Before Hamilton City Council

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

AND

IN THE MATTER of an application for resource consent for the construction and operation of a new supermarket including associated fuel facility, at 980 Te Rapa Road, Pukete

HEARING REFERENCE Resource consent – 010.2018.00009962.001

Legal submissions on behalf of Foodstuffs North Island Limited

Introduction

1. These submissions and the evidence to be presented are in support of an application by Foodstuffs North Island Limited ("Foodstuffs") for resource consents pursuant to the Resource Management Act 1991 ("RMA") in respect of the construction and operation of a new 6,358 m² supermarket (to be branded PAK’nSAVE) with an associated on-site fuel facility, and including carparking, vehicle access ways and all other enabling works ("the Application") on a 2.013 ha¹ Industrial zoned site at 980 Te Rapa Road, Hamilton ("the Site").

2. Evidence from the following witnesses has been circulated in support of the Application:

a. Nicholas Hanson, Head of Property Investment, Foodstuffs;

b. Christopher Brading, Architect;

c. Michael Martin, Civil Engineer;

d. Timothy Heath, Retail Consultant;

e. Mark Tansley, Retail Consultant;

¹ Now reduced to 1.9713 ha in order to accommodate the roundabout at the corner of Eagle Way Maui Street and Karewa Place.

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f. John Burgess, Traffic Engineer; and

g. Matthew Norwell, Planner.

3. During the course of Foodstuffs’ case, Messrs Hanson, Heath, Burgess and Norwell will present brief written supplementary statements in response to the expert evidence exchanged on behalf of submitters.

4. Council initially circulated a report pursuant to section 42A of the RMA dated 30 April 2019 ("the 42A Report"). In light of traffic concerns raised in the 42A Report, the processing of the Application was delayed to enable traffic engineers for Foodstuffs, submitters and Council to caucus. As a consequence of that process, the Application was amended under cover of a memorandum from Barker & Associates dated 8 August 2019. The evidence exchanged on behalf of Foodstuffs incorporates and is based on that amended proposal. The amendments related primarily to traffic arrangements regarding vehicles approaching, entering and exiting the Site. Council then circulated an addendum dated 7 October 2019 to the 42A Report ("the Addendum Report").

5. The Addendum Report states\(^2\), "... in the absence of additional mitigation to address the adverse traffic safety effects, at this point my recommendation that the application by Foodstuffs ... be declined has not changed. If additional mitigation measures, for example as outlined in this S42A Addendum Report and Appendix D, were to be incorporated into the proposal and addressed during the hearing, I will consider these and whether they address the safety concerns that are currently identified." The mitigation measures are addressed in Mr Burgess’ evidence.

6. The Addendum Report includes a draft suite of conditions as Appendix D, which includes the additional mitigation to address adverse traffic safety effects. The Addendum Report records that, "... in my opinion the additional mitigation measures identified in this report and Appendix D are within the scope of the application"\(^3\). The evidence of Mr Norwell includes an annotated version of the draft schedule of conditions. Mr Norwell has identified a number of relatively minor alterations to the conditions. In light of the changes to conditions suggested in evidence for The Base Te Awa Limited ("TBTAL"), a further annotated version of the conditions is annexed to

\(^2\) Addendum Report paras 24 and 25.

\(^3\) Addendum Report para 26.
these submissions as Attachment 1. Foodstuffs asks that Council grant consent to the Application subject to the conditions set out in Attachment 1.

7. Te Rapa Road has a northwest - southeast orientation adjacent to the Site. For ease of description, these submissions will assume a north - south orientation for that road and an east - west orientation for Eagle Way.

The Application

Context

8. The Application involves the establishment of a supermarket immediately across Te Rapa Road from the main entrance to Te Awa / The Base, which is the sub regional retail and commercial centre in the northern part of Hamilton. The Site has an Industrial zoning pursuant to the operative Hamilton City District Plan ("District Plan") but is in a retail and commercial context, with a Countdown supermarket immediately to the south across Eagle Way and a Kmart store adjacent to the southern boundary of that supermarket.

9. The Site is part of a large block previously occupied by Porters Properties Limited. That land is currently being redeveloped pursuant to its Industrial zoning. A key structural element of the redevelopment is an extension of Maui Street from the north so that it joins Karewa Place at the Eagle Way intersection. As a consequence, the Site will ultimately border the road network on three boundaries (Te Rapa Road to the west; Eagle Way to the south; and the Maui Street Extension to the east).

Activity Status

10. The Application triggers a number of Restricted Discretionary and Controlled Activity consent requirements under the District Plan, as summarised in Part 7 of Mr Norwell’s evidence.

11. Attachment 1 of Mr Norwell’s evidence identifies the matters over which the Council has reserved its control or restricted its discretion, considering in each case whether consideration is required in terms of effects regarding built form and site layout, traffic, engineering and business centres respectively. It is apparent from that attachment that each element for which consent is required requires consideration only with regard to 1 or 2 of those categories. That suggests that an atomised analysis of each matter for which consent is required would be sufficient. As noted in his paragraph 7.4, however, Mr Norwell has taken a conservative approach in his evidence by considering potential
effects arising from the proposal collectively (i.e.: as if it were for a Discretionary or Non-complying Activity).

12. There is one aspect of the application in respect of which assessing activity status under the District Plan is unusually complex, being the status of the new supermarket. In that regard, both Foodstuffs’ consultants and the Council’s experts have concluded that the supermarket has Restricted Discretionary Activity status. That has been challenged, albeit impliedly, in the evidence of Mr Briggs on behalf of TBTAL. Mr Briggs notes that, subject to the analysis required by the District Plan, the supermarket could be a Non-complying Activity, although he does not explicitly claim that it has that status. Mr Briggs further asserts:
   a. The (currently lapsed) consent obtained by Porters Properties Limited in relation to a wider area (including the Site) ("the Porters Consent") was not taken into account by the experts and that, if that consent is reinstated, the supermarket could potentially have adverse effects on and/or undermine the role and function of the Central City and sub-regional centres⁴.
   b. The framework of District Plan provisions (discussed below) requires a broader assessment than that which has been undertaken on behalf of Foodstuffs and Council⁵.
   c. Accordingly, the information provided is inadequate to enable the Application to be considered as a Restricted Discretionary Activity and to enable any decision to be made⁶.

13. Foodstuffs rejects those contentions. It notes that:
   a. All three economic experts who have provided reports or evidence on this matter agree that the supermarket qualifies as a Restricted Discretionary Activity;
   b. There is no evidence before you to the effect that The Base (or any other centre) will suffer relevant adverse RMA effects;

⁴ Briggs para 6.17.
⁵ Briggs para 6.18.
⁶ Briggs para 6.19.
c. Mr Heath’s evidence is that he has assessed the proposal with and without the Porters Consent\(^7\);

d. Mr Norwell has, in his evidence, assessed the potential effects of the proposal collectively; and

e. Mr Norwell has, in the AEE, assessed the proposal as if it were a Non-complying Activity and has concluded that in those circumstances it would warrant the grant of consent.

14. In that context, Foodstuffs considers Mr Briggs’ evidence to be unsupported supposition. Nevertheless, it is necessary to deal with his assertions and these submissions will therefore consider the relevant District Plan provisions, clarify the extent to which effects on centres are relevant under RMA, and canvas the conclusions that have been reached by the experts (see discussion on “Issue 1” below).

