

**IN THE MATTER of the Resource Management Act 1991 (RMA)**

**AND**

**IN THE MATTER of an application for resource consent made pursuant to section 88 of the Act to the Hamilton City Council referenced as 010.2018.00009962.001**

**IN RELATION TO:**

**The construction and operation of a PAK'nSAVE supermarket with an on-site fuel facility, including carparking and all other enabling works, at 980 Te Rapa Road, Hamilton.**

**SUMMARY OF DECISION**

Pursuant to sections 104, 104A, 104C, 108 and 108AA of the Resource Management Act 1991, consent to be above application is granted (subject to conditions) on the grounds that:

- The proposal is a restricted discretionary activity in the Industrial Zone of the operative Hamilton City District Plan. In particular, the proposal complies with rule 9.5.4 of the Plan, which requires the provision of a Centres Assessment Report which “*demonstrates that the proposal will not undermine the role and function of other centres within the localised catchment in the business hierarchy*”. Given its restricted discretionary status, the proposed activity is one which can be reasonably anticipated to be established within the Industrial Zone;
- Without mitigation, the proposed activity has the potential to create significant adverse transportation effects in the immediate locality and beyond. Any such effects have been appropriately addressed through a raft of mitigation measures which all traffic experts involved in the application and hearing process ultimately agreed with. These mitigation measures have been made the subject of consent conditions, all of which have been specifically offered and agreed to by the applicant;
- Some of the consent conditions are in the form of “conditions precedent” and while an element of risk is inherent in those conditions, any such risk will be borne solely by the consent holder, with no risk to the submitters, to Council or to the wider community.
- Subject to compliance with the attached consent conditions, controlled activity consent is appropriate under the NESCS for those identified HAIL activities.
- Given the foregoing, the proposal is consistent with the relevant objectives and policies of the operative Hamilton City District Plan as well as with the relevant provisions of the other applicable statutory planning instruments and of Part 2 of the Resource Management Act itself.

## HAMILTON CITY COUNCIL HEARING

### APPOINTMENT

The Hamilton City Council confirmed the appointment of Murray Kivell as an independent Hearings Commissioner and Chair, and Russell De Luca as an independent Hearing Commissioner pursuant to Sections 34 and 34A of the Resource Management Act 1991 (RMA 1991) to hear and determine this application for resource consent.

### NOTICE OF DECISION PURSUANT TO SECTION 113 OF THE RESOURCE MANAGEMENT ACT 1991

#### DETAILS OF THE APPLICATION

Application Reference	<b>010.2018.00009962.001</b>
Site Address	<b>980 Te Rapa Road, Hamilton</b>
Applicant's Name	Foodstuffs North Island Limited (FNIL)
Legal description of site	Section 23 S0 465769 and Section 24 SO 465769
Total site area	2.013 hectares – reduced to 1.9713 ha during the course of the hearing so as to accommodate a roundabout at the intersection of Eagle Way, Maui Street and Karewa Place
Proposal	Establish and operate a supermarket totalling 6,358m <sup>2</sup> gross floor area (GFA) and fuel facility with underground storage capacity of approximately 140,000 litres of petrol and diesel
Zoning, Overlays and Activity Status	Zoning: Industrial Designation E81 – Te Rapa Road Restricted Discretionary Activity on the basis that the demonstrated effects do not undermine a local business centre
Notations	N/A
Lodgement Date	23 July 2018
Further Information Request (S92)	16 August 2018  Responses: 23 October 2018
Notification Date	Public notification: 11 December 2018
Submissions Received (6)	1. J McCracken 2. S Jones 3. WEL Networks 4. Te Ha O Te Whenua O Kirikiriroa Trust 5. The Base Te Awa (TBTA) 6. Woolworths New Zealand Ltd (WNZL)
Hearing Date Convened	7, 8 October 2019

Site Visit Completed	8 October 2019 <u>Attendees at site visit:</u> Panel members Kivell and De Luca (unaccompanied)
Appearances at hearing	<u>Applicant:</u> Douglas Allan – Legal Counsel Nick Hanson – Foodstuffs, Property Investment Chris Brading – Architect Michael Martin – Consultant Engineer Tim Heath – Retail Economics Consultant Mark Tansley – Retail Economics John Burgess – Consultant Transportation Engineer Matt Norwell – Planning Consultant  <u>Submitters:</u> Te Haa o te Whenua o Kirikiriroa – Sonny Karena Te Haa o te Whenua o Kirikiriroa – Rawiri Bidois  The Base Te Awa (TBTA) and Woolworths NZ Limited Allison Arthur-Young – Legal counsel John Parlane – Consultant Traffic Engineer (TBTA) Don McKenzie – Consultant Traffic Engineer (Woolworths NZ) Michael Briggs – Planning Consultant (TBTA) Kay Panther Knight – Planning Consultant (Woolworths) Ian Passau – Corporate (TBTA) (Mr Passau was not able to attend the hearing)  <u>District Council:</u> Marianne Mackintosh – Legal counsel Sam Le Heron – Council s42A Reporting Planner Alastair Black – Consultant Transportation Engineer Mike Meister – Consultant Transportation Engineer Johnathon Brooke – Council Engineer Susan Fairgray – Retail Economics
Directions 1	1 April 2019: Hearing procedure and evidence exchange
Directions 2	7 May 2019: Expert caucusing by Traffic Experts
Directions 3	9 May 2019: Expert caucusing by Traffic Experts – Further Directions
Directions 4	23 August 2019: Hearing procedure and evidence exchange update
Caucusing Statement	23 May 2019: Caucusing of Traffic Experts
Hearing Closed	11 October 2019

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## 1 INTRODUCTION

- 1.1 This application seeks resource consent for the construction and operation of a new PAK'nSAVE supermarket and associated fuel facility, at grade parking and associated enabling works on a partially cleared site bounded by three roads in Te Rapa north, Hamilton – Te Rapa Road, Eagle Way and the Maui Street extension (currently under construction).
- 1.2 Once trading, the supermarket will be the largest of three PAK'nSAVE supermarkets in Hamilton and is proposed to be established immediately across Te Rapa Road from the main entrance to Te Awa The Base (TATB), a sub-regional retail and commercial centre, as well as being directly across Eagle Way from an existing Countdown supermarket.
- 1.3 The application was lodged with the Hamilton City Council (HCC) in July 2018 and was followed by:
  - Council section 92 Information Requests;
  - the Applicant's request for public notification of the application in December 2018;
  - a series of Directions from the Panel that provided for the caucusing of the respective traffic experts as well as evidence exchange in the lead-up to the hearing in October 2019.
- 1.4 We record at the outset that the caucusing of the traffic experts and their ensuing discussions led to most if not all the identified traffic/transportation issues being agreed and resolved by the commencement of the hearing. This resulted in the Applicant presenting a modified proposal with altered access arrangements to the site and agreed improvements for the wider City road network to appropriately manage traffic effects associated with the operation of the supermarket.

