BEFORE THE ENVIRONMENT COURT **ENV-2024-WLG**

IN THE MATTER	of an appeal under Clause 14 of the First Schedule to the Resource Management Act 1991
AND	
IN THE MATTER	of the decisions of the Wellington City Council on the Proposed Wellington District Plan
BETWEEN	**BP OIL NEW ZEALAND LIMITED, MOBIL OIL NEW ZEALAND LIMITED AND Z ENERGY LIMITED** Appellant
AND	**WELLINGTON CITY COUNCIL** Respondent

NOTICE OF APPEAL BY BP OIL NEW ZEALAND LIMITED, MOBIL OIL NEW ZEALAND LIMITED, AND Z ENERGY LIMITED
DATED 17 MAY 2024

To: The Environment Court Registrar
District Court Building
Level 5
49 Balance Street
Wellington 6011

INTRODUCTION

1. bp Oil New Zealand Limited, Mobil Oil New Zealand Limited, and Z Energy Limited (*the **Fuel Companies***) appeal against parts of a decision of Wellington City Council (*the **Council***) on the Proposed Wellington District Plan (***PDP***).

2. The Fuel Companies made submissions on the PDP but did not make any further submissions.

3. The Fuel Companies are not trade competitors for the purposes of section 308D of the Resource Management Act 1991 (*the **RMA***).

4. The Fuel Companies received notice of the Council's decisions, under Part 1 of Schedule 1 to the RMA process (*the **Standard Process***), on 5 April 2024.

BACKGROUND

5. The Fuel Companies receive, store and distribute refined petroleum products around New Zealand. In Wellington City, the Fuel Companies' core business relates to retail fuel outlets, including service stations and truck stops, and supply to commercial facilities. There are also two bulk fuel storage facilities (terminals) operated by the Fuel Companies in Wellington City; one at Miramar and one at Kaiwharawhara, with the Miramar terminal being a Major Hazard Facility.

THE PARTS OF THE DECISION BEING APPEALED

6. The parts of the decision that the Fuel Companies' appeal relates to are rules CCZ-R19, MCZ-R16, LCZ-R14 and NCZ-R14, which apply to Yard-based retailing activities (***YBRA***) in the City Centre Zone (***CCZ***), Metropolitan Centre Zone (***MCZ***), Local Centre Zone (***LCZ***) and Neighbourhood Centre Zone (***NCZ***), respectively. These zones are collectively referred to as the Centre Zones.

7. In particular, the Fuel Companies' appeal relates to the 'Notification Status' of these YBRA rules which require that any resource consent application made for '*either a new activity or expands the net area of an existing activity*'[1] be publicly notified. It is noted that the Notification Status of NCZ-R14 refers to '*area*' instead of '*activity*' which appears to be an error.

[1] Wellington City 2024 District Plan: Council Decisions Version for the Centre Zones (see for example Rule CCZ-R19).

REASONS FOR APPEAL

8. The general reasons for the appeal are that the decision:

   (a) Does not promote the sustainable management of, or the efficient use and development of, natural and physical resources.

   (b) Does not enable people and communities of Wellington City to provide for their social and economic wellbeing and their health and safety.

   (c) Do not result in the most appropriate plan provisions in terms of section 31 of the RMA.

   (d) Do not give effect to higher order planning documents under section 75(3) of the RMA.

   (e) Is not consistent with the relevant Centre Zones objectives and policies of the PDP, including those relating to amenity and design, and managing adverse effects.

   (f) Is contrary to good resource management practice.

   (g) Will potentially impose unnecessary and unjustified costs.

9. Without limiting the generality of the above, the specific reasons for the Fuel Companies' appeal are set out below.

The Fuel Companies' Submissions

10. The Fuel Companies' submission supported the PDP definition for YBRA, which includes 'service stations', with this definition applying to the YBRA rules in the Centre Zones. The Fuel Companies' submission supported the YBRA rules in so much as they provide for service stations as a discretionary activity in the Centre Zones.

