

Before the Commissioner
Appointed by the Selwyn District Council

Under	the Resource Management Act 1991
In the matter of	resource consent applications for Foodstuffs (South Island) Properties Limited to establish and operate a PAK'nSAVE supermarket and associated access, loading, car parking, signage, earthworks and landscaping at 157 Levi Road, Rolleston (RC216016)

Legal submissions in reply on behalf of Foodstuffs (South Island) Properties Limited

19 August 2022

Applicant's solicitors:
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**anderson
lloyd.**

May it please the Commissioner

- 1 The proposed PAK'nSAVE (the **Proposal**) is the result of collaborative design and an iterative process which carefully considered public submissions, the existing and future environment, and feedback from the Selwyn District Council (the **Council, SDC**) and its expert representatives.
- 2 It is submitted that the Proposal will provide substantial economic benefits to the community, but is also compatible with, and has acceptable effects on, the surrounding residential environment. As Ms Parish reiterated (orally) – Foodstuffs' neighbours are its customers. Additional refinements to design have been cognisant of residential character. Architect Mr Mitchell spoke at the hearing of unique residential design features for the Proposal (including more structure and detail designed to break down perceived mass, and use of recessive colour and treatments of material).
- 3 It is significant that all technical experts to the proceeding are agreed that any adverse effects are acceptable and appropriately managed through conditions of consent. Additional conditions of consent have been offered in response to residual matters raised by the experts representing Council. The level of agreement on conditions of consent¹ is reflective of the responsiveness of the Applicant to change, where operational efficiency is not compromised.
- 4 Resource consent is required for a discretionary activity under the Selwyn District Plan (**SDP**), and Ms Anderson and Mr Allan both consider that the SDP provides an avenue for non-residential activity; but that a detailed assessment of the appropriateness and compatibility of the Proposal and its effects within the site-specific environment is required. There remains disagreement between planners about how the Proposal should be considered against some provisions in the SDP, the proposed Selwyn District Plan (the **PSDP**) and the Canterbury Regional Policy Statement (the **CRPS**). However, the level of disagreement between the Council Officer and Mr Allan has reduced during the hearing. It is significant that Ms Anderson and Mr Allan consider the Proposal will contribute to a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and is consistent with the National Policy Statement for Urban Development 2020 (the **NPS-UD**). The NPS-UD, in my submission, is a document presumed to give effect to Part 2 and which should be given more weight as a recent policy expression².

¹ Refer to Appendix 2.

² Refer to opening legal submissions at paragraphs 32 and 33.

- 5 You have before you a well-considered and comprehensively assessed project which prioritises compatibility with the existing and future planned environment, has appropriate residential amenity effects, and is deserving of consent.
- 6 This right of reply addresses matters arising out of the hearing held on 2 – 4 August 2022.

Matters of reply

- 7 I address the following matters:
 - (a) Sufficiency of Written Approvals;
 - (b) Plan Change 71 – update;
 - (c) Planning assessments;
 - (d) Residual matters relating to urban design, landscape, transport, noise;
 - (e) Matters raised by submitters; and
 - (f) Changes to plans and conditions of consent.

Sufficiency of Affected Party Approvals

- 8 The Applicant has obtained Affected Party Approvals (**APA**) from the current landowner and occupier of 131 and 139 Levi Road and it is submitted that the Commissioner should have no regard to effects on this landowner and occupier³.
- 9 Ms Anderson questioned the sufficiency of the APA, essentially because the APA provided a link to the SDC website containing the Application documents instead of providing the documents themselves. At the hearing Ms Anderson said that in the past SDC had problems with links to websites being provided and people not having access to internet to view the documents. Ms Anderson acknowledged that in the circumstances, where the landowner and occupier are legally represented, the situation is different and she was prepared to accept the APA if the Commissioner took no issue with them.
- 10 Email confirmation was provided during the hearing by legal counsel representing the APA parties which confirmed that his clients reviewed the Application both in its original draft form and as it was publicly notified, and that there is a full understanding of the nature and form of the supermarket development and all relevant non-compliances with the District Plan. This is attached as **Appendix 1**.

³ Refer opening legal submissions at paragraphs 11-17.

- 11 It is submitted that the APA can and should be accepted. The securing of the APA ensures there are no immediately adjoining neighbours who have not provided written approval for the Proposal. However, as we discussed at the hearing the question of APA is largely moot as the Applicant's experts and evidence have addressed the impacts on the adjoining land both now (rural zoned) and in the future (residential zoned) through its Evidence in Chief (as the APA had not been provided at that time).