## 2 THE SITE, LOCALITY & APPLICATION

### Site

- 2.1 The description of the site is set out in paragraphs 29-31 of Mr Le Heron's s42A Council planning officer's report:

The site is in the northern suburb of Te Rapa, Hamilton. Te Rapa is an area that is characterised by a mix of activities and underlying zoning. The subject site is zoned Industrial. The site is surrounded by a road network that includes Te Rapa Road (Major Arterial Transport Corridor) to the west, Eagle Way (local road) to the south and Maui Street extension (Future Collector Road currently under construction) to the east.

The site is part of the former Porter Group Headquarters at Te Rapa which previously included activities such as the sales, hire and maintenance of heavy construction machinery. A large part of the site was used for the outdoor storage of hire equipment on a metalled yard which included a series of large buildings that were used for workshops and general storage of equipment. As a result of these former uses, the site reflects an industrial character and highly modified landform with expansive areas of hardstand surfaces with little to no landscaped areas on site.

And

..... Topography wise, the site is flat with no distinguishable slope or depression in the land form. Within the existing boundaries of the site there are two existing vehicle crossings along the Te Rapa Road frontage and two crossings along the Eagle Way frontage.

### **Locality**

- 2.2 The s42A report goes on to describe the locality as follows at paragraphs 33 and 34:

The site is adjacent to 'The Base' sub-regional centre located directly opposite the site on the western side of Te Rapa Road. The site is adjacent to Business 4 Zone Large Format Retail to the south, where Countdown and Kmart both operate. Access to both these activities is via Eagle Way and Karewa Place, with no direct access from Te Rapa Road. North and east of the subject site has an Industrial zoning under the Operative District Plan. Important to note is a consented baseline that exists over the wider Porters Development Land, where multiple land use consents were granted in 2014 for a mix of activities, including office, places of assembly, drive through services and large format retail (See Attachment 3 for a copy of the land use consents for the Porter's Site).

The wider Porter's Site went through a subdivision and land use consent (see Attachment 4) to establish the realignment of the previously consented transport corridor and intersection creation at Eagle Way / Karewa Place and Maui Street extension, in addition to fee simple creation of 7 industrial lots. As part of this subdivision consent it was considered that a give way Tee intersection was sufficient for the Industrial zoning of the land, and the consented baseline attributed to the wider Porter's Site.

And, concludes, at paragraph 35

I consider the subject site, and more generally the wider area to the north, as a contiguous block of Industrial zoned land which is surrounded by a combination of open space, residential and commercial activities. The traditional land use of Industrial is transitioning into a mix of activities that reflects the underlying zoning, the consented activities and incorporates some non-industrial uses.

- 2.3 We note that there is an extensive planning history associated with the zoning of the site (and the wider locality) but that it is not necessary for us to outline that, nor is it critical to our understanding of the current proposal and our determination of this application.

### **Application – An Overview**

- 2.4 We record that the application and site plans went through several iterations in the course of settling on the final and preferred design of the supermarket on the site and the access arrangements to the local road network. These details were confirmed to us during the hearing.
- 2.5 The applicant's architect, Mr Brading, informed us on his design brief and the architectural features and requirements of a modern day PAK'nSAVE supermarket – the building will abut the western boundary, have a gross floor area (GFA) of approximately

6,358m<sup>2</sup> that includes the main retail and mezzanine levels, be oriented to address the two main street frontages and with an entrance foyer (oriented to Te Rapa Road and Eagle Way), with the 'back of house' servicing of the supermarket accessed from Maui Street Extension, and the remote servicing (by underground pipes) of the fuel service facility. The building design-architectural matters remained settled (and uncontested) throughout the application and hearing process.

2.6 We therefore rely on Mr Brading's set of drawings referenced as "*Wingate Architects. Pak N Save Te Rapa. 980 Te Rapa Road Hamilton Resource Consent Drawings 20-09-2019*" as confirming the final proposal for the development of the site for the supermarket, fuel facility, parking, landscape and access/egress.

2.7 We also rely on the drawing in Mr Burgess's evidence in chief (EIC) discussed in his paragraph 117, and referenced as "*17119(44) TPC Traffic Planning Consultants. PTR 217, titled Overall Plan and dated 19.09.19*" to confirm the final entry and egress arrangements for the site and the footpaths on adjacent properties and the road reserve.

2.8 We record that Mr Burgess states at his paragraph 117:

*"I am of the opinion that this plan now incorporates all of the matters that have been raised throughout this process, and in particular meets the requirements of Mr Black. I would expect that some further refinement will occur through consultation with the Council during the detailed design and approval stages, including addressing any matters that might be raised by the Road Safety Audits...."*

2.9 Mr Norwell provides a useful summary record of the amendments to improve overall traffic management to the site and the wider network in his paragraph 4.3, and we summarise these as:

- The access on Te Rapa Road will be left turn entry only;
- The Eagle Way/Karewa Place/Maui Street intersection will be a roundabout with a single lane approach provided on Karewa Place and Maui Street, and a two-lane approach on Eagle Way;
- A left turn slip lane on Eagle Way will provide for a second entry to the site;
- A left turn exit from the site onto Eagle Way will be provided;
- A left turn entry to the site at Maui Street;
- A left turn entry and exit to and from Maui Street for the servicing area; and
- Onsite parking for 270 vehicles.

2.10 For completeness, we record that all traffic experts agreed that partial signalisation of the Wairere Drive - Karewa Place intersection is required along with the lowering of the posted speed limit along this section of Wairere Drive from 80 to 60 kph.

2.11 For completeness, we also note that in his section 42A report Mr Le Heron records the details of the application fully in his section 3 Application under a series of headings which we rely on; namely:

- Proposal;
- New Supermarket Building;
- Pak N Save Fuel Facility;

- Signage;
- Parking and Access Arrangements (noting that some details have been superseded in regard to the number and layout of parking and vehicle movement on the site);
- Land Disturbance;
- Landscaping; and
- Infrastructure and Servicing.

2.12 In floorspace terms the GFA breakdown for the proposed supermarket, based on Mr Heath's figures (EIC paragraph 4.1) is:

- 3,925m<sup>2</sup> retail trade area;
- 607m<sup>2</sup> mezzanine floorspace for office/administration;
- 581m<sup>2</sup> for service areas (deli, bakery, butchery);
- 877m<sup>2</sup> storeroom;
- 155m<sup>2</sup> back of house staff room; and
- 213m<sup>2</sup> delivery area.