**Legal Framework – Resource Management Act**

15. Sections 104, 104B and 104C are the key RMA provisions governing assessment of the Application. Sections 108 and 108AA RMA govern the imposition of conditions.

**Section 104**

16. The most relevant parts of section 104 RMA read as follows (emphasis added):

> “When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

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

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

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\(^7\) Foodstuffs' understanding is that the Porters Consent is not currently able to be exercised as it has lapsed, the application to extend was declined and a subsequent section 357 RMA objection has not yet been determined. The consent could, however, be reinstated if the section 357 application is successful.
(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application."

17. With regard to the listed matters to which you should have regard:

a. The evidence for the Applicant has assessed in detail the adverse effects that could potentially be generated by the Application.

b. The District Plan was developed in tandem with the Waikato Regional Policy Statement and Foodstuffs considers that it gives effect to it.

18. Your assessment is "subject to Part 2". The meaning of that phrase in the context of a resource consent application has been considered recently by the Court of Appeal in R J Davidson Family Trust v Marlborough District Council. While section 104 obliges you to consider Part 2, Davison records that, in many cases, doing so will not have any practical import because the relevant planning provisions have been established in accordance with and give effect to Part 2, so any analysis is unlikely to change the outcome of your enquiry. In this case, the District Plan is a relatively recent planning instrument which accurately reflects the Council’s current strategic thinking in terms of its centres hierarchy. Foodstuffs submits that the District Plan provisions appropriately give effect to Part 2 and, from a practical perspective, no further enquiry under Part 2 is necessary in this case.

Sections 104B and 104C

19. Section 104C RMA is relevant to the Restricted Discretionary Activity elements of the Application. It provides that, when considering an application for a resource consent for a Restricted Discretionary Activity, a consent authority must consider only those matters over which discretion is restricted (either in terms of national environmental standards or other regulations; or in terms of the relevant plan). If the consent authority grants an application, it may impose conditions only in respect of those matters over which the discretion has been restricted.

20. Section 104B RMA applies to Discretionary Activities and Non-complying Activities. It provides that, after considering an application for a resource consent for a Non-complying Activity, a consent authority may grant or refuse the application and if it grants the application may impose conditions under section 108. This is the provision

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8 R J Davidson Family Trust v Marlborough District Council [2018] NZCA 316

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that applies to your assessment of the supermarket if you adopt Mr Briggs’ suggestion (discussed below) that the level of information provided with and in support of the Application is inadequate to enable you to consider the supermarket as a Restricted Discretionary Activity. For the reasons set out below, Foodstuffs rejects that contention.

Sections 108 and 108AA

21. Sections 108 and 108AA govern the conditions that may be imposed on the consent. The most important provisions in this case, given the criticism of proposed conditions in evidence on behalf of the submitters are the following.

22. Section 108(1) provides that a resource consent may be granted on any condition that the consent authority considers appropriate. Comment: This is a very broad power to impose conditions, albeit subject to constraints in section 108AA discussed below.

23. Section 108AA(1) provides that:

"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

i) the condition relates to administrative matters that are essential for the efficient implemented Asian of the relevant resource consent."

Comment:

a. Subsection (a) essentially codifies the principal in Augier v Secretary of State for the Environment⁹, which had long been applied in New Zealand to RMA matters prior to the 2017 introduction of section 108AA. In this case Foodstuffs agrees to the imposition of conditions that the submitters’ witnesses criticise. That agreement ensures that:

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i. There is no obligation on Council to ensure that the conditions are reasonable or otherwise lawful to impose\(^{10}\);

ii. Foodstuffs cannot in this hearing and will not be able in the future to challenge the legality of the agreed conditions; and

iii. Accordingly, the broad power in section 108(1) can be given effect to with respect to the offered conditions.

b. In any event, 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 operation of the supermarket.

24. Evidence for the submitters (most notably Ms Panther Knight) challenges the appropriateness of the conditions. Those matters will be addressed later in the submissions.

**General Observations**

25. You have before you a significant amount of material from Council advisors and expert evidence on behalf of Woolworths New Zealand Limited ("Woolworths") and TBTAL. Foodstuffs’ reading of that material is as follows:

a. As noted above, Mr Briggs has raised a concern regarding the planning status of the supermarket, namely whether it is a Restricted Discretionary or Non-complying Activity. That concern relates to the adequacy of the Centre Assessment Report supplied with the Application but there is no evidence before you that the Application will generate any relevant adverse RMA distributional effects.

b. All parties agree that, absent the implementation of mitigation measures, the Application will have significant adverse traffic effects on the environment. In that regard:

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\(^{10}\) The Environment Court has emphasised that "neither a consent authority nor the Court may impose conditions on a resource consent which could effectively nullify that consent" (Richmond v Kapiti Coast District Council [2016] NZEnvC 1) but that is not what is occurring in this case, where the applicant is offering and agreeing to the relevant conditions.

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i. The traffic effects can be addressed through mitigation measures that have been identified and that Foodstuffs is prepared to implement.

ii. Aspects of the mitigation will require cooperation from third parties, namely Council as the roading authority (in terms of the partial signalisation of the Wairere/Karewa intersection and a reduction in the speed limit on Wairere Drive) and neighbouring landowners (in terms of the implementation of a slip lane on Te Rapa Road).

iii. It is the ability of the proposed conditions to adequately and appropriately address the mitigation measures that is of concern to the officers and submitters, not whether the effects are physically capable of mitigation.

c. No other substantive adverse effects environment are identified in the evidence or reports.

26. The submission by Te Ha o Te Whanau O Kirikiriroa Trust opposes the Application in its entirety on the basis that, “there has not been any consultation with local mana whenua Maori of the location”. The relief sought is for the Council to, “provide for consultation to occur prior to granting the application”. Section 36A RMA provides that neither an applicant for a resource consent nor the relevant local authority has a duty under RMA to consult any person regarding an application. Foodstuffs is not aware of any other statutory obligation to consult in this case.

27. The other submissions are addressed in Foodstuffs’ evidence.

28. In the circumstances, these submissions will focus on the two issues noted above, being:

a. The status of the application in the context of the potential distributional effects; and

b. The adequacy and legality of the traffic conditions.
**Issue 1 – Potential Distributional Effects and Activity Status of Supermarket**

**Caselaw re Relevant Distributional Effects under RMA**

29. Pursuant to section 104(3)(a), of the RMA, when considering an application for resource consent a territorial authority must not have regard to trade competition or the effects of trade competition. It is accepted law, however, that the Council should have regard to significant effects on the amenity of the public caused by any reductions in the viability or vitality of commercial centres that arise as a consequence of trade competition – i.e.: what can be termed “distributional” or “consequential” effects. These are the matters that are addressed in the Centre Assessment Report and in the evidence of Messrs Heath and Tansley.

30. The wording in section 104 RMA is also found in other parts of the Act with reference to plan provisions. The point at which such effects become relevant and worthy of consideration was determined by the Supreme Court in **Discount Brands Limited v Westfield (New Zealand)**. In summary, “social or economic effects must be ‘significant’ before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors.”

