

Before the Commissioner  
Appointed by the Selwyn District Council

Under the Resource Management Act 1991

In the matter of resource consent application 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)

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

2 August 2022

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Kia ora koutou

Naia te mihi kite mana whenua

Naia hoki te mihi

Ki a koutou Katoa

## Introduction

- 1 Foodstuffs (South Island) Properties Limited (**Foodstuffs**), a New Zealand owned and longstanding supermarket operator in the Selwyn District, seeks resource consent to establish and operate a PAK'nSAVE supermarket and associated access, loading, car parking, signage, earthworks, Click & Collect and landscaping (the **Proposal**) at 157 Levi Road, Rolleston (the **Application Site**, the **Site**).
- 2 The Proposal represents an exciting opportunity to: meet growing demand for supermarkets; provide substantial economic benefit to Rolleston and the Selwyn District; create employment; and provide consumer benefits such as additional product choice and reduced travel.
- 3 Foodstuffs' case is that the Site is an appropriate location for the Proposal. It will bring change, but it sits within an area of future urban growth and can achieve an appropriate residential amenity. The Proposal is strategically located within a large corner site on two arterial roads which provide access to Rolleston Town Centre. The Site size enables necessary operational and functional requirements to be met and provision for high-quality architectural design and landscaping to absorb the scale of the activity.
- 4 The Proposal has been comprehensively assessed by experienced and reputable technical experts, additional evidence provided at the request of the Council, peer reviews completed and submissions made genuinely considered. The Proposal is considered a better economic outcome for the Site compared with residential activity<sup>1</sup>, achieves a compact, consolidated urban form<sup>2</sup>, and will avoid material economic effects on the health and vitality of the Rolleston Town Centre<sup>3</sup>. Commercial frontages have been located away from streets in preference for attractive and large landscaped edges and setbacks more appropriate to the

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<sup>1</sup> SoE Mr Colegrave at [41].

<sup>2</sup> SoE Mr Burns at [9, 10, 18]; Ms Wolfer, Appendix 4, s42A Report.

<sup>3</sup> SoE Mr Colegrave at [55].

amenity values of surrounding housing (both existing and future zone-enabled)<sup>4</sup>. Façade materials and colours are reflective of the environment.

- 5 The design and layout of movement across the Site and within its context provides a safe and accessible environment. The traffic generated by the Proposal is within the capacity of the local transport network with the arterial routes intended to cater for the level of traffic generated<sup>5</sup>. The Site is accessible by all modes of transport. There is a high level of local connectivity – with seven pedestrian street connections proposed and 3 multi-modal connections<sup>6</sup>. Daytime transportation and servicing noise levels will comply with permitted standards<sup>7</sup> and the limited night-time deliveries will not cause additional sleep disturbance. Noise effects are considered acceptable<sup>8</sup>.
- 6 Where better outcomes for the environment can be achieved without compromising necessary functional and operational requirements, refinements and mitigation has been offered by the Applicant. Amendments have had a positive impact on the overall design and outcome of the Application. The level of agreement on substantive matters between experts (with the exception of planning experts) is significant. There are no immediately adjoining neighbours that have not provided written approval for the Proposal. An agreement has been reached with the landowner, occupier and plan change proponents for the future planned greenfield residential development along the eastern boundary to ensure future success and compatibility between activities.
- 7 It is submitted that, subject to the conditions proffered (and as amended through recent expert discussions), the Proposal:
  - (a) overall will have significant positive effects, and no more than minor and acceptable adverse effects including on residential character and amenity values<sup>9</sup>;
  - (b) has been designed to align with (and is not inconsistent with) the most relevant objectives and policies of the operative Selwyn District Plan (**SDP**). There are no directive policies which count against the Application and that the SDP provides for non-residential activities in the Living Zones where the

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<sup>4</sup> SoE Mr Burns at [25].

<sup>5</sup> SoE Mr Smith at [19].

<sup>6</sup> Summary Statement at [19].

<sup>7</sup> JWS Noise at [8(f)] and [8(h)].

<sup>8</sup> JWS Noise at [9].

<sup>9</sup> SoE M Allan at [113].

effects on the amenity and character of the receiving environment can be adequately managed is noteworthy;

- (c) is consistent with the Canterbury Regional Policy Statement (**CRPS**)<sup>10</sup>;
- (d) is consistent with the National Policy Statement on Urban Development 2020 (**NPS-UD**), a recent higher order planning document assumed to give effect to Part 2 of the Resource Management Act 1991 (the **RMA**) which specifically seeks to enable suitable sites for business activities to be realised and supported.

8 Overall it is submitted the sustainable management purpose of the RMA will be met, and the Proposal is deserving of consent.

### **Key issues**

9 My submissions address:

- (a) Preliminary issues:
  - (i) Affected Party Approvals;
  - (ii) Plan Change 71;
  - (iii) Scope of Application.
- (b) Legal tests:
  - (i) Section 104 and 104B RMA;
  - (ii) Existing environment;
  - (iii) Permitted baseline;
  - (iv) Alternative residential development scenario.
- (c) Actual and potential effects;
- (d) Planning provisions (including weight to be provided to the pSDP, CRPS, NPS-UD.);
- (e) Matters raised in submissions (amenity, property values, mental health);

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<sup>10</sup> Environment Canterbury has not made a submission on the Application considering its recent active involvement in applications and the plan process in the Selwyn District.

- (f) Conditions of consent.

### **Preliminary matters**

- 10 The Commissioner requested in Minute 2 (dated 29 July 2022) that I address the affected party approvals provided (**APA**) and the sufficiency of the APAs.