Plan Change 71 - update

- 12 At the hearing we discussed the uncertain status of Plan Change 71 (**PC71**), given that a Decision has not yet been made by Council; that the PSDP is in its infancy; and that no rules relating to PC71 currently have legal effect in the SDP or PSDP.
- 13 By way of update, the Applicant is aware that on 10 August 2022 the Council resolved to accept the Commissioners recommendation. The Decision will be publicly notified, and appeals will be able to be received. This is different to the position previously advised by the Council (set out at paragraph 19(b) of opening legal submissions) but does not change the tenor of the legal submissions presented in relation to PC71.
- 14 I acknowledged in opening that PC71 has gone through a robust RMA process, which has considered recent higher-level policy (i.e. NPS-UD) and that the Commissioner had decided to approve the Application. In my submission the Applicant and its team of experts has consistently advanced the Application on the basis that the land adjoining the eastern boundary could be residential, mitigation on the Site has been agreed with proponents of PC71 and APA has been obtained from the current landowner and occupier, and future developers.

Planning assessment

- 15 The high level of agreement achieved⁴ by technical experts has influenced a change in position from the Reporting Officer, in that she:
- (a) did not previously consider the future built environment provided by the NPS-UD, the Resource Management (Enabling Housing Supply and other matters) Amendment Act 2021 (the **EHS Act**) and associated Medium Density Residential Standards (which take legal effect tomorrow), but now considers that the alternative residential development provided by the

⁴ Summary Statement (**SS**) J Anderson at [2.3].

Applicant provides a useful reference in considering the potential built environment that is anticipated by the relevant planning framework⁵;

- (b) on balance considered the effects of the Proposal were considered more than minor on residential amenity values⁶, but now considers that the scale exceeds what could be reasonably anticipated within a residential environment but given the extent of mitigation measures proposed that the majority of issues can be managed⁷;
- (c) considered the Proposal was contrary to the objectives and policies of the SDP due to it being incompatible with the character of the receiving environment⁸, but now considers that the development will be "not inconsistent" with the objectives and policies of the ODP⁹;
- (d) considered the Proposal was contrary to the objectives and policies of the PSDP¹⁰, but now considers that the development will be "not inconsistent" with the objectives and policies of the PSDP¹¹;
- (e) maintains the Proposal is only partially consistent with Chapter 5, and partially consistent with Chapter 6 of the RPS¹²;
- (f) now acknowledges the enabling nature of the NPS-UD¹³ and that the Proposal will be consistent with a well-functioning urban environment and will meet the general directive of the NPS-UD¹⁴; and
- (g) has changed her recommendation from a "decline" to a "neutral" position; but acknowledged in questioning from the Commissioner there is no barrier to the grant of consent.

16 It is of note that when coming to her recommendation of neutral, Ms Anderson appears to not have considered the evidence provided by the Applicant in respect

⁵ SS J Anderson at [3.3].

⁶ Officer's Report at [166] and [226].

⁷ SS J Anderson at [5.1].

⁸ Officer's Report at [187] and [226].

⁹ SS J Anderson at [5.2].

¹⁰ Officer's Report at [194].

¹¹ SS J Anderson at [5.2].

¹² Officer's Report at [207] and [211].

¹³ SS J Anderson at [5.2].

¹⁴ SS J Anderson at [4.20].

of positive effects – either in her Officer's Report¹⁵ or summary statement. As I stated in my opening submissions an assessment of positive effects is important to the overall conclusion on effects.

- 17 Also of note, all planners accepted when questioned by the Commissioner that the SDP is incomplete (i.e. it does not consider the NPS-UD) and the PSDP should have little weight due to its infancy. In my submission, it is therefore significant that the Reporting Officer concludes the Proposal is consistent with the NPS-UD which is a the highest and most recent policy document, and which is a recent expression of Part 2 RMA.