31. For completeness, **Attachment 2** records key findings in the chain of High Court, Court of Appeal and Supreme Court decisions that resulted in the **Discount Brands Supreme Court** decision. The decisions collectively clarified the law on this point. They related to a proposal by Discount Brands Limited to establish the “**Fox Outlet Centre**” in Northcote, North Shore. It is submitted that, collectively, those decisions emphasise and establish that where trade competition produces social and economic effects that are not significant and are not beyond the effects ordinarily associated with trade competition, those effects are to be disregarded when assessing an application for resource consent.

**District Plan provisions re the status of Supermarket**

32. The following paragraphs address the relevant operative provisions of the District Plan. Those provisions are subject to Plan Change 6, which was notified in July 2019, but the proposed changes are not substantive.

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12 Blanchard J at paragraph 120 of the Discount Brands Decision.
33. **Part 9.3(cc) Industrial Zone Activity Table** provides that, "New supermarkets, where the activity complies with the standards in Rule 9.5.4" are a Restricted Discretionary Activity. Part 9.3(dd) provides that new supermarkets that do not comply with the standard are a Non-complying Activity. Reference to compliance with a standard to determine activity status is a common mechanism in plans. The issue in this case relates to the standard itself.

34. **Rule 9.5.4** sets out the following standard with respect to new supermarkets in the Industrial Zone: "a) Resource consent applications for new supermarkets in the Industrial Zone must provide a Centre Assessment Report ... which: i) addresses assessment criteria H2; and ii) demonstrates that the proposal will not undermine the role and function of other centres within the localised catchment in the business hierarchy." Both limbs of this standard are unusual:

   a. Item a) provides that activity status is dependent upon the submission of a report, which is not a matter that has any inherent connection to the activity itself.

   b. Item b) refers to the content of the report (item (i)) and what it "demonstrates" (item (ii)). Again, that has no connection to the nature and extent of the activity, although the conclusions in the report will be informed by those factors.

   c. With regard to item (b)(ii), it is not explicit whether the activity status is determined by what the report asserts is demonstrated or, alternatively, by an objective analysis on Council’s part as to the reasonableness of that conclusion. In this case, Council took a conservative approach and obtained its own report regarding this issue. Neither the Centre Assessment Report nor the peer review concluded that the proposal will undermine the role and function of other centres, and hence they both concluded that the supermarket should be assessed as a Restricted Discretionary Activity.

35. **Assessment criterion H2** reads: "Whether and to what extent the proposed Supermarket activity in the Industrial ... zone(s): a) Avoids adverse effects on the vitality, function and amenity of the Central City and sub-regional centres that go beyond those effects ordinarily associated with competition on trade competitors. b) Avoids the inefficient use of existing physical resources and promotes a compact urban form. c) Promotes the efficient use of existing and planned public and private investment in infrastructure. d) Is located within the catchment where suitable land is
not available within the business centres. e) Reinforces the primacy of the Central City and does not undermine the role and function of other centres within the business hierarchy where they are within the same catchment as the proposed supermarket. To demonstrate the above criteria can be satisfied and applicant must supply a Centre Assessment Report. The content of the Centre Assessment Report shall be prepared in accordance with clause 1.2.2.17.13 Comment: Rule 9.5.4 requires the Centre Assessment Report to address these assessment criteria. That has been done in both the Centre Assessment Report and the peer review. In assessing the Restricted Discretionary Activity application for the supermarket, you need to reach your own conclusions in that regard.

36. **Clause 1.2.2.17** (Volume 2) sets out information requirements for Centre Assessment Reports:

a. Plan Change 6 proposes a series of changes to the provisions but it is submitted that they do not substantially change the meaning of the rule.

b. **Paragraph b) (Purpose)** includes the following statement: “The content and detail of the Centre Assessment Report shall correspond with the scale, nature and potential adverse effects of the proposal. A detailed assessment may not be required if the applicant can clearly demonstrate that the proposed development is unlikely to have any significant effects in relation to the matters referred to above.” Comment:

i. Plan Change 6 proposes minor changes to these provisions including an amendment to the last sentence to replace “significant effects” with “significant adverse effects”. That more accurately reflects the law regarding relevant distributional effects under RMA (discussed above).

ii. Mr Heath and Mr Tansley have both considered the potential adverse effects that would be generated by the supermarket and conclude that no relevant RMA effects arise. Notwithstanding that conclusion, Mr Heath provided a lengthy and comprehensive Centre Assessment Report. There is no expert or other evidence before you that contradicts the substantive findings of those witnesses.

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13 Plan Change 6 proposes to delete the shaded wording. It is submitted that this change would not substantially alter the analysis required.
Paragraph c) (Information Requirements) comprises a list of information that shall be included in a Centre Assessment Report. Item iii) is, "the existing and consented development located outside of the Central City and/or sub-regional centres, which has been taken into account when assessing the potential adverse effects of the development." Comment:

i. Mr Briggs implies that the Centre Assessment Report is inadequate because it did not include consideration of the Porters Consent. Mr Heath’s evidence is that he did give consideration to the Porters Consent.

ii. In any event, the information requirement is to identify the existing and consented development that "has been taken into account" in the Centre Assessment Report. That is not a requirement to take into account all such development and in practice consultants such as Mr Heath and Mr Tansley exercise judgement with respect to the proposals that they consider are relevant and sufficiently concrete to warrant taking into account. Mr Heath has complied with the information requirement.

37. In the circumstances, the Centre Assessment Report submitted with the application was appropriate and adequate in terms of the District Plan provisions; complied with the obligations required in the District Plan for the supermarket to be assessed as a Restricted Discretionary Activity; and reached conclusions that have been supported by the evidence of Mr Tansley and the peer review undertaken on behalf of Council and that have not been contradicted by any other evidence.

Expert evidence

38. The potential for distributional effects to arise has been considered by Mr Heath, Mr Tansley and Council’s advisor, Susan Fairgray. In that regard:

a. Mr Heath concludes that, "... no existing supermarkets are considered likely to close and therefore there is likely to be no significant retail distributional effects generated as a result of the proposal, and the District Plan’s business hierarchy not undermined."14

14 Heath para 3.4. In

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b. Mr Tansley concludes that, "I see no possibility whatsoever, that impacts ... could conceivably have more than trade competition implications. Furthermore, only significant impacts on a centre-based supermarket could possibly be a pre-requisite to a relevant adverse RMA effect. For reasons I have given, I see no prospect of such an effect occurring."

c. Ms Fairgray expresses views with regard to the content of the District Plan provisions but ultimately concludes that, "for the purposes of rule 9.5.4 and within the commissioned scope of the assessment, based on assessing only the scale of the impacts, we cannot conclude that the proposed supermarket would undermine the business centres hierarchy." Mr Heath and Mr Tansley record their differences of opinion with Ms Fairgray regarding some of her analysis and commentary. Overall, however, Ms Fairgray's neutral conclusion is complementary to the more definitive opinions of Mr Heath and Mr Tansley.

39. Importantly, there is no evidence before you that contradicts the expert opinions and which asserts that the Application will generate a relevant significant adverse distributional effect on any centre. Intuitively, such a conclusion would be surprising: Mr Heath's evidence establishes that the Hamilton market is ready to accommodate another large supermarket in the north; there is no evidence that any existing supermarket would close; and locating the new supermarket adjacent to The Base will reinforce that very large centre rather than compromise it. Had this been a concern for TBTA it could and presumably would have presented evidence to that effect.