#### *Affected Party Approvals*

- 11 As you are aware, section 104(3)(a)(i) RMA requires that a consent authority must not, when considering an application, have regard to any effect on a person who has given written approval.
- 12 The following persons have recently provided APAs to the Application:
- (a) The current landowners and current occupiers of 131, 139 Levi Road (Lot 2 DP 322710 and Lot 2 DP 416195) (Mark Purdon, Natalie Clair Rasmussen). This land immediately adjoins the eastern boundary of the Proposal Site. The APA has been signed by both owners and dated 20 July 2022. A site plan of the supermarket has been attached and signed by both owners. A description of the activity is provided, and a reference is made to the notified resource consent application assessment of environmental effects on Selwyn District Council website – and a link to the website which contains all documentation is included.
  - (b) Four Stars Development Limited (one of the two proponents to PC71). Mr Purdon and Ms Rasmussen own 25% of the shares of Four Stars Development Limited (through a company of which they are the only directors and shareholders called Levi Holdings 2019 Limited) and Gould Developments Limited owns 75% of the shareholding. The APA is filled out in the same manner as above and signed by two directors. The obtaining of an APA from this person was a precaution if 131, 139 Levi Road (Lot 2 DP 322710 AND Lot 2 Deposited Plan 416195) changed hands during the course of this Application process.
  - (c) Gould Developments Limited (the second of the two proponents to PC71) a shareholder of Four Stars Development Limited and the current landowner of 232 Lincoln Rolleston Road (Lot 3 DP67190) and 5 Nobeline Drive, Rolleston (Lot 7 DP 483709). The APA is filled out in the same manner as above and signed by a director. The obtaining of an APA from this party was also a precaution if 131, 139 Levi Road (Lot 2 DP 322710 AND Lot 2 Deposited Plan 416195) changed hands during the course of this Application process. Additional properties owned by this developer (some distance from the Proposal) were included in the APA but are some distance from the Proposal and not affected by the Proposal.

- (d) Foodstuffs owns the 7.2ha Application Site, and the Application Site is included in PC71 area. Effects on Foodstuffs are not off-site effects and are to be disregarded.
  - (e) It is noted for completeness that beyond the shared eastern boundary of the Site, land is subject to PC71 and owned by J & T Whittaker (15 and 25 Nobeline Drive), N & S Chapman (294 Lincoln Rolleston Road), and 2 Degrees Real Estate Ltd (271 Lincoln Rolleston Road). No submissions were made by these parties within the PC71 area to the Application, but effects (if any) must not be disregarded on these properties as they have not provided APAs.
- 13 Before I address the sufficiency of the APAs, and by way of background, Ms Parish and I first met with representatives of the proponents of Plan Change 71 (**PC71**) and their legal counsel Mr Cleary, and discussed the interface between the two proposals for greenfield residential development on PC71 land and the proposed supermarket before Christmas last year. We discussed appropriate interfaces between the activities if the land directly adjacent to the Application Site remains rural zoned, and if it is rezoned residential and developed. As a result of these discussions the Application includes Option A (rural) & Option B (residential) plans for the eastern boundary of the Application Site. These options included input from a number of consultants including noise and landscaping. Night time noise conditions applying to the eastern boundary and conditions relating to limiting heavy vehicle movements on the Application Site are also proffered by the Applicant as a result of these discussions.
- 14 In terms of the sufficiency of the APAs, the Reporting Officer has raised concerns that:
- (a) The Council form requires: "3. The Proposal (*Description of the proposed development or activity, including the ways its does not comply with the District Plan*)". The ways in which the activity does not comply with the District Plan are included in the Assessment of Environmental Effects as required by Schedule 4 RMA. The APA provides a description of the Proposal and then the words "*as per the notified resource consent application and Assessment of Environmental Effects on Selwyn District Council website [with a link directly to the Application]*". The Reporting Officer does not consider the link to the website where all the documents notified are listed, dated and accessible is sufficient.
  - (b) The Council form requires: "4. Written Approval. This is the written approval to the activity described above that is the subject of the resource consent application. I have read the full application for resource consent, the Assessment of Environmental Effects and any site plans as follows (*List*

*document names and dates)*". The APA provides reference to a website where the documents are listed and contain dates within those documents: *"As per the notified resource consent application and Assessment of Environmental Effects on Selwyn District Council website [with a link directly to the Application]"*. The Officer again does not consider a website is sufficient.

15 In my submission, given the context of this Application, the Applicant can rely on the APAs provided in the form provided and the effects on the current land owners and occupiers on the eastern boundary with the Application Site must not be regarded:

- (a) The form is filled out in a manner which responds to matters raised in the form. It is clear from the form that the person signing it is aware that the Application is publicly notified and all the documents are contained on the publicly accessible Selwyn District Council website (and documents on this page are listed, contain dates and contain non-compliances with the District Plan). The Application contains a page of information for the person signing a written approval form.
- (b) The context of the Form 8A (prescribed in the Resource Management (Form, Fees and Procedure) Regulations 2003 is in relation to section 95(E)(i.e. a notification decision) is that it is designed to be filled out prior to a notification decision is made on an Application. In these circumstances, it is often not clear what information has been provided to an affected person and at what time of the process it has been provided (hence the requests for dates and what documents viewed). This is a stark contrast from a publicly notified application where submissions are sought on the basis of the documents as notified, and these documents are contained on a publicly accessible website.
- (c) The Resource Management (Form, Fees and Procedure) Regulations 2003 Form 8A prescribes the form which affected person written approval must be given. It requires a description of the Proposal but does not require a person to list the ways in which a Proposal does not comply with the District Plan.
- (d) Ultimately, the purpose of this form filling out exercise is to ensure the person providing APA is informed as to the effects on them and the impact of the APA (i.e. the Council must not have regard to any adverse effects on them). The persons who provided written approvals are legally advised by a specialised RMA lawyer, competent in RMA processes (having promulgated a plan change to rezone their land). The Applicant and representatives for the proponents have been involved in productive

discussions over the set of plans included in the Application, which have resulted in the plans for the eastern boundary interface and noise treatments to ensure both compatibility between activities. These plans were notified with the Application.

- (e) There is limited case law on the provision of an APA, but cases that are available do not take such a strict approach to the wording or structure of an APA: a registered covenant was considered sufficient written approval<sup>11</sup>; as has an agreement to not oppose a development<sup>12</sup>.

16 That said, these matters are administrative and easily remedied and if the Commissioner considers the APAs are not sufficient, I can speak with Mr Cleary and have him arrange for the APAs to be provided again.

17 I note for completeness, that the future developers of a large portion of the PC71 area have provided APA, and that no other occupier or landowner within the entire PC71 area has made a submission is significant, and in my view further demonstrates the future compatibility between the two activities as confirmed through expert evidence.

#### *Plan Change 71*

18 The Commissioner is well aware of the proposal to rezone the Plan Change 71 area, having heard and made recommendations on that application. An Interim Recommendation has issued, which is final in respect of the overall finding that the land to the north and the south of the 50 Ldn noise contour should be rezoned Living Z. For clarity, when reference is made to PC71, we have excluded the Application Site.

19 With regard to plan changes such as PC71, the Selwyn District Council's position<sup>13</sup> is that:

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<sup>11</sup> *Coneburn Planning Ltd v Queenstown Lakes DC* [2014] NZEnvC 267,. The covenant had been registered before the plans were even released so the affected parties would not even have viewed these. The Court held that the persons who entered into the covenant must have consciously turned their minds to all the possible planning applications that could be made by the developer or its successor thus satisfying the requirement that there was a written approval from those persons.