### 3 ACTIVITY STATUS

- 3.1 Under the Operative District Plan (ODP), the proposal triggers a number of restricted discretionary and controlled activity consent requirements, and these are detailed in both Mr Le Heron's report at paragraphs 65 – 75 and Mr Norwell's EIC at his paragraphs 7.1-7.4.
- 3.2 However, we rely on Mr Le Heron's systematic assessment of the nature of the infringements under the relevant ODP provisions to conclude that the application is a **controlled activity** in relation to the hazardous facility and a **restricted discretionary activity** under ODP Rule 9.5.4 in relation to the proposed supermarket itself, with discretion in the latter case restricted to General Criteria; Supermarkets; Transportation; Function, Vitality and Amenity of Centres; Hazards and Safety; and Three Waters Capacity and Techniques.
- 3.3 Mr Le Heron further outlines that a Detailed Site Investigation (DSI) records that the site was historically used as an orchard and most recently as a transport depot by Porters Group both of which are captured under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (NESCS) as HAIL activities. As this application involves the disturbance of soil on "a piece of land" on which a hazardous activity has been undertaken and based on the results in the DSI, the following consent matter has been identified.
- 3.4 At paragraph 78 Mr Le Heron's assessment is that the DSI demonstrates that the relevant standards are not exceeded, therefore conditions for site management only are warranted to ensure that the proposal meets the purpose of the NESCS. Accordingly, consent is required under the NESCS as a **controlled** activity.
- 3.5 In relation to determining compliance under the RMA we heard evidence of the challenge of assessing activity status of the new supermarket and that this was "unusually complex" in the words of Mr Allan. This was because a Centres Assessment

Report (CAR) was required to be completed to determine the activity status of the supermarket proposal. This was problematic, and it is at least implied in Mr Briggs' evidence that the supermarket should be considered as a Non-Complying Activity.

3.6 We discuss this further in section 8.4 of this decision, but based on the evidence presented both by the Applicant and the Council's experts we find that the supermarket proposal itself can be appropriately considered as a restricted discretionary activity under the provisions of the ODP.

3.7 With regard to the potential for the "bundling" of the various activities into one overall consent application having the most stringent activity status (in this case restricted discretionary), Mr Le Heron notes at paragraph 79 of his 42A report that:

.....a Controlled Activity and a Restricted Discretionary Activity cannot be bundled, and individual assessments and decisions will relate to both.

3.8 We gather that Mr Le Heron's opinion on bundling is based on relevant RMA case law (including we assume *Southpark Corporation Ltd v Auckland City Council [2001] NZRMA 350 (EnvC)*) and note that we received no legal submissions on this matter challenging Mr Le Heron's view. Notwithstanding this, and in the interests of pragmatism, we do not consider it necessary for us to separately consider or make separate decisions on each of the ODP provisions which render the various individual components of the application a controlled or restricted discretionary activity. We reach this position on the basis that the various components of the application have each been individually identified and assessed under the relevant planning provisions in the original AEE report submitted with the application as well as in Mr Le Heron's 42A report and Mr Norwell's evidence. The only matter potentially in dispute is whether the supermarket proposal meets the test in ODP Rule 9.5.4, which enables it to be considered as a restricted discretionary activity. This is not directly related to the "bundling" issue and is a matter which we discuss in more detail and make a finding on later in this decision. Included in this approach is the need for consent to a controlled activity under the NESCS which we have also considered as part of the overall application.

#### **4 RELEVANT STATUTORY PROVISIONS CONSIDERED**

4.1 Sections 104, 104A, 104B and 104C are the relevant RMA provisions that govern our assessment of the Application, along with sections 108 and 108AA, again as we explain further elsewhere in this decision.

4.2 These provisions include:

***Section 104 Consideration of applications***

*(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–*

*(a) any actual and potential effects on the environment of allowing the activity; and*

*(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset*

- or compensate for any adverse effects on the environment that will or may result from allowing the activity; and*
- (b) *any relevant provisions of—*
- (i) *a national environmental standard:*
  - (ii) *other regulations:*
  - (iii) *a national policy statement:*
  - (iv) *a New Zealand coastal policy statement:*
  - (v) *a regional policy statement or proposed regional policy statement:*
  - (vi) *a plan or proposed plan; and*
- (c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

**104A Determination of applications for controlled activities**

*After considering an application for a resource consent for a controlled activity, a consent authority—*

- (a) *must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity; and*
- (b) *may impose conditions on the consent under section 108 only for those matters—*
  - (i) *over which control is reserved in national environmental standards or other regulations;*  
*or*
  - (ii) *over which it has reserved its control in its plan or proposed plan.*

**Section 104C Determination of applications for restricted discretionary activities**

- (1) *When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—*
  - (a) *a discretion is restricted in national environmental standards or other regulations:*
  - (b) *it has restricted the exercise of its discretion in its plan or proposed plan.*
- (2) *The consent authority may grant or refuse the application.*
- (3) *However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which—*
  - (a) *a discretion is restricted in national environmental standards or other regulations:*
  - (b) *it has restricted the exercise of its discretion in its plan or proposed plan*

4.3 As a Restricted Discretionary Activity, the District Plan has restricted discretion to General Criteria, Supermarkets, Transportation, Function, Vitality and Amenity of Centres, Hazards and Safety and Three Waters Capacity and Techniques.

4.4 In addition, and subject to the foregoing limitations, Mr Allan drew our attention to Sections 108 and 108AA at paragraphs 21-24, of his opening legal submissions. Section 108 records that a resource consent “*may be granted on any condition that the consent authority considers appropriate*” and sub-section 2 provides the general framework for this to occur. More importantly, with respect to the consideration of this application Mr Allan noted that Section 108AA sets out:

**Requirements for conditions of resource consents**

- (1) *A consent authority must not include a condition in a resource consent for an activity unless—*
  - (a) *the applicant for the resource consent agrees to the condition; or*

- (b) *the condition is directly connected to 1 or both of the following:*
  - (i) *an adverse effect of the activity on the environment;*
  - (ii) *an applicable district or regional rule, or a national environmental standard; or*
- (c) *the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.*

- 4.5 Mr Allan went on to submit that the above sub-section (a) “*essentially codifies the principle in Augier v Secretary of State for the Environment which has long been applied in New Zealand to RMA matters prior to the 2017 introduction of section 108AA.*” (Paragraph 23).
- 4.6 It was a re-occurring theme and the clearly stated position of the Applicant throughout the hearing that when considering consent conditions, we should accept the conditions the Applicant has specifically offered (and which have been agreed by the respective traffic experts) so as to provide the necessary mitigation of the significant adverse traffic/transport related effects which would otherwise occur.
- 4.7 On this point, in his legal submissions Mr Allan states: “*...Foodstuffs submits that the conditions in question are lawful because they directly address an adverse effect of the proposed activity on the environment, as they require the imposition of mitigation measures to address traffic effects, as a prerequisite to the commencement of the supermarket.*” (paragraph 23b.)

## **5 THE APPLICANT’S EVIDENCE PRESENTED**

### **Overview**

- 5.1 All expert evidence was pre-circulated in accordance with the timeframes set out in the Act. We have read all the materials prior to the hearing and during the hearing took notes regarding the Applicant’s, as well as the submitters’ and the Council’s presentations and responses to our questions.
- 5.2 For this reason, the summaries of the evidence presented, are not intended to provide a full coverage of the matters raised. The focus is on matters of relevance to our consideration of the application.

### **Douglas Allan, legal submissions**

- 5.3 We have already made reference to Mr Allan’s legal submissions but wish to note the following matters that were also brought to our attention:
- The adequacy of the Centres Assessment Report – in this respect, there is no evidence that the application will generate “any relevant adverse RMA distributional effects” (paragraph 25a); and
  - “absent the implementation of mitigation measures, the Application will have significant adverse traffic effects on the environment” – Foodstuffs is prepared to implement the mitigation measures identified by the Traffic experts (paragraph 25b);
  - No other substantive adverse effects have been identified by submitters or the Council (paragraph 25c); and
  - The submission by Te Ha o Te Whanau O Kirikiriroa that opposes the application in its entirety because “there has not been any consultation with local mana whenua Maori on location” – neither the Applicant nor the Council is required to

consult with any person regarding an application and s36A RMA is cited in this respect.