Issue 2 – Traffic Effects and Adequacy of Conditions

Traffic Effects and Proposed Mitigation

40. The traffic effects likely to be generated by the Application have been the focus of caucusing and additional modelling since the 42A Report was released. Foodstuffs' hope was that the caucusing and modelling would produce consensus regarding the nature of effects, appropriate forms of mitigation, and the wording of conditions. While it appears that there is a general consensus regarding the first and second of those matters, the Addendum Report recommends that the Application be declined, albeit that Appendix D to that report includes draft conditions that, "essentially capture the key aspects that I consider the Applicant will need to address so that Council's
technical experts, and myself, can be satisfied that the proposal is appropriate in this location"\textsuperscript{15}.

41. Mr Burgess' evidence for Foodstuffs addresses the concerns expressed in the Addendum Report by Council's traffic engineers and planner. The attachment to his evidence is a plan that shows the mitigation measures in the immediate vicinity of the Site. Foodstuffs' witnesses have recorded the company's willingness to accept conditions governing the matters raised by Council's advisors.

42. The witnesses for TBTAL have suggested some amendments to the proposed conditions. The substantive elements of those conditions are largely accepted by Foodstuffs. John Parlane, TBTAL's traffic engineer concludes that, "If the speed limit can be addressed, signals installed and the other mitigation measures noted below can be built, then I consider that the traffic effects of the application can be mitigated to a level where it could be approved."\textsuperscript{16} Foodstuffs' intent is to implement the mitigation measures discussed by Mr Parlane.

43. Don McKenzie, traffic engineer for Woolworths, apparently agrees with the key elements of the mitigation proposed and does not propose any other significant forms of mitigation. Both Mr McKenzie and Kay Panther Knight, Woolworths' planner, express the view, however, that consent should be declined. Ms Panther Knight addresses those matters in detail and, in summary, argues that

a. The conditions require mitigation that is beyond Foodstuffs' control to deliver\textsuperscript{17}; and

b. As a consequence, there is no certainty that the proposed mitigation will be provided\textsuperscript{18}.

44. Those contentions will be addressed below.

Proposed Traffic Conditions

45. The Addendum Report proposes that any consent be subject to 71 conditions. The key conditions in terms of mitigation of traffic effects are set out below. Importantly, conditions 48 – 52 all use as a timing trigger the commencement of operation of the

\textsuperscript{15} Addendum Report para 22.
\textsuperscript{16} Parlane, para 1.4.
\textsuperscript{17} For example, see Panther Knight paras 4.14; 4.20; 4.21; 4.33; 4.51; and 6.1.
\textsuperscript{18} For example, see Panther Knight paras 4.16; 4.20; 4.21; and 4.30.
supermarket. That enables works on the supermarket site and the roading network to be undertaken contemporaneously. It is an appropriate timing trigger because it is only once the supermarket is operating that traffic (and hence any adverse traffic effects) will be generated by it.

46. The relevant conditions are as follows. Amendments to the wording now sought by Foodstuffs are annotated:

47) Prior to the operation of the supermarket, an left turn deceleration lane on Te Rapa Road shall be constructed in accordance with relevant standard Austroads Design Practices standards, or to the satisfaction of HCC, to avoid operational and safety concerns and to provide a left turn entry access from Te Rapa Road into the site from Te Rapa Road.

Comment: This condition is agreed to and offered by Foodstuffs. The proposed wording changes are intended to incorporate a suitable timing trigger and otherwise to clarify the wording.

48) Prior to the operation of the supermarket a partial signalised right-turn movement from the intersection of Wairere Drive with into Karewa Place shall be established signalised to provide the following:
   a) Two continuous unsignalised through lanes south-west bound on Wairere Drive with a separate signalised right turn into Karewa Place that has a storage length of 100 m;
   b) Two signalised through lanes on Wairere Drive north-east bound with a separate left turn slip lane with a storage length of 50 m; and
   c) An unsignalised left turn only lane on Karewa Place.

Comment: This condition is agreed to and offered by Foodstuffs. The proposed wording is adopted from Appendix A to Mr Briggs' evidence. Mr Briggs suggested the addition of a further sentence at the end of the condition, reading, "This signalised intersection is essential to mitigate severe adverse traffic effects that would otherwise be created at the intersection of Wairere Drive with Te Rapa Road and at the intersection of Te Rapa Road with Eagle Way". Foodstuffs does not consider that such an explanatory statement should form part of a condition. Conditions impose constraints or obligations on consent holders. While they are the consequence of a rationale, they should not include or comprise that rationale. Conditions are not an opportunity to make narrative statements regarding what is effectively the reasoning behind that condition. Your rationale for this and other conditions is appropriately recorded in your decision.

49) Prior to the operation of the supermarket a single-circulating lane roundabout shall be established at the Karewa Place / Eagle Way / Maui Street intersection shall be established. The roundabout shall include two approach
lanes on Eagle Way and be designed in accordance with the Austroads Guide to design Part 4B Roundabouts.

Comment: This condition is agreed to and offered by Foodstuffs. The proposed wording is adopted from Appendix A to Mr Briggs’ evidence.

50) Prior to the operation of the supermarket a reduction in the posted speed limit on Wairere Drive between Pukete Road and Te Rapa Road intersections shall be to a maximum of 60 km/h shall be established.

Comment: This condition is agreed to and offered by Foodstuffs. The proposed wording is adopted from proposed condition 50B in Appendix A to Mr Briggs’ evidence. Mr Briggs also suggested an additional condition 50A reading, “Prior to the start of construction of the supermarket approval to reduce the speed limit on Wairere Drive between the Pukete Road and Te Rapa Road intersections to a maximum of 60 km/h shall be obtained from Hamilton City Council in accordance with the Hamilton City Speed Limit Bylaw”. Foodstuffs does not consider such a condition to be necessary or appropriate:

a. It is for Council to control speed limits on public roads. Foodstuffs is not in a position to apply for or give effect to “approval” to such a reduction in speed limit.

b. Condition 50 adequately addresses the key issue, being whether the speed limit has in fact been reduced prior to the commencement of operation of the supermarket and the consequential generation of traffic movements by the proposal.

c. The advice of the traffic engineers is that implementation of the partial signalisation of the Wairere/Karewa intersection is necessarily tied to the reduction in speed limit. Both of those matters (which are addressed in conditions 48 and 50 respectively) are within the power of Council to implement. In that context, it is irrelevant in terms of the Application when Council decides to reduce the speed limit, provided that signalisation and speed limit reduction have both occurred prior to commencement of operation of the supermarket.

d. Proposed condition 50A could unnecessarily create logistical difficulties for Foodstuffs through its construction process. While it is in Foodstuffs’ interest to have certainty that the signalisation and speed limit reduction will occur, any risk that arises from Foodstuffs commencing construction on the Site prior to
Council formally determining that the speed limit will be reduced will be borne by Foodstuffs and not the public generally.

Accordingly, Foodstuffs supports Mr Briggs' version of proposed condition 50 (his condition 50B) but opposes his proposed condition 50A.