Urban design

- 18 Ms Wolfer raised some residual urban design concerns during the hearing. These are set out below, along with the Applicant's response:

- (a) *Mitigation of eastern boundary for future residential (PC71) is not fully achieved.*
 - (i) Ms Wolfer was concerned about an 85m length of wall and a shallow set back of 18.5m. It is noted that the balance of the NE built edge is setback a further 29m and only the 'bulk store' is 18.5m from the eastern boundary. The overall setback for the majority of the NE façade is 47m. Mr Burns doesn't include the canopy as part of the built façade as this does not present a dominant vertical face.
 - (ii) In terms of growth rate of landscape to screen/mitigate effects, it is submitted that 5yrs is not an unreasonable timeframe as suggested by Mr Milne, especially in the context of when PC71 housing might appear. The Applicant is comfortable with the condition suggested by Mr Ross that trees along the eastern boundary shall be planted prior to construction works commencing on the Site and this is included in Condition 7.
 - (iii) With respect to further architectural reduction of the rear NE façade. Mr Burns doesn't think this is necessary as it is a low point of the gable and will be screened by planting and fencing.
 - (iv) In any event, the eastern boundary neighbours have provided APA.
- (b) *Façade treatment of NW façade.* The following changes have been made in response to Ms Wolfer's concerns:

¹⁵ Limited to one paragraph at [165] and only in reference to the submitters comments made.

- (i) additional landscaping has been added in front of the Bulk Store – change reflected in McCoy Wixon Location Plan RC01, Site Plan RC02, Floor Plans RC03, North West Elevation RC05, North East Elevation RC06 and Recession Planes & Signage RC08, and Rough Milne Mitchell Landscape Plan RCL.1.0;
 - (ii) additional full height glazing has been added to the north west corner (internal stairwell) of the building – change reflected in McCoy Wixon Floor Plans RC03 and North West Elevation RC05; and
 - (iii) indicative applied artwork has been added to the Bulk Store façade – change reflected in McCoy Wixon North West Elevation RC05.
- 19 It is submitted that, with the additional changes proposed, all residual urban design concerns have been addressed.

Landscaping

- 20 To address Mr Ross' residual concerns, further additions have been made to the conditions. Of note:
- (a) submission of a detailed landscape plan and specification for certification by Council. The landscape plan is to be in accordance with the Landscape Plan presented at the hearing, achieve a specified density of planting along the eastern boundary, contain detailed planting schedules, details of pit design and irrigation, and include a management and maintenance plan (Condition 5);
 - (b) The eastern boundary planting should occur prior to construction works (Condition 7);
 - (c) all trees planted within the car parking area (excluding road frontage trees) shall be planted with a minimum uncompacted available soil volume based on the expected future size of the tree (as specified). Explanation of what uncompacted available soil volume means is included as an advice note. (Condition 10); and
 - (d) Replacement planting guidance is included (Condition 11).
- 21 It is submitted, with the additional changes proposed, all residual landscape concerns have been addressed.

Transport

- 22 A comprehensive assessment of transport matters has occurred, which included travel counts to ensure a high degree of confidence in the modelling exercise.

Conditions are agreed between the transport experts and these are included in the conditions of consent offered by the Applicant.

- 23 There is one area of disagreement. Mr Carr considers Access C should not be constructed. Mr Smith considers the effects from Access C to be acceptable, but should Mr Carr's concerns arise there are appropriate mitigation and design matters which could resolve it.
- 24 It is submitted:
- (a) there are safety audits required (Condition 33) at concept and detailed design stages which would independently address any such safety concerns as those raised by Mr Carr;
 - (b) Access C is required to be monitored (Condition 36(ii));
 - (c) there are a range of treatments and measures which could occur on site to improve the safety of Access C without affecting third parties should it be needed (signage, pavement marking and raised speed humps);
 - (d) there are also design options - the shared path could be diverted into the site at Access C in much the same manner as the treatment at Access D to further enhance pedestrian and cycle safety subject to an easement over this portion of the site; and
 - (e) Ultimately the requirement for Access C to be closed could be considered if all options above are not effective.
- 25 The measures above will be considered and the requirement for them satisfactorily addressed through the concept and detailed design safety audit processes.
- 26 The Commissioner must consider the conditions of consent offered when considering the acceptability of transport effects. It is submitted with the proposed suite of conditions, any potential effects resulting from Access C can and will be appropriately managed and Access C should be retained.
- 27 Other matters arising during the hearing which are now conditioned include:
- (a) At the request of Council, the Levi Road and Lincoln Rolleston Road Frontage Roundabout Scheme Concept Plan now records the following *"Where the proposed shared path along Levi Road and/or the Planned SDC upgrade of the Levi Road / Lincoln Rolleston Road / Lowes Road / Masefield Drive intersection require occupation of Foodstuffs' land, this shall be undertaken in consultation with the Council and formally secured by an appropriate legal mechanism to ensure the approved layout is implemented"*.