5.4 Attention was then focused on the predicted traffic effects and the proposed traffic mitigation measures. Mr Allan recorded that Foodstuffs' witnesses have all recorded the company's willingness to accept the conditions governing the matters raised by the Council's advisers (paragraph 41).

5.5 In his right of reply, Mr Allan posed two questions for this Panel to consider:

- How can the traffic be managed?
- Can the conditions make it work?

5.6 We address these matters specifically in Section 8 of this decision Principal Issues in Contention & Findings.

#### **Nick Hanson**

5.7 Mr Hanson is the head of Property Investment for Foodstuffs. He explained matters associated with supermarket retail and brand differentiation, supermarket operational and trading characteristics, along with opinion on supermarket shopper motivations focused around price, range and convenience.

5.8 The relevance of these matters to the Te Rapa site were outlined along with his consideration of the reasons and merits for choosing this site as opposed to a location within The Base sub-regional centre. We note that a substantial section of his Supplementary Evidence provided an explanation of Foodstuff's negotiations with The Base since 2010 and most recently during 2016 and 2017. Although this is not a matter on which we are required to make a specific finding, we conclude that, in essence, an acceptable commercial agreement could not be reached to enable a Foodstuffs supermarket to locate within the core of the expanded sub-regional centre of The Base.

5.9 Mr Hanson recorded his support for the amended and proposed set of conditions set out in Mr Norwell's evidence.

#### **Chris Brading**

5.10 We have previously noted Mr Brading's consideration of the building's location on the site and its orientation to the two main roads in the locality. We note that there were no matters raised by submitters or the Council regarding the overall design of the supermarket and its fuel service facility.

#### **Michael Martin**

5.11 Mr Martin is a Chartered Professional Engineer and broadly addressed geotechnical and civil engineering, and infrastructure servicing aspects for the development of the site. The key concern raised was that stormwater quantity control for climate change should not be implemented as the proposal does not result in increased adverse effects – his paragraphs 3.7 and 8.1-8.4 refer. He therefore questioned the need for such a condition as contained in the Council proposed set of conditions. He offered opinion on the other relevant conditions and where some wording refinement would be advisable.

#### **Tim Heath**

5.12 Mr Heath is a Property consultant, retail analyst and demographer. He completed an economic impact assessment of the retail implications of the proposed new Pak N Save supermarket for Foodstuffs. He also provided a supplementary statement of evidence.

5.13 His EIC is extensive and we note the following as key points:

- This proposal along with the established neighbouring Countdown supermarket together with The Base “in effect works as a single retail destination and forms part of the sub-regional centre” (paragraph 3.1);
- The proposed store is designed to serve the growing northern Hamilton market and northern rural areas surrounding the City (paragraph 3.2);
- No existing supermarkets are likely to close and therefore there will be no significant retail distributional effects generated as a result of the proposal and the business hierarchy will not be undermined (paragraphs 3.4, 11.5(c), 11.6(c), 11.7(b) and 11.10); and
- There is sufficient existing zoned and vacant industrial land supply that the loss of this 2 hectare industrial zoned site will not cause either a short or long term supply issue (paragraph 3.5).

5.14 Mr Heath’s analysis of the Operative District Plan’s provisions in respect of supermarket retailing is set out in section 13 of his EIC, his commentary on trade competition vs distributional effects is set out in section 14, while section 15 presents his CAR analysis.

5.15 Mr Heath assists us with understanding the differences between trade competition effects and flow-on retail distribution effects. We understand the meaning of these terms to be:

- Trade competition effects are retail trade impacts on other similar retail activity; and
- Retail distribution effects are a consequence of trade competition effects and may affect (positively or negatively) the patterns of performance, amenity and commercial activity within existing centres.

5.16 The ‘significant effect’ retail distribution threshold is determined to be breached “*where a new business affects key businesses in an existing centre to such a degree that the centre’s performance (and potentially viability) is eroded, causing a significant decline in its function and amenity, and disenabling the people and communities who rely upon those existing (declining) centres for their social and economic wellbeing*” (paragraph 14.5)

5.17 And importantly, “*retail distributional effects are differentiated from the effects of trade competition on trading competitors, which are to be disregarded pursuant to s104(3)(a) of the RMA with reference to any resource consent applications. Although retail distributional effects are a relevant consideration for a consent authority, it should be noted that Environment Court caselaw has made it clear that those effects must be significant (but not necessarily ruinous) before they could properly be regarded as going beyond the effects ordinarily associated with trade competition.*” (paragraph 14.6).

5.18 In relation to the CAR analysis Mr Heath then concludes, at paragraph 15.1:

*Following on from the above, in respect of assessment of adverse effects on the vitality, function and amenity of the Central City, Regional and Sub-regional centres that go beyond trade competition, there is simply no propensity for this to occur on the basis of a single supermarket being proposed in Te Rapa.*” (emphasis added)

5.19 When addressing the concern of the inefficient use of an existing physical resource, Mr Heath concludes at paragraph 15.2:

*On balance, the proposed development does avoid the inefficient use of physical resource and promotes a compact urban form”.*

And, at paragraph 15.3 he concludes:

*This is part of an expanding regional centre in general, but the site also provides direct access to public transport either along Te Rapa Road or in The Base/Te Awa Centre supporting investment in such infrastructure (current and future)."*

- 5.20 Section 18 of his EIC addresses the existing (2014) consent applying to the subject site, being the "Porters Properties Mixed-Use Development", and he addresses this matter further in his supplementary evidence in response to questions raised in the evidence of Mr Briggs, and to settle this point we record Mr Heath's response now, at his paragraph 2.3:

*"...I confirm that I have considered the implications of the Porters consent on the subject site in paragraphs 18.1-18.5 of my primary statement. I have considered the supermarket proposal both with and without the Porters Consent and reiterate my view that there are no meaningful RMA retail economic effects likely to be generated by the proposal."*

- 5.21 Mr Heath goes on to conclude, at paragraph 2.6 of his supplementary evidence:  
*"In any event, I do not consider that locating a supermarket on the site will generate relevant adverse RMA effects on The Base, regardless of whether the Porters Consent has lapsed or remains in force. The Base is a very large commercial centre and [in] my opinion is robust enough to benefit from, rather than to be adversely affected by, the establishment of complementary activities in the immediate vicinity."* (emphasis added)

### **Mark Tansley**

- 5.22 Mr Tansley is a very experienced adviser on retail planning and related resource management matters and has a long history of involvement with the evolution of retailing in Hamilton City.
- 5.23 His evidence provided an historical context upon which to consider this proposal as well as focus on the review of the methodology and analysis undertaken by Mr Heath and to provide some observations on the scale of the commercial effects and their RMA relevance.
- 5.24 Under the sub heading: *Conclusion based on Inspection*, Mr Tansley notes at paragraph 5.12:  
*"...Critically however, for the reasons discussed below, the proposed Te Rapa Pak N Save would not adversely affect the CBD or the prospect of it benefitting from future residential development at Peacocke."*
- 5.25 In his paragraph 7.5 Mr Tansley discusses the likely distributional issues and concludes in his section 10 that, in general, he agrees with Mr Heath's conclusions and also generally agrees with the Council's own findings based on Ms Fairgray's assessment that the proposal will not undermine the centres hierarchy and that the effects of the new supermarket's trading are acceptable.