51) Prior to the operation of the supermarket a raised safety platform is provided on the eastbound movement of Wairere Drive at the partial signalisation of the Karewa Place / Wairere Drive intersection.

52) Prior to the operation of the supermarket a pedestrian crossing facility shall be provided on Karewa Place.

Comment: Proposed conditions 51 and 52 are agreed to and offered by Foodstuffs.

Woolworths' Criticism of Conditions

47. Ms Panther Knight identifies in her paragraph 4.22 what she says is good planning practice with regard to conditions and in her paragraph 4.23 what she says is not good planning practice. She then states in her paragraph 4.24 that, in her view, "conditions 47 and 50 do not achieve best planning practice, and these concerns are not overcome or alleviated by the proposed review condition 71."

48. As a preliminary observation, while Ms Panther Knight identifies what she says is "good planning practice", her analysis in paragraph 4.24 is based on what must be a stricter test, being "best planning practice". In any event, the RMA does not identify "good planning practice", let alone "best planning practice", as a threshold or test in respect of the imposition of conditions.

49. Ms Panther Knight's paragraphs 4.22 and 4.23 form a convenient basis for an analysis of the appropriateness of the conditions. For completeness, the following analysis considers all of conditions 47 – 52 in terms of the items identified by Ms Panther Knight.

50. Ms Panther Knight's paragraph 4.22 reads, "Good planning practice seeks that conditions of consent must be (amongst other things):

- Certain;

Comment: Each of conditions 47 – 52 is certain in the sense that their meaning is clear; the consent holder can easily understand what is required of them; and the consequence of a failure to comply with a condition is apparent. [Nb: It is important not
to conflate the certainty of a condition's meaning with the separate issue as to whether
the consent holder will inevitably be able to comply with it.]

- *Practicable and enforceable;*

**Comment:** Each of the conditions is practicable and enforceable:

a. All but condition 50 involve the completion of physical works on the road
network (with condition 47 also requiring some work on neighbouring privately
owned land). There is no suggestion that the physical works are technically
incapable of being carried out and they all involve common traffic management
measures.

b. The conditions are easily enforced. The supermarket cannot commence
operation unless and until the physical works and speed limit reduction are in
place. Those physical works and speed limit reduction will be immediately
apparent on a site visit, as will whether the supermarket is in operation.

- *Within a council's powers under the Resource Management Act; and*

**Comment:** Each of the conditions is within Council's powers under RMA. All of them
are intended to respond to potential adverse effects arising from the Application
(section 108AA(1)(b)(i) RMA) and, in addition, all of them are offered by Foodstuffs
(section 108AA(1)(a)).

- *Physically and technically achievable."

**Comment:** For the reasons noted above, each of the conditions is physically and
technically achievable. Whether and when they are, in fact, achieved is a different
issue and not relevant at this stage.

51. Ms Panther Knight's paragraph 4.23 reads, "Conversely, in my opinion, it is not good
planning practice for conditions to:

- *Require the approval of another person or entity, i.e. a secondary approval;*

**Comment:** It is acknowledged that conditions that reserve to another party what is
effectively a substantive decision-making power in respect of the relevant application
are problematic. By way of example, conditions which are subject to the consent of a
Council officer need to be drafted in a manner which puts the officer in the role of a certifier and not an arbitrator\(^{19}\). That is not the issue that arises in this case, however:

a. Condition 47 requires provision of a left turn deceleration lane in accordance with Austroads Design Practices or to the satisfaction of HCC:

i. Determining compliance with the Austroads document is a straightforward matter of certification.

ii. Determining whether an alternative arrangement is to Council’s “satisfaction” is also in the nature of certification given that the condition specifies that the deceleration lane is “to avoid operational and safety concerns and to provide a left turn entry into the site”. Thus, Council (represented by its traffic engineers) will be able to certify whether an alternative proposal gives effect to those specified requirements.

b. Condition 47 also necessarily involves use of neighbouring land that is currently privately owned. In practice, complying with this condition will require Foodstuffs to reach agreement with its neighbour. Tenure and land use consent are two quite different and separate matters, however. An application can be made for resource consent over land that is not owned by an applicant but implementation of that consent will necessarily involve resolving the separate tenure issues. The condition does not require the neighbour to make a substantive decision in respect of the Application. It simply necessitates the consent holder and the neighbour reaching an arrangement as to tenure in order for the (very clear) condition to be complied with.

c. None of proposed conditions 48, 49, 51 and 52 require any involvement by a third party.

d. Compliance with proposed condition 50 will require Council to have resolved to reduce the speed limit on Wairere Drive. That is a separate statutory and regulatory function from the exercise of decision-making under RMA, however. That decision does not involve preserving to another party what is effectively a substantive RMA decision. Implementation of a complex development commonly involves an obligation to obtain a series of separate regulatory

\(^{19}\) See Pine Tree Park Limited v North Shore City Council [1996] NZRMA 401 (HC).

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approvals (e.g.: building consents). It is for the applicant to decide which approvals to seek first and it is the applicant that incurs the risk that only some of the necessary consents will be obtained. In this case Council’s decision-making in respect of the speed limit is likely to be dependent on the outcome of the Application so it is logical that the resource consent will be determined prior to the speed limit.

- *Require actions of third parties; and*

**Comment:** Conditions that purport to require third parties to undertake certain actions (e.g.: to attend meetings of liaison committees or provide particular information to the consent holder or council) are problematic. In this case, however, the proposed conditions do not require actions of third parties. Instead, they simply require certain events to occur prior to the opening of the supermarket. In order for those events to occur, the consent holder will practically need the cooperation of other parties but that is commonly the case with any proposal that involves works on a public road or the provision of infrastructure over public or privately owned land (in respect of which cooperation from the infrastructure providers and any affected landowners is essential).

- *Be outside the legal powers of the consent authority.*

**Comment:** For the reasons noted above, all of the conditions are within the legal powers of the Council.

52. The balance of Ms Panther Knight’s evidence including her conclusion that consent should be declined appears primarily to be based on her assessment of the adequacy of the conditions. It is therefore dependent upon the validity of her concerns regarding the conditions. For the reasons set out above, Foodstuffs considers that those concerns are overstated and that the proposed conditions are appropriate.

**Conclusion**

53. It is submitted that the issues in contention in respect of the Application are narrow and that you can safely grant consent subject to the conditions set out in *Attachment 1.*
54. As noted in the Addendum Report\(^{20}\), the critical issue is the adverse transportation safety effects arising from the proposal. The Addendum Report\(^{21}\) invites Foodstuffs to address the traffic issues of concern to the Council’s advisors and to respond to the proposed conditions in Appendix D. Foodstuffs’ evidence does so and there does not appear to be any substantive remaining issues between the traffic engineers, albeit that Woolworths’ traffic consultant opposes the application because of concerns regarding the appropriateness of the conditions.

55. For the reasons set out above, it is submitted that the proposed conditions are lawful, appropriate, certain, and enforceable. If the events prescribed in conditions 47 – 52 do not occur, then the supermarket cannot open and there will be no adverse traffic effects generated. If those events do occur, then the effects of the supermarket will be adequately and appropriately mitigated. Further, the traffic modelling indicates that the partial signalisation of the Wairere / Karewa intersection will generate benefits for the broader traffic network.