11. The Fuel Companies did not support the mandatory public notification clauses for resource consent applications made in respect of the YBRA rules and considered them unclear in how they applied to operational changes, upgrading or maintenance to existing lawfully established YBRA.

12. The Fuel Companies therefore sought clarity to ensure activities relating to the maintenance, operation and upgrading of existing activities are excluded from the public notification requirement to enable them to undertake important maintenance and upgrades, for instance, to meet other legislative requirements[2], better accord with good practise, introduce new

[2] Hazardous Substances and New Organisms Act 1996 (*HSNO*), the Health and Safety at Work Act 2015 (*HSWA*) and the Health and Safety at Work (Hazardous Substances) Regulations 2017.

technologies (e.g. electric vehicle (***EV***) charging infrastructure), or necessary changes to meet demand, as set out in the relief below (insertions underlined):

> *Notification Status: An application for resource consent made in respect of rule … must be publicly notified <u>except:</u>*
> *<u>a. The activity relates to the maintenance, operation and upgrading of an existing activity;</u>*

13. For completeness, the Fuel Companies also sought an additional exclusion to the Notification Clauses in their submission and hearing statement where '*new or existing activity adjoins another commercial zone, a residential zone or an arterial or collector Road'*[3]. However, this matter is not being pursued in this appeal.

Council Decisions

14. At its meeting on 14 March 2024, the Council decided to accept all of the Independent Hearing Panel (***IHP***) recommendations on the Hearing Streams 1 – 5 provisions under the Standard Process. The IHP recommendations rely upon the recommendations of Council's Section 42A (***s42A***) Officer, including supplementary evidence. The relevant s42A Officer recommendations and IHP recommendations are set out below.

Council's Section 42A Recommendation

15. The Section 42A (***s42A***) Officer stated the following in response to the Fuel Companies submission point in respect of Rule CCZ-19:

> *I agree with the submitters [372.153, 372.154, 361.119, 361.120] that activities associated with the ongoing operation, maintenance, and upgrades of existing service stations / yard-based retail activities need not be subject to this notification requirement. In such cases the use of the site for the specific activity (such as a service station) is established and it is reasonable that the effects of any change to this activity be assessed by a resource consent planner at the application stage, with discretion as to whether any form of notification is required residing with the reporting planner.*[4]

16. The s42A recommendations and reasonings relating to the other Centre Zones' YBRA rules, MCZ-R16, LCZ-R14 and NCZ-R14, are consistent with that stated above and/or adopts the same reasoning.[5]

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[3] Paragraph 1.7 in the Fuel Companies Submission.

[4] Section 42A report: Hearing Stream 4, Part 3, Commercial and Mixed Use Zones, Part 1: City Centre Zone, Te Ngākau Civic Square Precinct and Appendix 9, paragraph 384.

[5] Section 42A reports for Hearing Stream 4 – Part 2: Metropolitan Centre Zone, paragraph 205; Part 3: Local Centre Zone, paragraph 304; Part 4: Neighbourhood Centre Zone, paragraph 226; respectively.

17. The Fuel Companies supported the s42A Officer's recommendation, as endorsed in their hearing statement submitted on 9 June 2023, but did not prepare/present evidence to the IHP.

18. In the supplementary evidence of the s42A Officer, dated 19 June 2023, the following was noted:

> *In paragraph 384 of my S42A Part 1 CCZ report I agreed with submitters BP Oil New Zealand, Mobil Oil New Zealand and Z Energy Limited (the Fuel Companies) [372.153, 372.154, 361.119, 361.120] that activities associated with the ongoing operation, maintenance, and upgrades of existing service stations/yard-based retail activities need not be subject to the public notification requirement under CCZ-R15. Whilst I still hold this position, I have noticed a technical omission in that the notification settings now does not address an application that is a new activity or expands an existing activity.*
>
> *The wording I proposed in my S42A amendment being an exemption to public notification when the 'activity relates to maintenance, operation and upgrading of an existing activity' potentially allows maintenance or upgrading that expands an existing activity would not be subject to the requirement for public notification. I do not consider this to be appropriate…"*[6]

19. The s42A Officer subsequently recommended the following amendments to the Notification Clause:

> *Notification Status: An application for resource consent made in respect of rule CCZ-R15 <u>that is either a new activity or expands the net area of an existing activity</u> must be publicly notified.* [7]

20. There was no supplementary planning evidence or subsequent recommended amendments to the other YBRA rules in MCZ-R16, LCZ-R14 and NCZ-R14.