<sup>12</sup> *Waiheke Island Airpark Resort Ltd v Auckland CC* EnvC A088/09.

<sup>13</sup> By email dated sent to practitioners (including me) from Ben Rhodes (copying in Robert Love) regarding the Council Intensification Variation and Private Plan Change Requests dated 7 March 2022, with a follow up email 29 April 2022 (with reference to legal advice).



### *Operative SDP*

- (a) A private plan change that is not operative is not a 'plan' or 'proposed plan' as defined under the RMA<sup>14</sup> listed in section 104(1)(b) RMA to "have regard to";
- (b) SDC will not be making decisions on private plan changes recommended for approval by Commissioner (and therefore there will be no notification of decision, allowance of appeals or ultimately making the private plan change operative under the SDP);
- (c) At the time of any subdivision consent the land zoning will remain rural and consideration of the rural objectives and policies will apply under the SDP.

### *Proposed SDP*

- (d) The Council intends to include any Commissioner-approved private plan changes in the imminent Variation to the pSDP, and the onus is on the applicant for subdivision consent to provide evidence as to the weight to be provided to those proposed provisions.
- (e) The Council has advised "Any application will need to address how the RMA EHS Act is enabled ahead of the Variation being complete" and that the key risk to applicants in terms of the weighting exercise will be if there are any submissions on the Variation that either oppose the zoning areas or seek substantial changes to the provisions. The key date to understand any challenges to the proposed provisions and development areas will be the closing of submissions. The Council has advised this would be expected to be late September/early October.

### 20 Applying the Council's position to PC71:

- (a) PC71 does not form part of the SDP as a decision by Council has not been made.
- (b) PC71 is not at the point of time in the proposed Selwyn District Plan process where any significant weight to the objectives and policies applying to PC71 or the associated ODP can be applied. There will be a period of uncertainty from the date of notification (i.e. by 20 August 2022 until the close of submissions indicated as September/October) where it is not clear whether there will be a challenge to PC71;

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<sup>14</sup> Sections 43AA and 43AAC(1)(b)(i) RMA.

- (c) No rules relating to PC71 currently have legal effect in the SDP or pSDP. The permitted activity rules required to be included for MDRS will not have immediate legal effect on the greenfield or proposed MDRS areas of PC71.

- 21 It is acknowledged that PC71 as a private plan change to SDP has gone through a robust RMA process, which has considered recent higher level policy (i.e. NPS-UD) and that the Commissioner has decided to approve the Application. Foodstuffs and its team of experts have consistently advanced this Application on the basis that the land along the eastern boundary of the Proposal could be residential. Mitigation on the Application Site has been agreed with the proponents of PC71 and Foodstuffs has obtained APA from the current landowner and occupier (a shareholder of the company proposing to develop the land)

#### *Amendments to the Application*

- 22 The Proposal has undergone design changes and refinement when responding to Council feedback before notification, expert conferencing, and most recently to address concerns raised in submissions and the Officer's Report. Mr Allan details these amendments in his evidence (**Appendix 1**) and these will also be spoken to by the experts today.
- 23 Changes to the Proposal include reductions in size of signage affixed to the supermarket facade; reduced use of corporate colours; additional glazing; increased landscaping; inclusion of fast growing tree species along eastern boundary; formal specimen tree planting along Lincoln Rolleston Road replacing informal planting; reduction in height of pylon signage and freestanding signage; additional accessible car parking and cycle parks; carpark lighting plan.
- 24 As you will be aware, amendments to design and other details of an application may be made up until the close of a hearing, provided they are within the scope defined by the original application.<sup>15</sup>
- 25 In *Atkins v Napier City Council*<sup>16</sup> the High Court described the test for scope as follows:

[20] ... the test, as developed by the Environment Court and Court of Appeal through a series of cases, is whether the activity for which resource consent is sought, is ultimately proposed to the consent authority, is significantly different in its scope or ambit from that

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<sup>15</sup> *Darroch v Whangarei District Council* A18/93, at page 27, as confirmed more recently in *Simons Hill Station Ltd v Canterbury Regional Council* [2013] NZRMA 215, at [20].

<sup>16</sup> *Atkins v Napier City Council* [2009] NZRMA 429.

originally applied for and notified (if notification is required) in terms of:

- The scale and intensity of the proposed activity, or
- The altered character or effects/impacts of the proposal.

[21] Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test, but it is not the test itself.

- 26 The amendments to the Proposal further mitigate any potential adverse effects and respond to issues raised by submitters and/or Council officers. The amendments do not alter the scale or intensity of the proposed activity or the character or effects of the Proposal to the extent it is significantly different from that originally applied for and notified. There are no new non-compliances. On that basis it is submitted the amendments are within the scope defined by the original application.

### **Legal tests**

#### *Sections 104 and 104B RMA*

- 27 It is agreed by all three planners that the Application is to be assessed overall as a discretionary activity. The statutory framework will be well known to the Commissioner, and is set out in a summary form below.
- 28 The Commissioner must consider the application and submissions, subject to Part 2, having regard to section 104(1):
- (a) the actual and potential effects of the activity on the environment;
  - (b) any relevant provisions of a policy statement, plan or proposed plan; and
  - (c) any other relevant consideration.
- 29 Your evaluation requires giving "genuine thought and attention" to the various matters set out in section 104(1) RMA.<sup>17</sup> To "have regard to" does not require you to "give effect to". Parliament has left it to the decision maker to decide what weight should be given to each matter.
- 30 It is for the Commissioner to:
- (a) Assess the relevant potential effects of the Application. Your duty under section 104 is to consider all relevant effects, both positive and negative,

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<sup>17</sup> *Foodstuffs South Island Limited v Christchurch City Council* (1999) 5 ELRNZ 308 (HC), at p 309.

otherwise the assessment may be incomplete and the balancing of conflicting considerations may be distorted.<sup>18</sup> An assessment must be completed against the existing environment. How much weight is given to findings on effects depends on the credibility, reliability and persuasiveness of evidence. The Application is not required to have less than minor or minor effects<sup>19</sup>.