56. There is no technical or expert evidence identifying any other adverse effects that might be generated as a consequence of the Application.

57. Mr Norwell has carried out a detailed analysis of the Application with respect to the relevant District Plan provisions. He has also considered the relevant regional planning instruments. It is submitted that there is no legal impediment to you granting consent to the Application and that there is a sound planning basis for doing so.

Dated this 7th day of October 2019

Douglas Allan – Counsel for Foodstuffs North Island Limited

\(^{20}\) Addendum Report, para 21.
ATTACHMENT 1

ANNOTATED SCHEDULE OF CONDITIONS DATED 7 OCTOBER 2019
Appendix D - Draft Conditions September 16, 2019

The following is a draft list of conditions to assist the Commissioner’s should they be of the view to grant consent.

**General**

1. That the development be in general accordance with the plans and the information submitted with the application on 23 July 2018 and the plans titled “Pokio’s Le Te Rapa 980 Te Rapa Road, Hamilton” prepared by Wingate Architects, dated 20 September 2019, except where amended by the further information and updated plans.

2. That pursuant to section 36 Resource Management Act 1991, the following fees and charges be paid:
   a. Payment of additional Environmental Health fees for assessing consented reporting will be charged on a time-cost recovery basis in accordance with Hamilton City Council’s Schedule of Fees and Charges, with adjustments coming into effect at the beginning of each financial year. The fees will be levied at the completion of the consent review process and will be payable to the Environmental Health Unit upon notification that compliance has been achieved.

3. The opening hours of the consented activity shall be restricted to between the hours of 7.00am and 10.00pm.

**Landscaping**

4. The consent holder shall submit a landscape plan for the approved development to the Council’s Monitoring Team Leader for certification within one month prior to the start of works. The objective of the landscape plan is to ensure the permeability established onsite contributes to the amenity and stormwater management of the site. The landscape plan shall include details of the proposed species; plant numbers and density; and sizes/height at the time of planting and maturity.

5. The consent holder shall implement the approved landscaping within the first planting season following the completion of works in accordance with the certified landscaping plan submitted as part of condition 3 of this consent. This landscaping shall be maintained in good condition over the duration of the supermarket operating on site. In the event that any of the planting dies or declines in health beyond recovery, the consent holder shall undertake replacement planting.

**Electronic Signs**

6. The three LED pylon signs must not display any image that:
   - Resembles or is likely to be confused with any traffic sign or signal;
   - Contains reflective, fluorescent or phosphorescent materials that will reflect headlights, or distract and interfere with a road user’s vision;
   - Uses flashing or revolving lights or lasers or any other method of illumination that will dazzle or distract drivers.

7. The sign shall be limited to static displays only.

8. The sign content shall not change at intervals greater than once every 8 seconds.

9. Changes to sign content shall be limited to a maximum transition time of 1 second between two messages/images. There must be no scrolls flash, type or fade between the messages/images.
a. Maximum electronic luminance shall have the following limits:

- Day time luminance when the sun directly strikes the face of the sign 8000cd/m² and otherwise 6000cd/m².
- Day time luminance Morning/Evening Twilight and Inclement Weather: 600cd/m².
- Night Time Luminance: 350cd/m²
b. The signs must have a facility for automatically adjusting the sign luminance so that the sign brightness is always comparable with the surrounding luminance conditions and restrictions above.

10. The minimum letter size on each sign shall be as follows:
   • 150mm for the main message
   • 100mm for the property name
   • 75mm for the secondary message.

11. The signs shall include provisions for automatic shutdown in the event of a fault which affects the signs performance.

Earthworks

12. The Consent Holder shall ensure that all appropriate sediment and erosion control measures are adopted to minimise any sediment leaving the site. The measures shall include: creation of earth bunds to protect the site, the erection of silt fence, stabilised entranceways, cut off drains and the connection of downpipes to the stormwater system as necessary. These sediment control measures should be erected and maintained on site for the duration of the works. Note: refer to Waikato Regional Council’s “Erosion & Sediment Control, Guidelines for Soil Disturbing Activities” which can be found at http://www.walkatoregion.govt.nz

13. Earthworks shall not obstruct or divert any stormwater overland flow path or result in changed stormwater drainage patterns on adjacent land in different ownership.

14. A water sprinkler cart or similar be made available on-site during earthworks to mitigate any dust nuisance (when necessary).

15. All bare earth shall be re-vegetated or re-grassed as soon as practicably possible and within three calendar months following the completion of earthworks. If this cannot be achieved the area shall be temporarily covered by a surface suitable to protect against soil erosion until such time as re-vegetation or re-grassing can occur.

16. That the activity is conducted in such a manner so as to not create a dust nuisance. A dust nuisance will occur if:
   a. There is visible evidence of suspended solids in the air beyond the site boundary; and/or
   b. There is visible evidence of suspended solids traceable from a dust source settling on the ground, building or structure on a neighbouring site or water.

17. That while undertaking earthworks on the site, if any archaeological feature(s) (including human remains) are encountered, all work in the vicinity shall cease immediately and the following persons/parties shall be contacted:
   a. The Police (only in the event that human remains are encountered);
   b. Te Ha O Te Whenua O Kirikiri Trust;
   c. Heritage New Zealand; and
   d. Manager, Planning Guidance Unit.

The earthworks shall not re-commence until written authorisation has been obtained by the Consent Holder from Council’s Planning Guidance Unit Manager.
18. All works shall be undertaken in accordance with the Regional Infrastructure Technical Specifications (available from the internet at www.hcc.govt.nz) and/or to the satisfaction of the General Manager, City Infrastructure.

Noise:

19. All construction work on the site shall be designed and conducted to ensure that construction noise from the site received at any other site does not exceed 70dBA (Leq). In the event that any sound level measurements are recorded they shall be measured and assessed in accordance with the provisions of NZS 6803:1999 Acoustics — Construction Noise.

20. The cumulative noise emission from all sources on the subject site (excluding construction noise) shall not exceed 65dB (Aeq(15-mins)) at any point within the boundary of any other site. Noise levels shall be measured in accordance with NZ56801:2008 'Acoustics - Measurement of Environmental Sound' and assessed in accordance with NZ56802:2008 'Acoustics - Environmental Noise' before comparison with this level.

Hazardous Substances

21. The quantity of petrol and of diesel stored on site shall be limited to a maximum of 100,000 litres and 50,000 litres respectively in underground storage tanks.

22. Design information and an emergency response plan shall be provided to Council’s Planning-Guidance Manager before commencement of the consented activity. The design information and plan shall demonstrate how the consented activity will comply with Part 4 Subpart A and Clause 47 of the Hazardous Substances (Hazardous Properties Control) Notice 2012.

23. The consented activity shall comply with the Pak ‘n’ Save Emergency Site Management Plan.

Geotech

24. At the time of detailed engineering design, the applicant shall submit to Council a quantification of liquefaction risk report to determine the potential mitigation required, which will outline the static total and differential settlement once the building and fill loads and extent of any non-engineered fill is known.

NES Contaminated Land

25. That within three months of consent being granted and prior to any soil disturbance works commencing, the consent holder shall arrange a pre-commencement meeting. The meeting will involve discussions around roles and responsibilities, staging, reporting requirements and compliance relevant to the soil contamination investigation. In attendance must be:
   1. A SQEP
   2. HCC Contaminated Land Officer and Compliance Monitoring Officer
   3. All contractors, sub-contractors and works site supervisory staff who are carrying out any works associated with the NESCS part of the project.

