within my area of expertise, except where I state I am relying on what I have been told by another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.
- 1.5 I have read and endorse the affidavit of Brady Ross Nixon also provided in support of this direct referral application. That affidavit sets out the history and confirms Progressive's reasons for seeking direct referral.

Experience

- 1.6 I have over 30 years experience in planning and resource management fields and over the last 20 years I have had specific and extensive experience in retail planning. During this 20-year period, I have been responsible for the planning and resource management inputs for a range of major retailing clients on a number of proposed and operative district plans and a wide range of developments. More specifically I have been involved in the following:
- (a) North Shore District Plan Review - Commercial section (2001, 2002, 2004)
 - (b) Proposed Rodney District Plan Retail provisions (2002 - 2005)
 - (c) Papakura District Plan - Plan Changes to Commercial provisions (2002- 2005)

- (d) Gisborne District Plan Variations to Commercial provisions (2004)
- (e) Westfield Albany Town Centre development and expansion (2004 - ongoing)
- (f) Palmerston North Plan Change 28 (2006-2007)
- (g) North Shore City Plan Change 9 (2006-2007)
- (h) Hastings Plan Change 21 (2006 - 2007)
- (i) LGAAA Plan Changes (2006 - ongoing)
- (j) Te Awamutu: Plan Change 53 (2006 - 2007)

1.7 I believe my experience and understanding of both retail and urban planning dynamics around New Zealand gives me a sound appreciation of the impacts that the requirements of the RMA have on appropriate district planning and infrastructure provisions as they relate to commercial retail activity within urban areas, among other RMA issues.

2. OUTLINE

2.1 The purpose of this affidavit is to detail why, from a planners perspective, I consider it appropriate for the Environment Court to hear Progressive's Fresh Application in the first instance. In this affidavit, I address the:

- (a) **Section 3: Relevant planning Instruments**
- (b) **Section 4: Likely effects and straight forward nature of the Fresh Application**

2.2 In **Section 5**, I also address the reasonableness of the evidence timetable sought by Progressive in its notice of motion for orders.

3. RELEVANT PLANNING INSTRUMENTS

3.1 The background facts giving rise to this direct referral application are detailed in section three of Mr Nixon's affidavit. The purpose of this section is to provide a brief overview of the various planning instruments that have applied to Progressive's site in Warkworth ("Site") at various points since its acquisition.

3.2 Prior to the notification of Proposed Variation 125 to the Proposed Rodney District Plan and Proposed Plan Change 110 to the Operative Rodney District Plan ("**Plan Changes**"), the base status for supermarkets under the Proposed Plan was permitted. Progressive's proposal fell into restricted discretionary status as to parking and access issues because of the number of car parks provided.

3.3 The immediate effect of the Plan Changes made supermarkets non-complying, with any application notified and subject to appeals. While I supported the objective and policy intent of the Plan Changes, they were in my opinion likely to undermine the vibrancy and amenity of the

Warkworth town centre, as they prevented anchor activities from locating on the fringes of the town centre, where they can contribute to cross shopping, multipurpose opportunities. A logical result of the Plan Changes was that large format retail would locate outside the town centre, which could have reduced the amount of visitors to the town centre.

- 3.4 Progressive opposed the Plan Changes. A hearing of a panel of Independent Commissioners ("Panel") sat in May 2009 to consider the Plan Changes and their decision was released in early September 2009.
- 3.5 The Panel accepted Progressive's position (and made specific reference to my evidence presented at the Council hearing in the relevant part of its decision) that there is a need to provide for some large format to support the economic viability of the town centre in a defined "core expansion area".
- 3.6 Accordingly, the Panel identified three identified areas within the Warkworth Town Centre:
- (a) Policy Area A (the Core Area): This area reflects the present 'fine grained' and historic / character of the existing centre. In that area, retail below 200 sqm is permitted, between 201 and 350 sqm restricted discretionary and 351 sqm and above is non-complying.¹
 - (b) Policy Area B (the Fringe): the same size restrictions as in Policy Area A apply. Different policies and explanations apply to this area, but it is intended for the Fringe to accommodate a mix of business, offices, visitor accommodation and retail.
 - (c) Policy Area C (the Core Expansion): All new development within this area is restricted discretionary (as described above).
- 3.7 The Core Expansion area is that area identified on the Plan in Annexure C of the decision attached to this affidavit as Exhibit MJF - 1 and includes all of Progressive's Mill Lane / Neville Street Sites, as well as the bowling club. Within that area, there is no specific floor area trigger for assessment, but rather all new development is to be restricted discretionary.
- 3.8 In terms of activity status, this was a significant improvement for Progressive as it changed its Site from non-complying, to restricted discretionary as to supermarkets.
- 3.9 Despite the positive aspects of the Panel's findings, there were still areas of concern for Progressive in the decisions version of the Plan Changes. One of the key assessment criteria of concern was that which required consideration of "adverse cumulative effects on the character, vibrancy, vitality and economic sustainability of the town centre and/or other zoned business areas such as The Grange and Woodcocks Road which provide for large format retail activities."