- (b) Have regard to relevant statutory instruments and place different weight on their objectives and policies. The correct weight to be given to plan provisions flows from the provisions themselves, both their terms and their context. Generally, an assessment of relevant objectives and policies requires "a fair appraisal of the objectives and policies read as a whole".<sup>20</sup> However, following the judgment of the Supreme Court in *King Salmon*, it is now recognised that more specific or directive provisions, particular those which set "environmental bottom lines" may warrant greater weight.<sup>21</sup>
- (c) there may be resort directly to objectives and policies of recent instruments higher in the policy hierarchy and they may be given more weight, but relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled.<sup>22</sup>
- (d) As there is a pSDP (which has not yet considered the NPS-UD), you will need to decide how much weight is to be given to that document. It is my submission, limited weight (if any) should be given to this document as notified due to its early stage in the process. However, in my submission weight can and should be given to those aspects of the imminent Variation to the pSDP which enable MDRS on existing residential land (i.e. the Application Site). The Variation is required and will give effect to the rules and objectives and policies expressed in the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**RMA EHS Act**). The rules are intended to have immediate legal effect by 20

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<sup>18</sup> *AFFCO v Far North District Council* A 6/94 at 233 (adopting what was said in *Te Aroha Air Quality Protection Group v Waikato Regional Council (No 2)* A 70/93.

<sup>19</sup> The Officer's Report appears to apply the gateway tests for a non-complying activity to the Application.

<sup>20</sup> *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209 at [25]; Referred to with approval in *Davidson R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

<sup>21</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] NZLR 593 [King Salmon]; *Southland Fish and Game New Zealand v South Regional Council & ors* [2016] NZEnvC 220 at [23].

<sup>22</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 at [30] (in rejecting a suggestion that "environmental bottom lines" stood in the way of a proposal).

August 2022. There are objectives and policies referenced in the RMA EHS Act which are directed to be included in plans.

- (e) Have regard to effects in the context of properly weighted objectives and policies under section 104(1) and arrive at a judgement whether the proposal promotes the sustainable management of natural and physical resources; and , and whether consent should be declined or granted with conditions.
- 31 Section 104(1) provides for consideration of Part 2 in a particular way. The Commissioner may have recourse to Part 2 when considering the application and submissions under section 104(1). The circumstances where this may be done are:
- (a) Where there is invalidity, incomplete coverage or uncertainty of meaning within the planning instruments<sup>23</sup>; or
  - (b) Where, after careful analysis, the matters in subsection 104(1)(a), (b) and (c) are found to be in conflict<sup>24</sup>.
- 32 In both circumstances, the decision maker should look first to the higher order plans, for example the CRPS (15 January 2013) and the NPS-UD, and the RMA EHS Act in this particular situation, for direction. Where possible the provisions of the SDP could be read in a manner consistent with these documents. For this Application, neither the operative Selwyn District Plan (**SDP**) and proposed Selwyn District Plan (**pSDP**) (as notified) or the CRPS have been prepared pursuant to that NPS-UD and there is incomplete coverage of the NPS under these documents. However, Mr Allan does not identify any conflict between provisions, based on the expert effects assessments, and in my submission the SDP can be read in a manner consistent with the NPS-UD in favour of the Proposal.
- 33 In my submission the NPS-UD, as a recent document and expression, should be accepted as promoting Part 2. It should be given appropriate weight and there is no need to have general recourse to Part 2 of RMA if the Proposal is consistent with the NPS-UD, which the evidence of Mr Allan considers it is.

#### *Existing environment*

- 34 The environment against which the Application needs to be assessed is the 'existing' or 'receiving' environment. This includes the environment as it currently exists and the environment as it would exist with activities allowed under the SDP

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<sup>23</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [75]-[76].

<sup>24</sup> *McGuire v Hastings District Council* [2002] UKPC 43 [2002] 2 NZLR 577; more recently considered in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 at [30] above.

as permitted activities and/or unimplemented resource consents.<sup>25</sup> These factors provide context for assessing the appropriateness of the Application that is before you.

- 35 An unimplemented resource consent does not automatically form part of the existing environment – it is subject to the 'likelihood test' outlined in *Queenstown Lakes District Council v Hawthorn Estate Limited (Hawthorn)*.<sup>26</sup> Whether an unimplemented resource consent is considered part of the environment depends on the likelihood of that resource consent being implemented.<sup>27</sup> The Environment Court has since found that "likely" means "more likely than not".<sup>28</sup>
- 36 Foodstuffs holds resource consent RC185461 (granted in January 2019) authorising the establishment and operation of a PAK'nSAVE supermarket, which would replace the existing New World Rolleston in the Town Centre. Foodstuffs will surrender RC185461 should the Application be granted. It is accepted that this consent does not form part of the existing environment from which to assess effects.
- 37 The evidence refers to the unimplemented consent as it provides context and a comparison of the only possible alternative site within the existing Rolleston Town Centre that Foodstuffs has identified in its 12-year search in the District. In short, it is too small and will exacerbate existing congestion, within area sought to be repackaged to human-scaled built form that prioritises people over cars. It is my submission that the references in evidence demonstrates the superior outcomes for both the Application Site and the revitalisation of Rolleston Town Centre (through the retention and proposed upgrade to the New World supermarket) should this consent be granted.

#### *Permitted baseline*

- 38 Section 104(2) RMA provides you with discretion to disregard any adverse effect of the Application arising from a 'permitted baseline', being an activity with the relevant effect that is permitted in a national environmental standard or a plan.
- 39 There is no requirement that a permitted activity be of the same type as the proposed activity in order to apply the permitted baseline – the permitted baseline calls for a comparison of the effects of the permitted and proposed activities.

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<sup>25</sup> *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 425, at [84].

<sup>26</sup> Ibid.

<sup>27</sup> At [84].

<sup>28</sup> *Burgess v Selwyn District Council* [2014] NZEnvC 11, [74] and [79]; affirmed in *Otway Oasis Society Inc v Waikato Regional Council* [2020] NZEnvC 169 at [15].