26. That a Final Site Management Plan (SMP) shall be prepared and implemented in accordance with the RMA National Environmental Standards Contamination in Soil Regulations 2011 (NESCS). The SMP must reference the Foodstuffs North Island Detailed Site

27. The final Site Management Plan shall target the actual onsite conditions relating to human health exposure identified in the report, and the appropriate offsite soil removal relating to transport and disposal. The Plan must include the relevant human health-related controls to ensure minimal exposure via the applicable pathways for the duration of the soil disturbance works. The Plan must also include appropriate contingency measures for any previously unidentified contamination being discovered, and an acceptable method for works completion reporting.

28. A copy of the Site Management Plan shall be provided to Council’s Environmental Health Manager prior to any soil disturbance works commencing. Any alternative methods or measures must be proven to be consistent with the objective of the approved Plan prior to their implementation.

29. Works Completion reporting shall be provided within two months of soil disturbance works being completed to confirm that the methods outlined in the Site Management Plan were enforced for the period required, and that the measures were successful in ensuring the potential risks were adequately managed.

30. In the event that any previously unidentified contamination is discovered in any exposed or excavated soil, works are to cease immediately, and Council shall be notified of the discovery. A Suitably Qualified Environmental Practitioner (SQEP) shall assess the risk and determine the appropriate contingency, remediation or management measures that are required to reduce the potential risk to site workers, future site users and the environment.

31. Any investigation, remediation, validation and soil management works shall be undertaken and reported in accordance with current editions of the Ministry for the Environment Contaminated Land Management Guidelines No. 5 – Site Investigation and Analysis of Soils No.2 – Hierarchy and Application of Environmental Guidelines and No.1 - Reporting on Contaminated Sites in New Zealand.

32. That any soil exceeding the applicable NESCS standard shall be removed under controlled conditions to a licensed waste facility or landfill for disposal in accordance with the requirements of the disposal site and the relevant authority. Receipts of transport and disposal must be included in the Site Validation Report or Works Completion Report.

33. That pursuant to section 26 Resource Management Act 1991, the following fees and charges be paid:

   a. Payment of additional Environmental Health fees for assessing consented reporting will be charged on a time cost recovery basis in accordance with Hamilton City Council’s Schedule of Fees and Charges, with adjustments coming into effect at the beginning of each financial year. The fees will be levied at the completion of the consent review process and will be payable to the Environmental Health Unit upon notification that compliance has been achieved.

Commented [MNS]: Condition retained but relocated to "General Conditions" section for clarity.
Engineering

General

24. The consent holder shall submit engineering plans detailing service locations, existing and any proposed water, wastewater and stormwater connections and system to the Planning Guidance Unit for review by the General Manager, Development (or nominee) prior to building consent application and construction work commencing onsite, this plan shall be amended by the Consent Holder as required until stamped ‘Accepted’ by General Manager, Development (or nominee).

25. All engineering works and designs shall be in accordance with the Regional Infrastructure Technical Specifications (available from the internet at www.hcc.govt.nz).

26. The consent holder shall retain the services of a suitably professional qualified person to oversee the construction of any infrastructure required for the development. This person shall be responsible for ensuring adherence to approved construction plans, quality systems, and project completion requirements. The name and contact details of this person shall be nominated on all engineering plans submitted to the Strategic Development Unit.

27. A register of all assets to be vested in Council (e.g. road infrastructure) and associated GST requirements shall be submitted to Strategic Development Unit at the completion of works (ref Hamilton City Council form GST Requirement/Asset Register and Tax Invoice).

28. All works within the road corridor shall be managed by a contractor operating under a current CAR (Corridor Access Request), made through the www.beforeudig.co.nz website and appropriate traffic management. The Corridor Access Request shall be approved by the Road Controlling Authority prior to construction works commencing onsite.

Construction Management Plan

29. At least one month prior to the commencement of any earthworks or construction activities onsite the Consent Holder shall provide a Construction Management Plan (CMP) for certification by the General Manager, Development (or nominee). The objective of the CMP is to outline the approach to be taken for the managing construction works to ensure that impacts that may arise from the works have been appropriately identified, managed and minimised.

30. The consent holder shall carry out operations in general accordance with the provisions of the certified Construction Management Plan, and any subsequent changes. The Construction Management Plan (CMP) shall include but not limited to:
   a. Details of the works, intended construction timetable (including staging) and hours of operation
   b. Methods to control dust, debris on roads and silt laden runoff during construction
   e. Existing network utilities
   d. Anticipated truck movements and routes to and from the site during construction
   e. Site access and management
   f. Traffic Management
   g. Contact details for the contractor, including a process for complaints and remedying concerns
h. Adjacent land owner liaison during the construction stage
i. Quality assurance/quality control
j. General methods to mitigate and manage construction noise and vibration in order to comply with the applicable noise limits
k. Identification of any special construction activities (including any pile driving and concrete pours) that may require specific mitigation measures in order to comply with the applicable noise limits

Any changes to the Construction Management Plan shall be confirmed in writing by the Consent Holder following consultation with the General Manager, Development (or nominee) before implementation.

Roading

41-40. The proposed vehicle crossings and site accesses shall be designed to provide pedestrian priority and a continuous footpath and be constructed to the applicable standard in accordance with the Regional Infrastructure Technical Specifications, Drawings D3.3.1 and D3.3.5. The vehicle crossings and site accesses shall be fully formed to the site boundary in the same material as the footpath.

42-41. All service relocation required to accommodate the new vehicle crossings shall be at the consent holder's expense.

42-42. Any obsolete vehicle crossings servicing the site shall be removed, and the kerb and channel, footpath and berm reconstructed as applicable to match the surroundings.

44-43. On completion of site works any roadside damage shall be repaired, and the kerb, berm and footpath reinstated to match the surroundings. The reinstatement work shall not be carried out until all service trenching in the footpath has been completed and shall include the reinstatement of all trenches.

45-44. The footpath and berm shall be kept clear during construction, or, if not practicable, may be temporarily closed along the site frontage. An application for Temporary Use of the Road Corridor can be obtained at no charge from City Transportation Unit.

46-45. The site shall be provided with outdoor lighting for the safety of users in accordance with Section 4.7, AS/NZS 2890.1:2004.

47-46. Prior to the operation of the supermarket a left turn deceleration lane on Te Rapa Road shall be constructed in accordance with relevant standard Austroads Design Practices standards, or to the satisfaction of HCC, to avoid operational and safety concerns and to provide access off a left-turn entry Te Rapa Road into the site from Te Rapa Road.

47-47. Prior to the operation of the supermarket a partial signalised right-turn movement from the intersection of Waipere Drive into Karewa Place shall be established signalised to provide the following:

a. Two continuous unsignalised through lanes south west bound on Waipere Drive with a separate signalised right turn into Karewa Place that has a storage length of 100 metres.
b. Two signalised through lanes on Waipere Drive north east bound with a separate left turn slip lane with a storage length of 50 metres; and

a-c. An unsignalised left turn only on Karewa Place.