- (b) the Applicant will install signage at the internal entrance to the staff parking area near the service yard with 'No Public Access' or words to that effect to advise that the public should not seek to gain access to this area (Condition 32); and
- (c) the Applicant will not do anything that prohibits or discourages staff from parking onsite (Condition 29).

Noise

- 28 The noise experts considered the effects were acceptable and consistent with reasonable amenity. Mr Reeve accepted that noise on roads wasn't covered by the SDP, which he considered is typical. An additional condition has been added regarding the generator in accordance with the JWS Noise and the discussion around what emergency meant during the hearing (Condition 24).

Submitters

- 29 The Applicant provides the following clarification in response to submitters concerns not already addressed.

Alan and Kathleen Haycock

- 30 At the hearing the Haycocks expressed concerns that the solar panels on their house, located at 158 Levi Road, would be impacted by shading from the PAK'nSAVE. We refer to the shadow models attached to the evidence of Mr Mitchell, in particular:
 - (a) RC12, which shows that shading will impact a small portion of the Haycock's residence for a short time between the hours of 6am-6.45am during mid-summer; and
 - (b) RC14 which shows that shading will impact the Haycock's residence for a short time between the hours of 7.42am-8.05am during autumn. The alternative residential development would cause shading effects of longer duration.
- 31 The Haycocks were also concerned that if the Proposal was granted other retail will follow. This concern was raised by other submitters too. Foodstuffs can confirm that the Proposal is for a standalone supermarket and this is reflected in the proposed conditions. If further retail or a petrol station was to go onto the site resource consent would be needed for at least a discretionary activity and the application scrutinised, as this one has been.

- 32 In terms of concerns raised regarding gatherings on site, Ms Parish confirmed orally that this is a legitimate concern but that Foodstuffs would not allow it and use methods such as gating the carparking and having security on site.

Nicholas and Glenda Brown

- 33 Mr Brown expressed concern about the possibility of staff members parking on nearby roads which could cause issues for residents. The Applicant is to provide 14 staff car parks as well as permitting staff to park in the wider car park area. The Commissioner and Mr Carr both suggested this could be expressly recorded in a condition. Condition 29 which addresses this is now offered.
- 34 The Browns' acknowledged that supermarkets can go into residential areas but considered it should be in a location where the residents are new and know what they are signing up for. It is submitted that the uniqueness of the Site means that this is what is will occur for future residential activity on a number of interfaces such as the PC71 land, Harbour Partnership Ltd's (**HPL**) land and the future intended development of Ms Robb's property.

Ms Laird on behalf of Harbour Partnership Ltd (HPL)

- 35 The Applicant met with HPL prior to the hearing (and again during the hearing) to discuss its concerns about Access A, which is opposite HPL's land. HPL desire to develop its land in future.
- 36 A flush median is proposed as part of the Proposal and appears on the Lincoln Rolleston Road Frontage concept plan (recorded within Condition 1). Mr Smith considers this median will improve access for any future development on the HPL land by enabling for right turn movements using the flush median. He also considers the Proposal does not preclude future upgrades in the vicinity of the HPL land should they be required. No traffic evidence was presented by HPL, and as a future developer the submitter will have a number of options to design for access appropriately.

Shona Robb

- 37 Ms Robb is concerned the development of her property would be compromised by the Proposal. She accepted the changes made to the Proposal were a "huge improvement" and the change overall to Rolleston in her 22 years living there was significant, but she remained opposed to the Proposal for several reasons.
- 38 Ms Robb was concerned that Access A and the entrance sign was very close to her entrance. Foodstuffs can confirm the sign (also now reduced in height and proposed not to be lit at night) and Access A is approximately 38.5m south of her driveway at 353 Lincoln Rolleston as opposed to being directly opposite.

- 39 In response to discussions with Ms Robb during the hearing, Foodstuffs offer to retain the existing hedges along the road frontages as long as practicable during construction (to assist mitigation of construction effects such as dust and visual). This is reflected in Condition 4.