Whether or not the permitted activity is 'fanciful' may have a bearing on your decision of whether or not you exercise your discretion.<sup>29</sup>

*Alternative Residential Development scenario*

- 40 Both the NPS-UD and RMA EHS Act direct the Council (as a Tier 1 Council) to provide for more housing and businesses to be built in places close to jobs, community services, public transport and to respond to market demand.
- 41 The Council must apply the MDRS to existing residential areas by 20 August 2022 (i.e. within 3 weeks) and the Council is preparing a Variation to the pSDP to do this. In effect, this means the Application Site can be intensified through the development of up to three residential units per site, with development up to a height of 11m, setbacks of 1-1.5m depth, with 50% coverage without the need for resource consent<sup>30</sup>. Associated subdivision will be a controlled activity and must be granted<sup>31</sup>. Pursuant to section 86BA RMA, any rules within plans or plan changes giving effect to the MDRS will have immediate legal effect upon notification (and all other rules will cease to have legal effect).
- 42 Objectives and policies that the RMA EHS Act require a consent authority to include in the pSDP are enabling and encouraging of housing – but are not directive or discouraging of other non-residential uses<sup>32</sup>.
- 43 The Applicant modelled a reasonable (i.e. a not fanciful) alternative residential development on the Site (to demonstrate the degree of change which could be enabled by MDRS. The alternative residential development has not maximised the development potential, and is not relied on as a permitted baseline but rather has been prepared and provided in response to the Reporting Officer's consideration of the character of the area.
- 44 Mr Milne will discuss this development and considers the alternative residential scenario presents a realistic comparison of effects and such an outcome will convey a different amenity to that existing. Mr Milne's opinion is the landscape outcome afforded by the Application potentially provides a greater level of amenity, than an outcome enabled by the MDRS along the interface of the Application Site<sup>33</sup>.

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<sup>29</sup> *Rodney DC v Eyres Eco-Park Ltd* [2007] NZRMA 1 (HC), at [37].

<sup>30</sup> EHS Act, Schedule 3A, Part 2.

<sup>31</sup> EHS Act, Schedule 3A, clause 3.

<sup>32</sup> Schedule 3A RMA, Clause 6 Objectives and Policies – use words which include "provide for", "enable", "encourage".

<sup>33</sup> Summary Statement Mr Milne at [11].

- 45 It is acknowledged that this imminent and future plan-enabled intensification is most likely to occur on currently underutilised land to the West, and South, and future zoned land to the East, as opposed to within established housing areas to the north.

### **Actual and potential effects**

- 46 You can be confident that a robust and thorough process of assessing the potential adverse effects of the Proposal has been undertaken. The Proposal has been carefully designed to be compatible with its setting. The Applicant's evidence is that any potential adverse effects on the environment arising from the proposal can be satisfactorily mitigated to the point where effects are acceptable. It is submitted that, once these effects are balanced with the significant positive benefits of the proposal (under section 104(1) RMA), the only conclusion that can be drawn is that the effects will be entirely appropriate.

### *Positive effects*

- 47 The positive effects of the Application are to be considered in accordance with section 104(1) RMA. The reasons given by Submitters supporting the Application include:
- (a) Good location;
  - (b) Provides competition and reduces costs of living;
  - (c) Generates employment and economic activity for Rolleston;
  - (d) Accessible for residents and reduces trips to and from Christchurch supermarkets;
  - (e) Supports current and future population growth in Selwyn District.
- 48 In addition, the Application responds to recent and projected future growth in district supermarket demand;<sup>34</sup>. During the construction period the Application will create full-time employment for 100 people for two years and generate just over \$10 million in household incomes. The Application will provide employment opportunities within Rolleston (more than 260 people permanently). There are also a number of positive outcomes arising for landscape, design and connectivity of the Site and these are addressed by Mr Milne and Mr Burns in more detail.

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<sup>34</sup> Evidence of Fraser Colegrave at [21].



### *Potential adverse effects*

49 To summarise, the potential adverse effects most relevant for this Application include:

- (a) *Architectural and urban design* – Mr Mitchell is responsible for the architectural design of the Supermarket and post-application further changes were made to respond to submissions and in line with recommendations made by Ms Wolfer and Mr Burns.<sup>35</sup> Mr Burns was involved at an early stage of the Proposal and his urban design expertise informed design development and was used to test alternative layouts. Mr Burns<sup>36</sup> and Ms Wolfer (SDC urban designer), agree on all substantive matters including the urban design approach, strategic location; the position of the supermarket on the site;<sup>37</sup> approach to mitigation including use of deep setbacks and landscaping;<sup>38</sup> relevance of future residential development under MDRS; reduction in signage dominance and height and architectural treatments;<sup>39</sup> additional glazing along parts of the northwest, southwest and southeast façades;<sup>40</sup> provision of a second bike parking facility near the northwest façade.<sup>41</sup> The result of this collaborative approach taken by the Applicant is an improved design outcome.<sup>42</sup>
- (b) *Landscape* –Mr Milne and SDC's landscape architect, Mr Gabriel Ross are also essentially in agreement, and consider the overall level of effects being Low to Moderate and overtime reducing to the lower end of the effects scale. Mr Milne, in discussions with Mr Ross, have made further changes to the Application and these will be discussed when presenting today.
- (c) *Lighting* – Mr Kitto has assessed effects associated with artificial outdoor lighting and illuminated signage. Any adverse effects can be managed primarily by considering the level of illuminance, directing lights downward and away from adjacent properties to achieve permitted standards.<sup>43</sup> The Reporting Officer considers that any adverse effects associated with the

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<sup>35</sup> Evidence of Matthew Mitchell at [20].

<sup>36</sup> Evidence of Andrew Burns at [18].

<sup>37</sup> Peer review of Gabi Wolfer at [2.2], p8.

<sup>38</sup> Peer review of Gabi Wolfer at [2.3], p10.

<sup>39</sup> Peer review of Gabi Wolfer at [2.3], p9.

<sup>40</sup> Peer review of Gabi Wolfer at p16.

<sup>41</sup> Peer review of Gabi Wolfer at [2.5], p16.

<sup>42</sup> Evidence of Matthew Mitchell at [69].

<sup>43</sup> Evidence of Greg Kitto at [57]-[61].

artificial outdoor lighting will be adequately managed by means of the proposed design and associated controls.<sup>44</sup>

- (d) *Retail distribution / Economic effects* – Mr Colegrave considers he and Mr Heath (SDC Peer Reviewer) are in close agreement about "virtually every aspect of this Proposal" and that they both emphatically conclude that it would not have any material adverse effects on the health and vitality of the Rolleston Town Centre. No adverse retail distribution effects will be generated by the Proposal on the Rolleston KAC.<sup>45</sup> Mr Heath considers economic benefits would be material over the long term and his overall finding is that the Proposal could be supported from an economic perspective.<sup>46</sup>
- (e) *Transport* – Mr Smith and Mr Carr have undertaken caucusing and produced a substantial JWS. They are in agreement on the majority of the transport-related aspects of the Application, and following expert caucusing the only point of disagreement is Access C. While Mr Carr does not consider it should be formed, both experts agree that if it is formed then it should be monitored to ensure that no adverse effects are arising.
- (f) *Noise* – Mr Hay and Mr Reeve (for SDC) took part in conferencing on 27 July 2022 and agree on all substantive issues including that: the existing noise environment is typical of a peri-urban area dominated by traffic on arterial roads and that the noise level is expected to increase with intensifying new residential development to the west of the Site; and early deliveries from two heavy good vehicles are unlikely to cause additional sleep disturbance. The minor point of disagreement concerns the description of the change in traffic noise level compared to the baseline, which is likely to be less than 2 dB. Mr Hay describes the change as "imperceptible" whereas Mr Reeve describes it as "acceptable".<sup>47</sup>
- (g) *Infrastructure management* – Mr Brogden's evidence explains that any effects of sediment laden stormwater runoff and windblown dust during construction will be appropriately managed by standard practices and an Erosion and Sediment Control Plan.<sup>48</sup>

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<sup>44</sup> OR at [92].