### **John Burgess**

- 5.26 Mr Burgess is an experienced traffic engineer, and in addition to his EIC also presented a supplementary statement of evidence. He has advised Foodstuffs as a traffic consultant for about seventeen years and is experienced in how Foodstuffs' supermarkets are designed and operated from a transport perspective. He emphasised the extensive modelling exercise carried out to arrive at the conclusions agreed on a collaborative basis between the traffic experts.

5.27 The focus of his supplementary evidence was on the question of achieving certainty with the proposed conditions given that all five traffic experts agreed on the mitigation measures necessary to manage traffic effects to an acceptable level.

5.28 His conclusion at paragraph 15 of his supplementary evidence is:

*“Overall, I confirm my conclusions set out in my primary statement of evidence that all of the transport matters that have been in debate in relation to this proposal have been satisfactorily addressed through the latest modifications to the plan and through the Draft Conditions of Consent, and I conclude that the proposed Pak N Save development will be acceptable in terms of effects on the transport network.”*

5.29 We deal with some of these condition setting matters under our Section 8, Principal Issues in Contention and Findings.

### **Matt Norwell**

5.30 Mr Norwell is an experienced resource management consultant and has advised Foodstuffs on supermarket development over the past seventeen years. He has been involved with this proposal since 2017 and led the preparation of the application documentation prepared to support the proposal under the RMA.

5.31 The key points to record from his two statements of evidence are:

1. The uncertainty regarding the activity status of the proposal resulted in assessments based on both consideration as a restricted discretionary activity and as a non-complying activity (section 6);
2. General agreement with the Council that the actual and potential effects of the proposal can be appropriately mitigated. Such effects relate to:
  - Built design and site layout;
  - Business centres;
  - Traffic and
  - Geotechnical and civil engineering.
3. There are no relevant matters to consider in relation to any National Policy Statements;
4. In relation to the Waikato Regional Policy Statement the proposal does not challenge any matters of regional significance; and
5. In relation to the extensive discussion on the Operative District Plan provisions, there is consistency with the policy framework and conditions can be set to manage adverse effects to an acceptable level.

5.32 Mr Norwell’s overall conclusion is stated in paragraph 16.1 of his EIC as:

*“In my view, the proposed supermarket is ideally suited to the site. From a planning point of view, the proposal creates no challenges to the objective and policy framework of the District Plan. Further, other than traffic, both the applicant’s and council’s experts agree that any environmental effects will be no more than minor. Further, Mr Burgess*

*has produced a plan to carefully illustrate a number of the proposed changes intended to address the outstanding traffic effects.” (emphasis added)*

5.33 In his supplementary evidence Mr Norwell rebutted a number of statements made in the evidence of the other planning experts which called into question some parts of his EIC. He also confirmed his agreement to the amended version of the draft consent conditions presented as part of Mr Allan’s opening legal submissions.

## **6 THE SUBMITTERS’ EVIDENCE PRESENTED**

Three of the submitters in opposition to the application presented to the Panel. We summarise their concerns below.

### **Te Haa o te Whenua o Kirikiriroa Trust**

6.1 Sonny Karena (Trust Chairperson) and Rawiri Bidois (Trust Manager) spoke to their concerns recorded in the Trust’s written submission.

6.2 The request of Messrs Karena and Bidois was that before the development proceeded there be consultation with the Applicant so as to provide for the ‘cultural safety’ of the project on this site. The expectation was that such engagement could occur and be completed over a two-three month period.

### **The Base Te Awa (TBTA) and Woolworths New Zealand Limited**

#### **Allison Arthur-Young, legal submissions**

6.3 Ms Arthur-Young presented legal submissions on behalf of both submitters. Ms Arthur-Young’s key issues were:

- The activity will generate significant adverse traffic effects that will affect the two submitters and which need to be mitigated;
- These effects have not been sufficiently addressed by the proposed conditions, which lack certainty and enforceability; and
- There is also uncertainty regarding the centres assessment report (CAR) and the extent to which the ‘old Porter’ consent has been considered.

6.4 Specific shortcomings addressed concerned site access and road network performance, including:

- Wairere Drive/Karewa Place intersection and speed environment;
- Te Rapa site access; and
- Eagle Way/Karewa Place/Maui Street roundabout.

6.5 The road network upgrades agreed by the traffic experts, including the change in speed limits, are necessary and all require the support and agreement of the road controlling authority and actions enabled under other legislation; namely the Local Government Act (LGA). There is therefore, no certainty that the necessary LGA approvals will be granted.

6.6 The crux of Ms Arthur-Young’s legal submissions is that this uncertainty represents poor planning practice as there is insufficient certainty that the adverse effects will be appropriately mitigated by the implementation of these ‘essential mitigation measures’. Uncertainty also exists in respect of the possibility that the third-party consent of adjoining landowners would nullify the entire consent.

- 6.7 Ms Arthur-Young then referred us to what she considered to be relevant case law for our consideration.
- 6.8 On this basis, we were requested to refuse consent until these critical issues were resolved (paragraph 3.8).
- 6.9 Ms Arthur-Young also advised that in terms of the planning advice that followed, these “significant uncertainties” with the condition setting and their implementation meant that the application is not consistent with the transport objectives and policies of the District Plan and Waikato Regional Policy Statement (Paragraph 4.4).
- 6.10 We accepted Ms Arthur-Young’s suggestion that the respective traffic and planning expert witnesses jointly present and respond to any questions we had on those particular professional matters.

**John Parlane – Traffic (TBTA)**

**Don McKenzie – Traffic (Woolworths NZ)**

- 6.11 Both experts agreed that the proposed site access and wider road network upgrades were “absolutely necessary” along with the reduction in the 80kph speed environment to 60kph in the vicinity of the Wairere Drive/Karewa Place intersection.
- 6.12 If there was no certainty about the implementation of these works then we were advised that the consent should be declined.
- 6.13 Discussion focused on whether and how the proposed conditions could be refined to ensure that the supermarket could not open for trading until these works were in place.