Changes to plans

- 40 Further to Appendix 1 of Mr Allan's evidence (Post Notification amendments), the following additional changes have been made which is reflected in the Resource Consent plans in **Appendix 4**:

- (a) the alignment of the shared path along Levi Road has been amended to accommodate the planned SDC upgrade of the intersection – change reflected in McCoy Wixon Location Plan RC01 and Site Plan RC02, and Rough Milne Mitchell Landscape Plan RCL.1.0 including consequential changes to landscaping at the northwest corner of the Site;
- (b) 'Access A-E' notations have been added to McCoy Wixon Site Plan RC02 and Rough Milne Mitchell Landscape Plan RCL.1.0;
- (c) additional landscaping has been added in front of the Bulk Store – change reflected in McCoy Wixon Location Plan RC01, Site Plan RC02, Floor Plans RC03, North West Elevation RC05, North East Elevation RC06 and Recession Planes & Signage RC08, and Rough Milne Mitchell Landscape Plan RCL.1.0;
- (d) additional full height glazing has been added to the north west corner (internal stairwell) of the building – change reflected in McCoy Wixon Floor Plans RC03 and North West Elevation RC05;
- (e) indicative applied artwork has been added to the Bulk Store façade – change reflected in McCoy Wixon North West Elevation RC05; and
- (f) McCoy Wixon Site Plan RC02 legend has been amended to remove the North West and South East face corporate colour area notations.

Conditions of consent

- 41 It is submitted, the conditions offered by the Applicant are fit for purpose.
- 42 The Applicant has accepted most of the feedback provided by the Reporting Officer. A tracked copy of conditions of consent with Council feedback is at **Appendix 2**.

- 43 The Council's suggestions for Conditions 3 and 53 have not been accepted in the Applicant's offered version of conditions (**Appendix 3**) for the reasons provided in the tracked change version of conditions (**Appendix 2**).
- 44 The conditions and Council feedback (**Appendix 2**) were provided by Mr Allan to Ms Laird (representing HPL) for comment and she replied by email with "*we have no comments on these changes – although I do appreciate the update*".

Conclusion

- 45 PAK'nSAVE supermarket sites must meet specific requirements to be viable. The location, between two arterial roads, and the ability to position the supermarket on the Site reducing amenity effects through landscaping and generous setbacks, make this site unique. The iterative design process, with input from submitters and SDC, has resulted in a PAK'nSAVE supermarket designed specifically to fit the residential environment surrounding the Site. It is submitted that due to the location and layout of the site, the activities are able to exist or occur together without problems or conflict (i.e. compatibility as defined¹⁶).
- 46 The district is growing and the demand is there in Rolleston for a PAK'nSAVE. You have heard that in 12 years of searching Foodstuffs have not been able to locate an alternative location. Supermarkets can and do successfully co-exist in a residential setting. The Proposal will provide a more affordable grocery offering for people in the Rolleston community and 22 submitters support the Proposal.
- 47 If consent is granted, the Commissioner can be confident that the Proposal will assist to provide for a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.

Attachments

- 48 The following documents are **attached**:
- (a) Confirmation of APA by legal counsel – **Appendix 1**;
 - (b) a tracked copy of conditions of consent with Council feedback – **Appendix 2**;
 - (c) a clean copy of the Applicant's preferred conditions – **Appendix 3**.

¹⁶ SS J Anderson at [3.4].


- (d) a full set of Resource Consent plans as referenced in Condition 1 – **Appendix 4**;
- (e) For completeness, although not included in Condition 1, perspective views incorporating additions to design made since the hearing – **Appendix 5**.



Dated this 19th day of August 2022

A handwritten signature in black ink that reads "A Booker". The signature is written in a cursive, flowing style.

Alex Booker
Counsel for the Applicant


Appendix 1



Gerard Cleary <gerard.cleary@ah.co.nz> |  jane.anderson@selwyn.govt.nz  Alex Booker ▾

03/08/2022

FW: PAK'nSAVE Rolleston (RC 216016) – Foodstuffs' evidence

 You replied to this message on 03/08/2022 10:10 AM.

Good Morning Jane

I act for the following parties who provided written approval to the Pak N' Save application:


- Mark Purdon
- Natalie Rasmussen
- Gould Developments Ltd
- Four Stars Development Limited


The written approvals provided form part of an agreement between the abovementioned parties and Foodstuffs. The process leading up to the development and execution of this agreement was comprehensive in nature, and involved a detailed review of the Pak N Save application both in its original draft form and, more recently, the version that was publicly notified. This review was carried out not only by myself, but also by our clients and, as such, there was a full understanding of the nature and form of the supermarket development and all relevant non-compliances with the District Plan. Development of the agreement also included a number of meetings and extensive correspondence between the parties regarding the amendments to the application which Foodstuffs now propose to address effects on the PC71 land, noting our understanding that these effects would essentially be confined to a limited portion of the property at 139 Levi Rd currently owned by Mr Purdon & Ms Rasmussen.

I trust the above assists.

Kind regards

Gerard Cleary
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Proud to support the payment of the Living Wage through our supply chain

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