<sup>45</sup> Heath Peer Review at p9.

<sup>45</sup> Heath Peer Review at p10.

<sup>46</sup> OR at [152].

<sup>47</sup> JWS: Acoustics at [9].

<sup>48</sup> Evidence of Keegan Brogden at [28].

Stormwater management from the hardstand areas will be managed on Site up to and including the 1:50 year 24 hour event. There will be little to no change to the levels and route of the existing modelled 1:200 flooding event, which may affect properties in Levi Road. In respect of Lincoln Rolleston Road, design options will ensure the capacity of the existing secondary flow path is maintained and that it is not pushed into the residential properties as a result of the Proposal.<sup>49</sup> Mr Brogden has also offered a condition of consent to ensure that development will not increase the extent of the secondary flow path for the 1: 200-year flood event on any residential property from the Proposal.<sup>50</sup>

Resource consent is required for the discharge of construction phase and developed stormwater as a discretionary activity.<sup>51</sup> Ms Ambury's evidence is that design solutions are available to adequately mitigate any potential effects related to stormwater on the environment.<sup>52</sup>

The Site is well serviced and the OR agrees that there are no issues with servicing this Proposal.<sup>53</sup>

- (h) Soil contamination – Earthworks associated with the Proposal have been conservatively assessed as a discretionary activity under Regulation 11 of the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health Regulations 2011 (**NESCS**).

The Applicant has provided a Preliminary Site Investigation (**PSI**) prepared by Mr Knoyle. In response to queries from the Contaminated Land Officer (**CLO**) at Environment Canterbury, the Applicant committed to undertaking a Detailed Site Investigation and has provided condition of consent to that effect (including steps to be taken if contaminated soils are identified).<sup>54</sup>

The Officer considers that subject to the proposed conditions any adverse effects resulting from soil contamination will be no more than minor.<sup>55</sup> Mr Knoyle proposed minor changes to these conditions in his evidence to assist with clarity.

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<sup>49</sup> Evidence of Keegan Brogden at [26].

<sup>50</sup> Evidence of Keegan Brogden at [37].

<sup>51</sup> Canterbury and Land Water Regional Plan, 5.94A-5.96.

<sup>52</sup> Evidence of Fiona Ambury at [21].

<sup>53</sup> Evidence of Keegan Brogden at [33].

<sup>54</sup> Evidence of Guy Knoyle at [32].

<sup>55</sup> OR at [147].

- 50 It is clear from the evidence that there are no fundamental outstanding issues which would count against the grant of consent from the technical experts, and that effects can be appropriately resolved through conditions of consent.

### **Planning provisions**

- 51 This is not a non-complying activity. Under section 104 even if there is a conflict the Proposal may be granted. A single issue planning response is also not appropriate, particularly if it is not substantiated in terms of the overall effects that are likely to arise from this Proposal. In *Dye*<sup>56</sup> the Court of Appeal held that an assessment of relevant objectives and policies requires "a fair appraisal of the objectives and policies read as a whole."
- 52 The Reporting Officer, Ms Laird (for Harbour Building Partnership) and Mr Allan have all provided planning evidence. It is accepted by all planners that residential activity is enabled on the Application Site. They disagree as how the Proposal should be considered against the SDP (and pSDP) provisions and CRPS.
- 53 The objectives and policies in the SDP and the CRPS allow for commercial development to locate out of centre, in residential zones, where appropriate and where the proposal will not give rise to significant distribution or urban form effects<sup>57</sup>. It is submitted that the consistency with the provisions will depend on factual conclusions reached with respect to the existing environment, and the effects of the Application as assessed by the technical experts. Mr Allan has undertaken a comprehensive analysis of the applicable planning framework and relies on the evidence of the technical experts in forming his opinion. In my submission his evidence should be preferred.
- 54 With respect to weighting of provisions I make the following comments:

#### *Proposed Selwyn District Plan*

- 55 Both the Reporting Officer and Mr Allan do not consider the residential provisions to the pSDP to be much different to the SDP, and their conclusions as to the consistency reflect that which they both reached on the SDP. One notable difference from the SDP is the inclusion of Strategic Directions and General District Wide Matters relating to District Identity and Urban Form. Mr Allan considers the

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<sup>56</sup> *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209; Referred to with approval in *Davidson R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

<sup>57</sup> SDP, policies B3.4.2, B3.4.18, B3.4.23, B3.4.27, B4.3.8, B4.3.4 and B4.3.10; CRPS Objective 6.2.6 and policy 6.3.6.

evidence provided for the Applicant demonstrates the consistency with these directions.

56 Mr Allan considers limited weight can be given as no decisions have been released, and due to the fact the pSDP does not yet implement the directions of the NPS-UD and EHS Act<sup>58</sup>. I agree. However, in my submission when the Variation to the pSDP is notified, weight can and should be provided to the MDRS rules (which have legal effect), and those objectives and policies required to be included by the RMA EHS Act.

57 For completeness it is noted that I have represented Foodstuffs on the pSDP and presented submissions in relation to the provision for supermarkets in the pSDP (along with Ms Parish, Mr Colegrave and Mr Allan). Foodstuffs submitted:

- (a) There are no suitable sites in the town centre, or any other commercial areas zoned in Rolleston, under either the SDP or pSDP. As notified, the pSDP requires consent for a new supermarket in the Large Format Retail Zone as a non-complying activity, in a Neighbourhood Centre as a non-complying activity, in a General Industrial Zone as a non-complying activity, and in the General Residential, Large Lot and Rural zones a supermarket is provided for as a non-complying activity.
- (b) A new supermarket is permitted in the Town Centre Zone only. In Hearing 23 relating to Commercial and Mixed Use Zone (CMUS) the two economists – Mr Colegrave (appearing for Foodstuffs) and Mr Foy (appearing for the SDC) agreed there will be demand for several additional supermarkets in the future and there is insufficient space to accommodate them within the existing centres (i.e. those centres notified with the pSDP).
- (c) the pSDP must contribute to a 'well-functioning urban environment' as required by planning decisions made under the NPS-UD which, as a minimum, enables suitable sites (in terms of both location and size) for business activities to be released and supported by an associated policy framework.
- (d) that supermarkets should be able to secure resource consents in catchments where there is a demonstrated need for the essential service, provided it can be justified on its merits and adverse effects managed when considering the receiving environment.