The Independent Hearing Panel's (IHP) Decision and Council Decision

21. The amended s42A Officer's recommendation and amended Notification Clause as it relates to CCZ-R19 was supported by the IHP who stated the following:

> *'We agree that such activities are generally inappropriate in the CCZ and a new or expanded activity for yard-based retailing should have to justify its case. In general, we do not agree that using mandatory public notification in a punitive manner is a*

[6] Statement of Supplementary Planning Evidence of Anna Stevens on behalf of the Wellington City Council, paragraphs 76-77.

[7] Ibid, paragraph 77. (Note – rule reference CCZ-R15 in the supplementary planning evidence is renumbered to CCZ-R19 in the Decisions Version of the PDP).

reasonable rationale. However, proposing to use valuable city centre land for a low intensity purpose is contrary to the public policy directive of the NPSUD and of the PDP. While we did consider whether the standard notification tests under Section 95 should apply, we do not see that it sends a strong enough signal that such an activity is generally an inefficient use of CCZ land where we are obliged, as a matter of public policy, to consider the maximisation of urban development potential.' [8]

22. The IHP also supported the supplementary evidence of the s42A Officer and amended Notification Clause in respect of Rule MCZ-R16.[9] Rules LCZ-R14 and NCZ-R14 have similarly been amended in the Decisions Version of the PDP, but the IHP did not give reasons in support of supplementary evidence of the s42A Officer or amended Notification Clauses.[10]

SPECIFIC REASONS FOR THE FUEL COMPANIES APPEAL

23. It is acknowledged that the IHP considered whether standard notification tests would be the more appropriate method of determining notification requirements. The Fuel Companies do not accept that a mandatory public notification clause should be used as a deterrent or '*signal*' to discourage a specific land use in a zone, and to do so would likely result in unintended consequences that are potentially disproportionate to the scale and intensity of effects. Any deterrent or discouragement of a particular land use should be directed by the policy framework and activity status of the PDP, noting that YBRA are discretionary and not non-complying activities.

24. As set out in the Fuel Companies submission and hearing statement, it is considered more appropriate to determine notification requirements for any operational changes, upgrading or maintenance to existing activities through standard notification tests that assess the nature and scale of the changes and their associated effects on people and the environment.

25. In addition, the wording of the Notification Clauses in the Decisions Version of the PDP is unclear in how it is to be applied. For example, service stations typically comprise various integral and ancillary components, which may include buildings (e.g. retail shop), refuelling forecourt (with or without a canopy), ancillary services (e.g. LPG Swap n Go facility, carwash, and trailer hire), landscaping, parking and manoeuvring areas. More recently, many service stations are installing EV charging infrastructure. It is unclear what the term '*net area*' is intended to capture, noting that this term is not defined in the PDP. As currently worded, a $1m^2$ increase in building footprint, a $1m^2$ increase in impervious area, or installation of an EV charger, could be interpreted as an activity that '*expands the net area of an existing activity*' with any application made in this respect needing to be publicly notified. It is considered that clarity is needed with regard to the intent of this phrasing to ensure effective plan implementation.

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8 Report and Recommendations of Independent Commissioners: Hearing Stream 4: Report 4B, paragraph 235.

9 Report and Recommendations of Independent Commissioners: Hearing Stream 4: Report 4C, paragraph 106.

10 Ibid, paragraphs 378 and 569.

26. As stated in Paragraph 7, the Notification Clause of Rule NCZ-R14 refers to '*area*' instead of '*activity*' which is anticipated to be error.