**Michael Briggs – Planning (TBTA)**

**Kay Panther Knight – Planning (Woolworths)**

- 6.14 Mr Briggs affirmed to us that without mitigation the Application would create significant adverse traffic safety effects.
- 6.15 Mr Briggs also emphasized to us that it was not clear that the CAR had taken into consideration the consented Porter mixed use development for the larger part of this development site. He advised that we needed to be certain of this when assessing the distributional effects of the proposal and that the unimplemented Porter consents should be considered.
- 6.16 His opinion on the proposed consent conditions was similar to that expressed by Ms Panther Knight which we now consider.
- 6.17 Ms Panther Knight re-affirmed Ms Arthur-Young’s view that various traffic management upgrades and a change to the speed environment of Wairere Drive require approvals under the LGA, and “*crucially, neither this process nor its outcome are within the Applicant’s control to deliver.*” (paragraph 4.14).
- 6.18 On this basis Ms Panther Knight advised that the proposal does not achieve the objectives and policies of Chapter 25 City Wide-Transportation.
- 6.19 Ms Panther Knight concludes at paragraph 4.25 by stating:

*In the absence of valid and enforceable conditions of consent which are able to be implemented by the consent holder, I consider the application should be declined on the grounds of significant adverse effects on the traffic environment and on the safety of motorists, pedestrians and cyclists since the Applicant has not demonstrated that:*

- *The proposed mitigation measures are achievable and feasible;*
- *The conditions of consent can be wholly implemented by the Applicant without reliance on any other third party or approval process; and*
- *Sufficient information has been provided to confirm those mitigation measures achieve an acceptable outcome in terms of the level of effect on the traffic network and surrounding activities.*

## **7 THE COUNCIL OFFICERS' EVIDENCE (SECTION 42A REPORT & RESPONSES)**

### **Marianne Mackintosh, legal submissions**

7.1 Ms Mackintosh's legal submissions on behalf of Council focused on:

- Traffic effects and proposed mitigation by way of consent conditions;
- Activity status of the application;
- Other matters raised in submissions;
- Section 42A report recommendation and conditions.

7.2 In respect of the foregoing, Ms Mackintosh's conclusions were:

- The proposed conditions precedent designed to address the traffic effects of the proposal are certain and enforceable and therefore valid;
- The uncontested expert evidence has established that the proposal meets the requirements of ODP Rule 9.5.4 and the application is correctly assessed as a Restricted Discretionary Activity;
- There is no statutory requirement for consultation on a resource consent application and there is no power to direct such consultation; and
- There is nothing precluding resource consent being granted subject to the suite of conditions attached to Mr Le Heron's supplementary/updated section 42A report.

### **Sam Le Heron**

7.3 Mr Le Heron's evidence was in the form of his original s42A report dated 30 April 2019, his s42A report addendum dated 16 September 2019 and his evidence presented at the hearing on 8 October 2019. In both his original report and his report addendum, Mr Le Heron's recommendation was that the application be declined on the basis of adverse traffic effects which could not be adequately mitigated. In both cases however, he attached draft consent conditions in the event that we decided on the evidence presented at the hearing that consent could be granted. In his own evidence presented at the hearing (having heard all evidence presented and prior to Mr Allan's closing legal submissions) Mr Le Heron's recommendation was that consent could be granted, subject to revised conditions.

7.4 The following extract from paragraph 46 of Mr Le Heron's evidence presented at the hearing outlines his changed opinion (based on advice from Council's traffic experts) that the traffic effects of the application could be appropriately addressed and mitigated through the imposition of consent conditions:

*Based on the evidence presented and the outcomes of the traffic caucusing, in my view the critical issue is any potential adverse transportation safety and efficiency effects arising from the proposal. In that regard, I have reviewed and considered the traffic/transportation evidence and information on this issue, including the information provided in the original application, the revised layout and additional mitigation measures, the relevant technical assessments, the submissions, the applicants evidence and submitters evidence and the hearing evidence. In my view, the transportation effects of the proposal have been robustly considered by all traffic experts, and I rely on the expertise of Mr Black and Mr Meister primarily, but also acknowledge*

*that all experts are in alignment on the critical matters, to inform my view that the transportation effects can be adequately addressed by way of conditions of consent on the Application. Additional specificity has been provided to address the matters raised by Submitters, which make improvements to the original draft wording put forward as part of my S42A Report and S42A Addendum Report. I have attached to this Supplementary Evidence as Attachment 1 a revised set of conditions, to reflect the outcome of the evidence exchange and hearing process.*

- 7.5 Regarding the economic effects of the proposal, including compliance with ODP Rule 9.5.4, Mr Le Heron's view (again relying on Council's market economics expert consultant) was consistent throughout the reporting and hearing process and is summarised as follows in paragraphs 45-46 of his hearing evidence:

*I agree with the Market Economics interpretation of the supermarket provisions in the Industrial Zone, particularly Rule 9.5.4. The rule does not define or provide criteria to determine what it means to 'undermine' the role or function of other centres. In this context Market Economics have determined this to mean the closure of a supermarket, thereby changing the role or function of an established centre. The Market Economics reports records that the most significant effects in terms of % change to floorspace productivity and vulnerability to adverse effects is the Nawton Suburban Centre Countdown which would experience measurable impacts, that would contribute to lower floorspace productivity and less overall sales, but not to the extent that closure of the supermarket is likely. I therefore rely on the Market Economics conclusion that the scale of the proposed Pak N Save supermarket will not undermine the Nawton Suburban Centre and established Countdown supermarket.*

*Accordingly, based on the assessment criteria for supermarkets seeking to establish in the industrial zone, I have concluded that the proposal will not undermine the centres hierarchy and that the effects of the application in that regard are acceptable."*

- 7.6 With respect to the submission on the application lodged by Te Ha O Te Whenua O Kirikirioa Trust, Mr Le Heron's evidence at paragraph 97 of his s42A report was:

*"Submission 4 (Te Haa O Te Whenua O Kirikirioa Trust) to the application was in opposition, where it outlined that no consultation with local mana whenua Maori had occurred in relation to the proposed development. The submission sought consultation to occur prior to granting the application. The proposal site is zoned Industrial in the ODP, has previously been used as part of Porter Groups operations and was previously an orchard. The ODP holds no known information regarding any cultural values associated with the site. Consultation with the relevant Iwi authority is strongly encouraged when the proposal impacts on known or is in close proximity to local areas of known cultural significance. The proposed site is not considered under the ODP to be either culturally significant, nor are there any wider nearby localities that would warrant consultation with the relevant Iwi. The public notification of this proposal has provided the opportunity for the relevant Iwi to engage in the process and their views can be expressed and considered through the hearing process."*

#### **Alastair Black & Mike Meister (Transportation experts)**

- 7.7 As with that of Mr Le Heron, Mr Black's and Mr Meister's views on the proposal evolved from initial opposition, because of what they considered to be the unacceptable traffic and roading effects, to one of agreement subject to the implementation of a raft of traffic mitigation measures agreed with the traffic experts of the applicant and submitters, recommended to be the subject of conditions imposed on any consent granted.

### **Johnathon Brooke**

- 7.8 Mr Brooke is a Project Engineer employed by the Council whose role was to liaise with the various engineering experts engaged to assess the application so as to provide them with an understanding of the Council's standards, practices and processes relating to public engineering infrastructure. In addition, he was involved in reviewing draft consent conditions relating to engineering matters, including in respect of stormwater which is the subject of draft recommended condition 66. That condition requires on-site flow attenuation to offset the effects of climate change on stormwater peak flows. As we have noted in paragraph 5.11 of this decision, the applicant's chartered professional engineer, Mr Martin, did not consider such a condition to be necessary given that there would be no increase in stormwater flows created by the proposal. However, at the hearing Mr Brooke reiterated his view that the condition was appropriate.