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<sup>58</sup> SoE Mr Allan at [89].

### *Canterbury Regional Policy Statement (CRPS)*

- 58 Providing for business activities in appropriate locations, including outside of a centre, subject to appropriate management of effects is consistent with the CRPS<sup>59</sup>. Mr Allan considers, applying the expert assessment, that the Proposal is consistent with the CRPS. It is significant that the Canterbury Regional Council has not made a submission on this publicly notified application, giving its active involvement in urban growth processes in Selwyn.
- 59 The CRPS was prepared prior to the NPS-UD and does not implement the direction for responsive planning. The recent Change 1 to the CRPS did not give effect to all provisions of the NPS-UD. The Report to the Minister on Change 1 confirmed that work is underway to progressively implement the new national direction set out through the NPS-UD, including changes to the district plans, the completion of a new capacity assessment and future development strategy, and the CRPS review, including those in Chapter 6<sup>60</sup>.

### *NPS-UD*

- 60 The NPS-UD is designed to improve responsiveness, and is a recent statement which recognises the national significance of:
- (a) having well-functioning urban environments that enable all people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, now and in the future;<sup>61</sup> and
  - (b) providing at least sufficient development capacity to meet the different needs of people and communities.
- 61 The Recommendations and Decisions report for the NPS-UD states: Urban areas are dynamic and complex, continually changing in response to wider economic and social change. The current planning system can be slow to respond to these changing circumstances and opportunities, which can lead to a mismatch between what is enabled by planning and where development opportunity (or demand) exists. This can lead to delays in supply, or incentivise land banking; and the intent of the responsive planning provisions is to enable the planning system to work

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<sup>59</sup> The CRPS provides for development in and around existing urban areas as the primary focus for accommodating the region's growth (Objective 5.2.1 Location, Design and Function of Development), and recognises that new commercial activities are primarily directed to the central city, key activity centres and neighbourhood centres (Objective 6.2.6(3) Business Land development); and expressly provides that some new commercial development will be appropriate outside of a centre subject to appropriate management of effects (policy 6.3.6 Business Land).

<sup>60</sup> Report to the Minister on Change 1 to Chapter 6 of the CRPS, at paragraph 133.

<sup>61</sup> Objective 1 NPS-UD 2020

responsively towards more competitive development markets, through development (including at scale).

62 The Environment Court has previously said the purpose of the (now superseded) National Policy Statement on Urban Development Capacity 2016 is "... *to open doors for and encourage the development of land for business and housing, not to close them*"<sup>62</sup>. This statement remains applicable.

63 Of particular relevance to this application, the NPS-UD applies to Planning Decisions that affect an urban environment<sup>63</sup> (i.e. a resource consent). Regard must be had to relevant provisions of the NPS-UD:

- (a) to be enabling of more businesses to be located in areas of urban environment in or near a centre zone or other area with many employment opportunities and where there is high demand for housing (Objective 3); and
- (b) to achieve a well-functioning urban environment by having or enabling as a minimum a variety of sites that are suitable for different business sectors in terms of location and site size; and supporting the competitive operation of land and development markets (Policy 1(b) and 1(d)).<sup>64</sup>

64 Mr Allan has assessed the specific policies apply to planning decisions and he considers the Proposal to be consistent with the NPS-UD. Significant weighting should be provided to the NPS-UD.

### **Matters raised in submissions**

65 The Application was publicly notified at the request of the Applicant<sup>65</sup>. 22 submissions were received in support, 26 in opposition (including two late submissions accepted by the Commissioner) and 1 neutral. Relevant RMA issues raised by submitters have been given due consideration and are addressed in evidence.

### ***Amenity***

66 An assessment of amenity values must start with an understanding of the subjective, based on articulation by those who enjoy the values, but it must be able to be tested objectively with reference to the relevant plans.

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<sup>62</sup> *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59, [2019] NZRMA 426 at [39]

<sup>63</sup> Urban environment is defined as any area of land that is, or is intended to be, predominantly urban in character; and is, or is intended to be, part of a housing and labour market of at least 10,000 people.

<sup>64</sup> Well-functioning Urban Environment is defined in Policy 1 NPD-US 2020; Policy 1(b) and (d) referenced.

<sup>65</sup> It was not determined under section 95A-E by SDC as stated in the Officer's Report at p10.

67 In *Schofield v Auckland Council*<sup>66</sup> the Environment Court stated:

*The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself provides some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activity they undertake there, and the emotion they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in the space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of the subjective, it must be able to be tested objectively.*

68 In *Yaldhurst Quarries Joint Action Group v Christchurch City Council*<sup>67</sup> the Environment Court observed that a change to amenity values does not necessarily equate to a loss of rural character or an adverse effect on amenity values. To test the proposition that scale and intensity of effects will be adverse, experts need to first assess the baseline environment against which the effects are evaluated. The Court outlined its approach when assessing amenity values evidence as follows:<sup>68</sup>

- (a) *identify the values of people and communities. Based on the topics above this will include the attributes and characteristics of the existing landscape, soundscape and air quality that are valued by them. [We expect the experts will explain how they ascertained the values of people and communities];*
- (b) *ascertain whether the District Plan identifies any valued attributes or characteristics for the relevant zone, landscape or more broadly the receiving environment. These elements may also be identified from other documentation such as a Conservation Management Strategy;*
- (c) *determine whether the amenity values are reasonably held. In that regard we expect the experts to objectively test the basis of the values that are derived from the environment. This is necessary because the residents' views on their existing amenity is subjective and*

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<sup>66</sup> *Schofield v Auckland Council* [2012] NZEnvC 68 at [51]

<sup>67</sup> [2017] NZEnvC 165.

<sup>68</sup> At [117].