Relief Sought

27. The Fuel Companies seek the following relief from the Court:

(a) Amend Rules CCZ-R19, MCZ-R16, LCZ-R14 and NCZ-R14 (additions in underline, deletions in strikethrough):

Notification Status: An application for resource consent made in respect of rule … ~~that is either a new activity or expands the net area of an existing activity~~ must be publicly notified, except where:
a. The activity relates to the maintenance, operation and upgrading of an existing activity.

(b) Such further, consequential or alternative relief as may be necessary or appropriate to address the Fuel Companies' concerns as outlined in this appeal and to give full and proper effect to the relief sought.

Signature of person authorised to sign on behalf of the Fuel Companies.

.....
Miles Rowe
Principal Planning Consultant

Dated this 17th May 2024

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Attention: Miles Rowe

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Annexures:

1. A copy of the Fuel Companies' submissions
2. A copy of the decision on the relevant points subject to this appeal
3. Names and addresses of the persons to be served with a copy of this notice

Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must,—

- within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see* form 38).

**How to obtain copies of documents relating to appeal*

The copy of this notice served on you does not attach a copy of the appellant's submission or the part of the decision appealed. These documents may be obtained, on request, from the appellant.

Advice

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

ANNEXURE 1

A copy of the Fuel Companies' submission

ANNEXURE 2

A copy of the decision on the relevant points subject to this appeal

Relevant recommendations of the Independent Hearing Panel for rules on Yard-based retailing activities, as accepted by Council:

- **Report and Recommendations of Independent Commissioners: Hearing Stream 4: Report 4B**

Pages 63 - 64

CCZ-R15 – Yard-based retailing activities (P1 Sch1) now CCZ R19

232. Century Group Limited [Submission # 238.19] sought to retain CCZ-R15 as notified.

233. The Oil Companies collectively, and Z Energy Limited [Submissions # 372.153-154, 361.119-120], considered that public notification should not be required if the activity relates to maintenance, operation and upgrading of an existing activity, or if the new or existing activity adjoins another commercial zone, residential zone or an arterial or collector Road.

234. Ms Stevens [Section 42A Report, at paragraphs 384-385] agreed with the first point, but not the second. She stated:

> *…it is these zone interfaces that the District Plan seeks to protect, and quality urban design outcomes should be encouraged in these locations. I agree that yard-based activities adjacent to arterial or principal roads will potentially be appropriate, and the underlying policy framework establishes that these activities are 'potentially incompatible' within the CCZ. As such, I consider that the mandatory requirement for public notification is appropriate as it discourages these activities from occurring within the zone at the expense of more appropriate activities.*

235. We agree that such activities are generally inappropriate in the CCZ and a new or expanded activity for yard-based retailing should have to justify its case. In general, we do not agree that using mandatory public notification in a punitive manner is a reasonable rationale. However, proposing to use valuable city centre land for a low intensity purpose is contrary to the public policy directive of the NPSUD and of the PDP. While we did consider whether the standard notification tests under Section 95 should apply, we do not see that it sends a strong enough signal that such an activity is generally an inefficient use of CCZ land where we are obliged, as a matter of public policy, to consider the maximisation of urban development potential. The notification status statement is therefore recommended to be amended as follows:

> *1. Activity status: Discretionary Notification Status: An application for resource consent made in respect of rule CCZ-R19~~15~~ that is either a new activity or expands the net area of an existing activity must be publicly notified.*

236. There are also six rules applying to Buildings and Structures within the CCZ.

- **Report and Recommendations of Independent Commissioners: Hearing Stream 4: Report 4C**

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MCZ-R16 – Yard-based retailing activities

103. Ms Hayes summarised the submissions of Z Energy [Submissions #361.85 and #361.86] and BP Oil New Zealand, Mobil Oil New Zealand Limited and Z Energy (the Oil Companies) [Submissions #372.151 and #372.152] to amend the provision at her paragraphs 202 – 204 of her Section 42A Report. We adopt her summary.

104. In Ms Hayes' Section 42A assessment, she agreed with Z Energy and the Oil Companies that activities associated with the ongoing operation, maintenance, and upgrades of existing service stations / yard-based retail activities need not be subject to this notification requirement. However, she disagreed that there should be an exemption from notification where a yard-based activity is located at the periphery of the MCZ, adjacent to a different zone, due to potential interface issues.