### **Susan Fairgray**

- 7.9 Ms Fairgray is a market economics consultant engaged by the Council to assess the economic effects of the proposal, particularly in the context of ODP Rule 9.5.4 and the potential for the role and function of other centres to be undermined. In addition to her original economics assessment forming Attachment 11 to Mr Le Heron's original s42A report, she presented evidence at the hearing itself. In the conclusion to her evidence, she stated that while the proposed new PAK'nSAVE supermarket on the subject site would have an impact on the existing Countdown supermarket in the Nawton commercial centre, she could not conclude "*that it would undermine that centre*".

## **8 PRINCIPAL ISSUES IN CONTENTION & FINDINGS**

- 8.1 As background, Section 113 of the RMA directs, in the case of decisions on resource consent applications, to state the principal issues that were in contention and to state the main findings in relation to those issues.
- 8.2 We have assessed the principal resource management issues in the following format:
- Issue/Topic to be determined; and
  - Evaluation; and
  - Findings.
- 8.3 Based on the application documents, the submissions, the further written and oral evidence presented, and the Applicant's and Council officer's reports, the principal issues in contention are:
- Proposal activity status and compliance with ODP Rule 9.5.4;
  - Transportation effects and proposed mitigation measures;
  - Conditions precedent and reliance on actions of third parties;
  - Tangata whenua consultation; and
  - Stormwater attenuation for climate change.
- 8.4 Proposal activity status and compliance with ODP Rule 9.5.4**
- 8.4.1 The subject site lies within the Industrial Zone of the ODP and pursuant to Rule 9.3(cc) the following are a restricted discretionary activity (RDA) in that zone:

*“New supermarkets where the activity complies with the standards in Rule 9.5.4.”*

However, under rule 9.3(dd), where an activity is deemed to not meet the “standards” in Rule 9.5.4 it becomes a non-complying activity (NCA).

Rule 9.5.4 requires an application to include a “Centre Assessment Report” (CAR) which addresses a number of specified criteria and which also *“demonstrates that the proposal will not undermine the role and function of other centres within the localised catchment in the business hierarchy.”*

- 8.4.2 The appropriateness of a rule of the foregoing nature, which requires a subjective judgement to be made in order to determine compliance and which may alter the activity status of a proposal is problematic. That aside, both the applicant’s and the Council’s experts concluded that the proposal did comply with Rule 9.5.4 and therefore fell to be considered as an RDA. However, the evidence of the planner for TBTA, Mr Briggs, was that the applicant’s CAR was deficient because in his opinion the information submitted did not meet one of the information requirements set out in ODP Rule 1.2.2.17 (cross-referenced in Rule 9.5.4) which requires the adverse effects of a proposal on a consented but not yet implemented development to be taken into account. In this case, the consented but as yet unimplemented development in question relates to a Mixed-Use Development on part of the land (“the Porters site”) subject of the current application. Mr Briggs suggested that this may render the proposal a NCA but as Mr Allan noted in his opening legal submissions on behalf of the applicant, Mr Briggs’ claim of NCA status was implied rather than explicit, and we note that the activity status matter was not pursued in Ms Arthur-Young’s legal submissions presented on behalf of TBTA and Woolworths.
- 8.4.3 In any event, and as we have already noted in our summary of the evidence presented, the applicant’s retail consultant, Mr Heath, specifically addressed Mr Briggs’ evidence on this matter in paragraphs 2.1-2.6 of his supplementary evidence and confirmed that in his assessment of the proposal he had specifically taken into account the unimplemented Porter’s consent and that in his opinion the proposal would not create any adverse RMA effects on the neighbouring TBTA commercial centre. Again, as we have already noted, Mr Heath also concluded in paragraph 15.1 of his EIC that there is *“simply no propensity”* for the proposal to create adverse effects on Central City, Regional and Sub-regional centres that go beyond trade competition.
- 8.4.4 Mr Heath’s expert evidence was supported by the expert evidence of Mr Tansley (also a retail consultant) for the applicant and Ms Fairgray (market economist) for the Council, both of whom concluded that the proposal would not undermine the viability of other existing commercial centres.
- 8.4.5 No expert retail or market economics evidence was presented on behalf of the submitters TBTA and Woolworths NZ Ltd.

#### Findings

- 8.4.6 Given the foregoing, we find as follows:

- The proposal complies with the requirements of ODP Rule 9.5.4, including that it “*will not undermine the role and function of other centres within the localised catchment of the business hierarchy*”; and
- The status of the proposal is therefore that of a restricted discretionary activity (RDA).

## 8.5 Transportation effects and proposed mitigation measures

8.5.1 It was acknowledged by all transportation expert witnesses that without the implementation of appropriate mitigation measures, the adverse traffic and roading effects of the proposal would be significantly adverse and unacceptable. These adverse effects included those related to vehicle access to the site as well as impacts on the immediately adjoining streets and on the wider roading network in the vicinity.

8.5.2 Following lodgement of the application, including pre-hearing caucusing of the transportation experts as well as through the hearing process itself, the proposal underwent a number of refinements to address the identified adverse traffic effects which would occur if appropriate mitigation measures were not put in place. Through this process, which culminated in an agreed set of consent conditions based on a raft of agreed mitigation measures, all of the transportation experts were of the opinion that all actual or potential adverse transportation effects could be appropriately addressed. Those measures are incorporated in Conditions 39-62 of the suite of consent conditions attached to this consent. The following are of particular note:

### Condition 45

Provision of a left turn deceleration lane on Te Rapa Road and a left-turn entry into the site;

### Condition 46

The partial signalisation of the Wairere Drive / Karewa Place intersection;

### Condition 47

Construction of a roundabout at the Karewa Place / Eagle Way / Maui Street intersection;

### Conditions 48 & 49

Reduction in the posted speed limit on Wairere Drive between the Pukete Road and Te Rapa Road from 80km/hr to a maximum of 60km/hr;

### Condition 50

Provision of a raised safety platform for the east bound movement of Wairere Drive to Karewa Place; and

### Conditions 51, 54 and 55

Provision of satisfactory road safety and pedestrian safety audits.

### Findings

8.5.3 Subject to compliance with all relevant consent conditions which incorporate the aforementioned agreed mitigation measures, we find that the transportation effects of

the proposal will be acceptable, with upgrades to the road and pedestrian networks required to be completed prior to the operation of the supermarket.

## 8.6 “Conditions precedent” and reliance on actions of third parties

8.6.1 Conditions 45-47 and Conditions 49-51 are required to be complied with “*prior to the operation of the supermarket*” while Condition 48 is to be complied with “*prior to the start of the construction of the supermarket*”. In addition, Conditions 48 and 49 are dependent on the actions of a third party, being the Hamilton City Council, and involve processes to be completed under the Local Government Act (LGA).