¹ An exception was, however, made for the New World site on the basis that it is an existing use. The continuing use of the supermarket is permitted, with any extensions, additions, or alterations to be restricted discretionary.

- 3.10 I understand that the lawfulness of having to have regard to the impact of an in-centre proposal on the viability of a trade competitor's out-of-centre proposal, particularly where there has been no development on that trade competitor's site is questionable. Progressive made this known to the Council.
- 3.11 The Council and Progressive have subsequently reached agreement as to the wording of Variation 125 which achieves a sustainable resource management outcome and which does not require Progressive to have regard to trade competitors or the effects of trade competition. That agreement, of course, remains subject to other appeals (by trade competitors NTC and Perendale), and will ultimately require a decision by the Court (or, if parties agree, endorsement by way of consent orders).

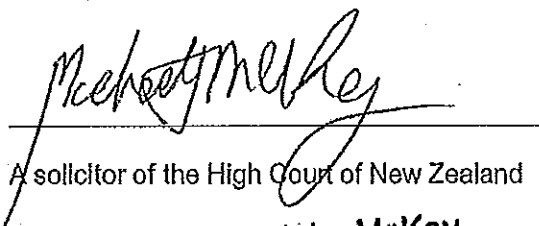
4. LIKELY EFFECTS AND STRAIGHT FORWARD NATURE OF THE FRESH APPLICATION

- 4.1 In my opinion, the likely effects of the proposed supermarket development will be minimal, and certainly less than minor such that the grant of consent is warranted (as evidenced in the AEE, technical reports and now the Council's s87F report). The proposal is not complex and does not offend relevant objectives and policies, but rather assists to achieve them.
- 4.2 Accordingly, it is not the nature of the project that warrants special attention by the Environment Court on direct referral. Rather, it is the risk of trade competitors' involvement and their intentions to further delay Progressive's development plans (which is further detailed in Mr Nixon's affidavit) which drives the need for direct referral.

5. REASONABLENESS OF PROPOSED TIMETABLE

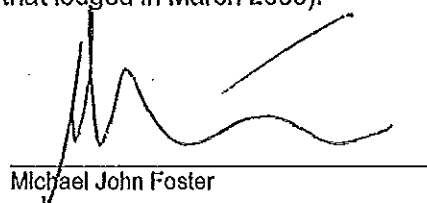
- 5.1 I understand that orders have been sought by Progressive that align with the appeals on the decisions version of the Plan Changes. Given the close relationship between the Plan Changes appeals and the direct referral application (which must be assessed against the Plan Changes), I support these orders.
- 5.2 At a practical level, those parties involved in both the Plan Change appeals and the direct referred consent could file separate briefs for the two matters or file a single brief but separated into two parts.
- 5.3 In terms of timing, I consider the proposed timetable sufficient to enable the parties to produce the evidence required. The issues are straight forward and have been well known for a significant period of time (the Fresh Application is almost identical to that lodged in March 2009).