Commented [MN6]: Proposed insertions and amendments as per Appendix A of Mr Briggs evidence.
48. Prior to the operation of the supermarket a single-circulating lane roundabout shall be established at the Karewa Place/Eagle Way/Maui Street intersection. The roundabout shall include two approach lanes on Eagle Way and be designed in accordance with the Austroads Guide to design Part 4R Roundabouts.

49. Prior to the operation of the supermarket a reduction in the posted speed limit on Wairere Drive between the Pukete Road and Te Rapa Road intersections shall be established.

Commented [M7]: Proposed insertions and amendments as per Appendix A of Mr Briggs evidence.

Commented [M8]: Proposed insertions and amendments as per Appendix A of Mr Briggs evidence.
50. Prior to the operation of the supermarket a raised safety platform is provided on the eastbound movement of Waierere Drive at the partial signalisation of the Karewa Place/Waierere Drive intersection.

51. Prior to the operation of the supermarket a pedestrian crossing facility shall be provided on Karewa Place.

52. Fuel tanker deliveries shall be limited to outside shop opening hours and occur via remote fuel filling in the delivery area.

53. Internal signs and markings shall clearly identify one-way movement through the fuel facility.

54. Prior to the operation of the supermarket parking restrictions shall be implemented on Karewa Place.

Road Safety Audit

55. Prior to engineering design acceptance, a detailed design road safety audit of all proposed works within the road corridor in accordance with Sections 3.2.5 of the Regional Infrastructure Technical Specifications shall be undertaken at no cost to Council. The road safety auditors shall be commissioned from another organisation independent of the Consent Holder, designer and contractor. Audit recommendations and design changes arising from the detailed design road safety audit shall be certified by the General Manager, Development (or nominee) prior to changes (if any) being implemented.

56. At completion of work a post-construction road safety audit of all works completed as part of this consent in accordance with Sections 3.2.5 of the Regional Infrastructure Technical Specifications shall be undertaken at no cost to Council. Road safety auditors shall be commissioned from another organisation independent of the Consent Holder, designer and contractor. Audit recommendations and design changes arising from the detailed design road safety audit shall be certified by the General Manager, Development (or nominee) prior to changes (if any) being implemented.

Parking

57. Provision shall be made on site for a minimum of 270 spaces for parking including 7 accessible parking spaces and 5 less mobile spaces.

58. Provisions shall be made on site for a minimum of 28 cycle spaces for staff and customers.

59. Provision shall be made on site for a minimum of 2 showers and 2 changing rooms to cater for end-of-journey cycle facilities for staff.

60. Provisions shall be made on site for a minimum of 8 motorcycle parking spaces.

61. A loading bay shall be provided in accordance with the minimum size requirement detailed in Section 4.10, AS/NZS 2890.1:2004.

62. Vehicle parking spaces shall be delineated with white painted lines with the exception of the accessible needs and loading spaces, which shall be delineated with yellow painted lines and have appropriate signage in accordance with NZS 4121:2001 requirements.
63. Where any sealed car park or landscaped area adjoins a road, kerbing or similar barrier not less than 125mm in height shall be provided.

Three Waters
64. Service connections shall be rationalised on site. Any private pipes and connections not required by the proposed development shall be appropriately disconnected to the satisfaction of the General Manager, Development or nominee. Removal of existing connections shall be done by Council at the consent holder’s expense.

65. All building over or adjacent to the public stormwater mains running through the site shall be designed and constructed in accordance with the requirements of Section 4.2.9 of the Regional Infrastructure Technical Specifications, Building Over or Adjacent to Pipelines.

Water
66. The site shall be provided with a metered water connection.

Wastewater
67. The site shall be provided with a wastewater connection.

Stormwater
68. The stormwater management measures required for the site outlined in the approved sub-catchment ICMP by Wainui Environmental dated August 2018 Version 3 for 980 – 1024 Te Rapa Road shall be in place and fully operational prior to the operation of the supermarket.

69. A copy of the operation and maintenance procedures for onsite stormwater management measures shall be submitted at engineering design stage.

Review Condition
70. The Hamilton City Council may give notice pursuant to Section 128(1) of the Resource Management Act 1991 of the intention to review the conditions of this resource consent at any time for the following purposes:
   a. To review the effectiveness of this resource consent in avoiding, remedying or mitigating any adverse effects on the environment. The review shall consider the performance of the site and all associated movements and accesses on the wider network.
   b. If necessary to avoid, remedy or mitigate such effects by way of further amended conditions.
   c. To address any other adverse effect on the environment which has arisen as a result of the exercise of this consent; and, if necessary and appropriate, to require the Holder of this resource consent to adopt the best practicable option to remove or reduce adverse effects on the surrounding environment due to the activity.
ATTACHMENT 2

DISCOUNT BRANDS CASE

1. In Northcote Mainstreet Incorporated v Discount Brands Limited (High Court, CIV-2003-404-5292, Auckland Registry, 5 February 2004; (2004) 10 ELRNZ 146, Randerson J) the Court traversed the principles as they relate to the consideration of trade and consequential effects under the RMA. The test, as described by the High Court on that occasion was as follows:

“The RMA’s concern with the broader effects of proposals on the community is consistent with the widely stated purpose of the RMA in s5 with its reference to enabling “…people and communities to provide for their social, economic, and cultural wellbeing…”. But, the Environment Court has made it clear that adverse social or economic effects must be significant before they could properly be regarded as going beyond the effects ordinarily associated with trade competition on trade competitors: see the discussion in Imrie Family Trust v Whangarei District Council (1994) NZRMA 453 at 462-463 (para 57) …

The key point of distinction between the adverse effects of trade competition on trade competitors and adverse effects which may properly be considered under the RMA, is that trade competition effects focus specifically on the impacts on individual trade competitors. In contrast, where a proposal is likely to have more general effects on the wider community, then the RMA permits consideration of those effects. (para 60) …

In regard to shopping centres, I would not, with respect, subscribe to the view that the adverse effects of some other competing retail development must be such as to be ruinous before they could be considered. But they must, at the least, seriously threaten the viability of the centre as a whole with on-going consequential effects for the community served by that centre.

(para 62) (emphasis added)

2. Randerson J’s decision was then appealed to the Court of Appeal. In Discount Brands Limited v Northcote Mainstreet Incorporated [2005] NZRMA 57; 10 ELRNZ 204, the Court of Appeal described the test as follows:

“As a general proposition, the adverse trade effects of a proposed retail development must be such as to seriously threaten the viability of existing retail centres, with ongoing consequential effects for the community served by those centres, before they can properly ground an objection to the grant of a resource consent. The consequential effects might take the form of an effect on public amenities or roading. Those might, for instance, be rendered redundant, or diminished in their community benefit, because the viability of an existing retail centre might be undermined.”

(para 10)
3. The Court of Appeal's decision as it related to the adequacy of information provided with the application was then overturned in the Supreme Court in the Discount Brands Decision. In relation to the appropriate test to be adopted with regard to the potential adverse effects of the proposal, Blanchard J stated:

"An important matter which the Council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres – on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the road system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.

(para 119)

The Court of Appeal considered that only 'major' effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s94(2)(a). But in equating major effects with those which were 'ruinous' the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be 'significant' before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected."

(para 120) (emphasis added)