8.6.2 The first point we note is that all of the conditions in question have been specifically offered and agreed to by the applicant and therefore fall within RMA section 108AA(1)(a) which, subject to other relevant legal tests, effectively authorises a condition which might otherwise be deemed ultra vires.

8.6.3 In her legal submissions on behalf of TBTA and Woolworths, Ms Arthur-Young argued that, notwithstanding RMA section 108AA(1)(a), RMA case law has found that a condition which relies on third party approval and which would effectively nullify the consent if such approval was not forthcoming, is ultra vires. She also submitted that the conditions in question involved processes with outcomes which were inherently uncertain. Ms Arthur-Young provided copies of the cases on which her submissions were based. Those cases are:

- Richmond v Kapiti Coast District Council [2016] NZEnvC1; and
- Laidlaw College Inc v Auckland Council [2011] NZEncC 248.

8.6.4 Ms Arthur Young also referred to the evidence of Ms Panther Knight, on behalf of Woolworths, in which Ms Panther Knight expressed opinion was that the conditions in question were insufficiently certain and therefore represented “poor planning practice”.

8.6.5 The Council’s legal counsel, Ms Mackintosh, had a different view. In paragraph 6 of her legal submissions she argued that “complete certainty” that the conditions could be complied with was not required. Rather, the test was whether the outcomes of the conditions were “capable of being achieved” and that this was the “basic approach to conditions precedent”. She went on to submit that:

*Fundamentally, the risk of whether the “pre-conditions” can be satisfied fall on the Applicant and the commercial risks of that are not a matter for the commissioners to evaluate.*

and further, in her paragraphs 7 and 8:

*In my submission, the proposed conditions precedent are certain and enforceable. It is a straightforward question of whether the required mitigation is in place prior to certain activities commencing.*

And,

.....in my submission the risk of there being a fully constructed and “ready to open” Pak’n Save in the absence of those conditions precedent being satisfied is extremely low.

8.6.6 In her paragraph 24 Ms Mackintosh distinguished the current proposal from the circumstances prevailing in the cases referred to by Ms Arthur-Young.

8.6.7 In his closing legal submissions on behalf of the applicant, Mr Allan also distinguished the current proposal from the cases referred to by Ms Arthur-Young. In particular, there is a far greater level of certainty in the current case because in this case:

- The detail of the required traffic mitigation measures is known;
- There is agreement among the traffic experts that the measures will ensure that any adverse traffic effects will be managed to an acceptable level;
- While third party involvement is necessary, this is not a legal bar to the validity of a “condition precedent”;
- Any risk relating to third party involvement rests solely with the applicant; and
- All of the conditions in question have been offered and agreed to by the applicant.

#### Findings

8.6.8 We have read the cases referred to us by Ms Arthur-Young and have carefully considered her legal submissions as well as the submissions of the other legal counsel. We accept the legal submissions of Mr Allan and Ms Mackintosh in respect of these matters and in particular we find that the circumstances of this application can be distinguished from those applying to the proposals subject of the caselaw referred to us by Ms Arthur-Young. Further, that the conditions in question meet the relevant legal tests relating to “conditions precedent” as well as to the necessary involvement of third parties in achieving compliance with them.

### **8.7 Tangata whenua consultation**

8.7.1 As we recorded in the summaries of evidence, Mr Le Heron referred to this matter in paragraph 97 of his s42A report where he noted that the submission of Te Haa O Te Whenua O Kirikiriroa Trust sought consultation with the applicant prior to the application being granted consent. Mr Le Heron also noted that the ODP did not identify matters of cultural significance in respect of the site or in the immediate locality. No cultural, spiritual or other effects on Maori values in respect of the site or the supermarket proposal itself were identified in the submission, nor were any such effects identified by the submitters when presenting their evidence at the hearing.

8.7.2 On behalf of the applicant, Mr Allan submitted that there is no statutory requirement for consultation on a resource consent application and Council’s legal counsel Ms Mackintosh concurred with that submission and also advised that we “*do not have jurisdiction to direct consultation*”.

### Findings

8.7.3 While we do not doubt the sincerity of the submitter's request for consultation, we find that any such consultation is entirely at the discretion of the applicant and we have no power to direct the applicant to consult in this particular case. We also find that no matters of cultural sensitivity in respect of either the subject site or the proposal itself were identified by the submitters or any other party.

8.7.4 We do note however, that prior to construction works commencing, it remains open to the applicant to consult with the submitter's representatives in respect of the possible implementation of matters relating to the "cultural safety" of the development.

### **8.8 Stormwater attenuation for climate change**

8.8.1 The advice of the Council's Project Engineer, Mr Brooke was that stormwater attenuation for climate change (as encapsulated in draft recommended consent condition 66) was appropriate. In addition, the proposed wording of the condition was considered necessary so as to ensure alignment with an existing consent notice registered on the title of the land. The applicant's engineer, Mr Martin disagreed on the basis that once developed, the proposal would not result in any increase in stormwater run-off from the site, and he was of the opinion that the word "quantity" in the draft condition should be replaced with the word "quality".

### Findings

8.8.2 We consider that there has been no compelling evidence provided in support of amending the condition as proposed by Mr Martin and find that the condition should remain as currently drafted by Mr Brooke.

## **9 SECTION 104 MATTERS**

### We find as follows:

9.1 That subject to compliance with the attached comprehensive set of consent conditions, any adverse environmental effects actually or potentially created by the proposed development are able to be appropriately avoided, remedied and mitigated to an acceptable level.

9.2 That as a restricted discretionary activity provided for in the Industrial Zone, a proposal of the nature applied for is anticipated by the Hamilton City ODP. Also, we agree with both Mr Norwell's and Mr Le Heron's assessments of the proposal under the relevant objectives and policies of the ODP that, overall, the proposed supermarket is consistent with those provisions.

9.3 We also agree with and adopt Mr Le Heron's assessment in section 8.0 of his s42A report that the proposal is consistent with the relevant provisions of the National Policy Statement on Urban Development and the Waikato Regional Policy Statement. Similarly, we agree with Mr Le Heron's assessment that subject to compliance with conditions 24-31 of the attached consent conditions, controlled activity consent is appropriate under the NESCS.

## 10 PART 2 MATTERS

10.1 Overall, we find the proposal to be consistent with the sustainable management of resources purpose of the RMA 1991 as set out in section 5 and that it is consistent with the relevant matters in section 7 to which regard is to be had. In particular, we find that the proposal is consistent with the relevant objectives and policies of the operative Hamilton City District Plan as well as with the relevant provisions of the other applicable statutory planning instruments and of Part 2 of the Resource Management Act itself.

## 11 OVERALL DETERMINATION

11.1 We find the proposal is worthy of consent, subject to the attached conditions. Schedule 1 - Application Reference 010.2018.0000962.001 – Conditions, refers.

## 12 THE DECISION & REASONS

12.1 As in the “Summary of Decision” set out at the beginning of this Decision report, resource consent is granted for the reasons contained in both the Summary and elsewhere in the body of this report.



**Murray Kivell**  
Hearing Panel Chairperson  
18 November 2019



**Russell De Luca**  
Hearing Commissioner

**Schedule 1:** Application Reference 010.2018.0000962.001 - Conditions