*influenced by personal feelings or opinions, including the strength of their attachment to this place;*

- (d) assess whether the proposal gives rise to adverse effect on the relevant attribute or characteristic;*
- (e) if it does, then to consider whether, in this case, rural character is maintained and second, whether there are any consequential effects on the existing amenity values; and*
- (f) finally, to assess those effects in light of the outcomes for the relevant resources and values under the District Plans.*

69 Recently, in *New Zealand Southern Rivers Society Incorporated v Gore District Council*<sup>69</sup> the Court of Appeal was considering the High Court's decision to decline an application for judicial review in relation to the grant of consents for a river rafting tourism activity on a non-notified basis. The Court of Appeal reiterated that, when considering amenity issues, it is important to note that what is to be assessed is those qualities and characteristics which contribute to the appreciation of the recreational attributes, not the appreciation itself. There the Court of Appeal found that the subjective views of the anglers were not necessary to assess the effects of the application. Instead, the Court of Appeal found:<sup>70</sup>

What was necessary was that the Commissioner be informed about the characteristics of the area, and the effects of the proposed activity on those characteristics....the subjective views of the anglers would not have added anything of value to his consideration of the application.

70 The expert evidence has assessed the effects on amenity as appropriate, with reference to the SDP and the future plan-enabled changes.

71 Further, the NPS-UD expressly identifies that it is likely to bring significant changes to existing urban areas that may result in a reduction of amenity values, but such changes are not, of themselves, identified as an adverse effect

- (a) Planned urban form may involve significant changes to an area and those changes may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types and are not of themselves an adverse effect (Policy 6).

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<sup>69</sup> *New Zealand Southern Rivers Society Incorporated v Gore District Council* [2021] NZCA 296

<sup>70</sup> At [56].

- (b) Urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities and future generations (Objective 4).

#### *Property valuation*

- 72 The question of adverse effects on property values has been addressed by the Courts on several occasions. Effects on property values are not a relevant consideration *per se* in determining whether resource consent should be granted. If it occurs at all, diminution of property values is simply another measure of adverse effects on amenity values.<sup>71</sup>

#### *Mental health*

- 73 The RMA requires assessment of the effects of an activity on the basis of an ordinary reasonable person, not a person that is particularly sensitive or hypersensitive.<sup>72</sup> The Courts have held that genuine concerns and fears can only be given weight if they are reasonably based on real risk.<sup>73</sup> There is no place for the Court to be influenced by the mere perception of risk which is not shown to be well founded.<sup>74</sup> More recently, citing *Shirley Primary*<sup>75</sup>, the Court stated that a decision should not be made based on people's fears which might never be realised.<sup>76</sup>

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<sup>71</sup> *City Rail Link Limited (CRRL) (Successor to Auckland Transport) & Ors v Auckland Council*, [2017] NZEnvC 204; See also *Wilson v Dunedin City Council* [2011] NZEnvC 164 at [28].

<sup>72</sup> In *Re Meridian Energy Limited* [2013] NZEnvC 59 the Environment Court assessed the effects of noise from the proposed windfarm on children with Autism Spectrum Disorder and agreed with a previous approach taken in *Motorimu Wind Farm Ltd v Palmerston North City Council* (W067/08, 26 September 2008 (Judge Dwyer) by the Environment Court) whereby "ultimately, consideration of noise effects must be based on normal physiological responses, and cannot seek to protect those whose sensitivities might be at the higher end of the scale" at [327]

<sup>73</sup> *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 concerned a non-complying activity consent granted to Telecom for a cell site at 9 Shirley Road by Christchurch City Council. The Environment Court assessed the adverse effects of the proposal, including (but not limited to) the health effects from Radio Frequency Radiation (RFR). The Environment Court noted (at [193]) that "we had direct evidence about people's fears of exposure to RFR from enough parents and teachers to be sure that a significant part of the school community is genuinely concerned about, even fearful of, the effects. But whether it is expert evidence or direct evidence of such fears, we have found that such fears can only be given weight if they are reasonably based on real risk".

<sup>74</sup> *Contact Energy Limited v Waikato Regional Council* (2000) 6 ELRNZ 1 at [254]

<sup>75</sup> *Shirley Primary School v Christchurch City Council* C 136/98

<sup>76</sup> *City Rail Link Ltd v Auckland Council* [2017] NZEnvC 204 at [64]

- 74 The genuinely held view of the submitter is acknowledged, but it is submitted that the law must properly be applied in this case based on the evidence that is before you.

### **Conditions of consent**

- 75 Section 108 provides wide scope to impose conditions on resource consent, however this scope has been restricted through case law. To be intra vires, conditions must be for a resource management purpose, must fairly and reasonably relate to the Application, and must not be so unreasonable that an authority could not have approved the conditions.
- 76 Section 108AA(1)(b) RMA requires conditions must be directly connected to 1 or both of the following:
- (a) An adverse effect of the activity on the environment; and
  - (b) An applicable district or regional rule, or a national environmental standard.
- 77 It is available to the Commissioner to grant consent conditions which may require involvement of Council as a party having the statutory power to execute the work.<sup>77</sup>
- 78 The Applicant will provide a revised set of conditions which pick up recommendations made by experts (including from the JWS) and any additional changes from the hearing in our reply.

### **Conclusion**

- 79 Foodstuffs has carefully analysed the market and it has taken 12 years to locate an appropriate site in Rolleston. The Application Site meets the needs of a PAK'nSAVE supermarket given its size, location and proximity to the town centre and growing residential development.
- 80 Foodstuffs is confident that matters raised by Council and submitters have been appropriately considered and responded to in these submissions and through the technical evidence. Where practicable, changes have been made to design and conditions of consent volunteered.
- 81 There is no doubt the proposal will contribute significantly to the economic wellbeing of the community. You have before you a well-considered and comprehensively assessed project which prioritises compatibility with the existing and future planned environment and is deserving of consent.

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<sup>77</sup> *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249, at [66]-[67]

82 Finally, the Applicant wishes to acknowledge the genuine concerns held by submitters and to thank them for their involvement in this process.

**Witnesses**

83 The Applicant will call the following witnesses in support of its case:

- (a) Ms Rebecca Parish – Applicant representative
- (b) Mr Matt Mitchell – architect
- (c) Mr Tony Milne – landscape and amenity
- (d) Mr Andrew Burns – urban design
- (e) Mr Dave Smith – transport
- (f) Mr Rob Hay – acoustic
- (g) Mr Fraser Colegrave – economics
- (h) Mr Keegan Brogden – civil engineer
- (i) Ms Fiona Ambury– stormwater treatment/disposal
- (j) Mr Guy Knoyle– soil contamination
- (k) Mr Greg Kitto – lighting
- (l) Mr Mark Allan – planning.

Dated 2 August 2022



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Alex Booker  
Counsel for the Applicant