SWORN at Auckland this 19th day of
February 2010 before me


A solicitor of the High Court of New Zealand

Michael John McKay
Solicitor
Auckland

2099521


Michael John Foster

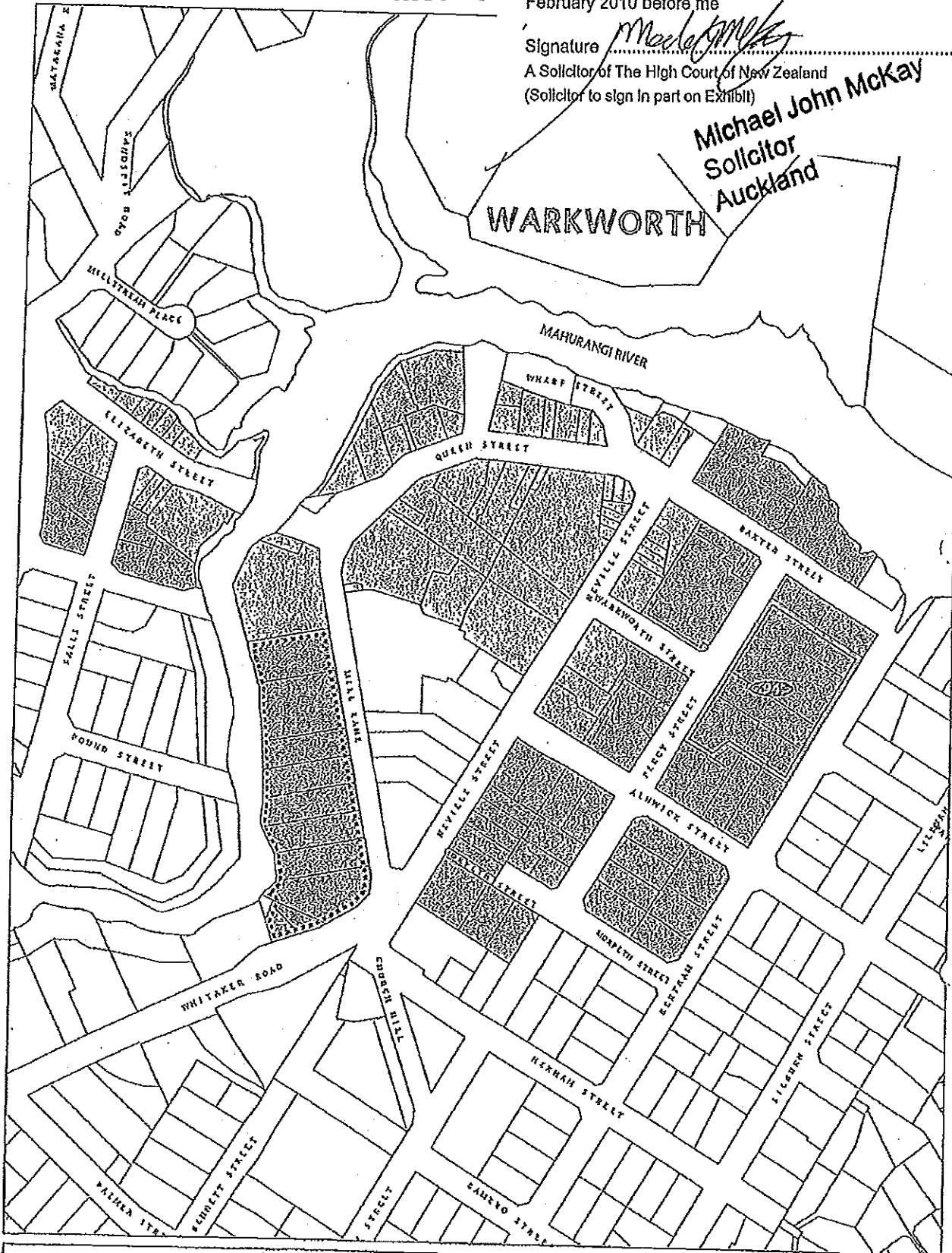
MJF-1

This is the annexure marked 'MJF - 1' referred to in the affidavit of Michael John Foster sworn at Auckland this 9th day of February 2010 before me

Signature

A Solicitor of The High Court of New Zealand
(Solicitor to sign in part on Exhibit)

Michael John McKay
Michael John McKay
Solicitor
Auckland



Rodney DISTRICT COUNCIL

Head Office: 58 Centenary Road, Orewa
Phone: 09 429 6900, 09 429 1451, New Zealand
Tel: 0800 335110, Fax: 09 429 7130
Email: info@rodneycouncil.govt.nz

Legend

- Add Policy Area A
- Add Policy Area B
- Add Policy Area C
- Rezone Commercial 4A to Commercial 1A
- Add Scheduled Activity 91

Decision on Plan Change 110
Planning Map Amendments
J-19/4

0 25 50 75 100 125
1:40000
SCALE: 1:3 500 @ A4

The plan is for information purposes only, it is not intended to be used for legal purposes, and it is not intended to be used for any other purpose. It is not intended to be used for any other purpose. It is not intended to be used for any other purpose.

DATE: August 2009
RDC 20488 Map 1

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