105. We note that Ms Westoby [HS4 EIC Sarah Westoby for Z Energy Ltd 12 June 2023 paragraphs 7.1-7.14] for Z Energy acknowledged support in part from the Officers for the submissions. However, in summary, she considered that it would be more appropriate to determine notification through the standard RMA notification tests at the application stage. In her opinion, where activities adjoin another zone or an arterial or collector road, there is not the same expectations of urban design outcomes and levels of visual amenity as for a more centrally located site in the zone / Centre. In her conclusion, Ms Westoby considered that requiring public notification of some yard-based retail activities in some locations incorrectly assumes incompatibility of all activities and elevates consenting risk.

106. In Ms Stevens' Rebuttal at paragraphs 76 – 80 [Which Ms Hayes adopted at her paragraph 85 of her Supplementary Statement of Evidence 19 June 2023] , she noted a technical omission in that the notification settings do not address an application that is for a new activity or seeks to expand an existing activity and that the change recommended in her (and Ms Hayes') Section 42A Report(s) would have the result that public notification would not be required. In her opinion, this was not appropriate. Ms Stevens further recommended amendments to the Rule address this issue. The Panel accepts the reasons for the amendments to the rule by the Reporting Officer and adopts the Section 32AA assessment.

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LCZ-R14 – Yard-based retailing activities

376. Z Energy and the Oil Companies [Submissions #361.39 and #361.40, and #372.149 and #372.150 respectively] supported LCZ-R14 in part, but sought an amendment to the notification clause under the rule.

377. WCC Environmental Reference Group [Submission #377.475] was concerned that the Discretionary Activity status will be unduly restrictive of activities such as small garden centres, and hinder walkable neighbourhoods. It sought amendments or a tiered approach, whereby some yard-based activities are permitted.

378. Ms Hayes recommended acceptance in part of the submissions of Z Energy and the Oil Companies for the same reasons as in relation to the MCZ, which we have recommended being accepted. We agree with that position in this context also and adopt her Section 32AA evaluation [HS4 Section 42A Report MCZ Lisa Hayes paragraphs 205-210].

379. As regards the submission of WCC Environmental Reference Group, Ms Hayes disagreed that the activity status should be amended [HS4 Section 42A Report LCZ Lisa Hayes paragraph 305]. She observed that elsewhere in the Plan where an activity is potentially incompatible with the underlying zone, a Discretionary Activity status prevails, and conversely, yard-based activities are enabled in the MUZ and GIZ. We agree with her reasoning.

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NCZ-R14 – Yard-based retailing activities

568. Oil Companies [Submissions #372.147-148] supported NCZ-R14 in part, and sought exceptions be included to the requirement for public notification.

569. Ms Hayes referred to her reasoning and recommendation in relation to MCZ-R16 on that matter. There, she considered that activities associated with the ongoing operation, maintenance, and upgrades of existing service stations / yard-based retail activities need not be subject to this notification requirement. However, she rejected any exemption from notification where a yard-based activity is located at the periphery of the MCZ adjacent to a different zone due to potential interface issues. She considered the same reasoning was applicable in the NCZ context. We agree and accept Ms Hayes' recommendations.

570. WCC Environmental Reference Group [Submission #377.447 112] saw the rule as unduly restrictive and sought to amend the rule status to Restricted Discretionary Activity. It provided a list of matters of discretion, and also sought deletion of the requirement for public notification.

571. Ms Hayes noted that under NCZ-P4, yard-based activities are 'potentially incompatible' within the NCZ. She considered that where an activity is potentially incompatible with the underlying zone, a Discretionary Activity status is appropriate, subject to the exception above for existing activities, as it will allow the Council to retain full discretion when considering the potentially wide-ranging effects of a yard-based retail activity. The Panel agrees with this reasoning and recommendation.

ANNEXURE 3

Names and addresses of persons to be served with a copy of this notice

Council served notice

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Submitters served notice

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