

Notice of Meeting:

I hereby give notice that an ordinary Meeting of the Council will be held on:

Date: Wednesday 30 November 2016
Time: 9.30am
Meeting Room: Council Chamber
Venue: Municipal Building, Garden Place, Hamilton

Richard Briggs
Chief Executive

Council OPEN LATE AGENDA

Membership

Chairperson	Mayor A King
Deputy Chairperson	Deputy Mayor M Gallagher
Members	Cr M Bunting
	Cr J R Casson
	Cr S Henry
	Cr D Macpherson
	Cr G Mallett
	Cr A O'Leary
	Cr R Pascoe
	Cr P Southgate
	Cr G Taylor
	Cr L Tooman
	Cr P Yeung

Quorum: A majority of members (including vacancies)

Meeting Frequency: Monthly – or as required

Lee-Ann Jordan
Governance Manager

25 November 2016

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Committee: Council

Date: 30 November 2016

Report Name: Housing Accord

Author: Kelvyn Eglinton

Report Status	<i>Open</i>
Strategy, Policy or Plan context	<i>Hamilton Urban Growth Strategy Future Proof</i>
Financial status	<i>There is not budget allocated Amount \$ - Within existing budgets</i>
Assessment of significance	<i>Having regard to the decision making provisions in the LGA 2002 and Council's Significance Policy, a decision in accordance with the recommendations is not considered to have a high degree of significance</i>

1. Purpose of the Report

2. To inform Council on the development of a Housing Accord with the New Zealand Government which will act as a tool to assist in the supply of future supply of housing within Hamilton

3. Executive Summary

4. Staff have been working with officials from the Ministry for Business, Innovation and Employment (MBIE) on the development of a draft Housing Accord which will support the Councils desire to advance housing supply to the market and aligns with the Councils indicative proposal to the Housing Infrastructure Fund.
5. The draft Accord is presented in advance of submission to government for comment before returning to Council for consideration for adoption at the Council meeting of 13 December 2016.

Recommendations from Management

That:

- a) the report be received;
- b) Council approve the further development of the draft Housing Accord; and
- c) a final draft be brought to the 13 December 2016 Council meeting for consideration for approval.

6. Attachments

7. Attachment 1 - Draft Housing Accord (*Under Separate Cover*)

8. Key Issues

- 9. In recent discussion with government regarding Hamilton City Council’s indicative application to the Housing Infrastructure Fund, Council has been made aware of the opportunities to support the advancement of housing supply within Hamilton via the development of a Housing Accord with the New Zealand government.
- 10. Council passed a resolution at the meeting of Council on 25th August 2016 to endorse the commencement of a draft proposal to the Government \$1Billion infrastructure fund based on advancing the Peacockes growth cell and related infrastructure requirements.
- 11. In order to meet cabinet deadlines and to show alignment with government prior to submitting our indicative proposal to Government for the Housing Infrastructure Fund, Council staff and MBIE officials have been forming the attached draft accord.
- 12. In conjunction with MBIE officials staff have identified that whilst Hamilton has sufficient long term supply within zoned land, there exist opportunities within the city where additional supply might be advanced through the Accord.
- 13. The Accord is the mechanism by which, in partnership with Government, opportunities can be examined to determine the appropriateness or otherwise of utilizing the tools contained within the *“Housing Accords and Special Housing Areas Act”* legislation to advance housing supply.
- 14. The Minister will be examining the draft for consideration of approval in the week commencing 5 December 2016.
- 15. A final draft for approval by Council will be presented to Council for consideration for adoption at the December 13 Council meeting.

16. Financial and Resourcing Implications

- 17. Nil – within existing budgets

18. Risk

- 19. That market conditions alter such that targets are not able to be met.
- 20. The accord provides for six monthly meetings with government and provides for the alteration of targets in the event weaker market conditions occur.

Signatory

Authoriser	Richard Briggs, Chief Executive
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Committee: Council

Date: 30 November 2016

Report Name: A&A King Family Trust v HCC
regarding Partly Operative
District Plan

Author: Luke O'Dwyer

Report Status	<i>Open</i>
Strategy, Policy or Plan context	<i>Partly Operative District Plan</i>
Financial status	<i>Not applicable</i>
Assessment of significance	<i>Having regard to the decision making provisions in the LGA 2002 and Council's Significance Policy, a decision in accordance with the recommendations is not considered to have a high degree of significance</i>

1. Purpose

- To inform Council of the decision of the Environment Court with respect to an appeal lodged by the A&A King Family Trust (AAKFT) against the Partly Operative District Plan (PODP).

3. Key issues

- The AAKFT submitted an appeal to the Environment Court in September 2014 against the decisions made by independent commissioners with respect to the PODP.
- The appeal related to land located at the corner of Killarney Road and Greenwood Street Frankton. It is zoned Industrial and is approximately 1.7ha in size.
- The land is owned by the AAKFT. The relief put forward by the AAKFT sought to retain the Industrial zone while simultaneously introducing a mixed use overlay and supporting planning provisions. The relief would only apply to the AAKFT site.
- The key issues resulting from this appeal included the potential introduction of office and retail land uses which are not provided for in the Industrial zone, the alignment of these land uses with the Waikato Regional Policy Statement and the PODP, and the potential effects on the Frankton suburban centre and the State Highway 1 corridor.
- Expert planning, traffic and economic evidence on behalf of Council carefully analysed the appeal but could not support it due to a range of effects that could be generated if the relief was granted.
- The matter was heard by the Environment Court over 10 days in June, August and September 2016. The Court issued a decision on the matter on 23 November. The appeal was dismissed and the decision has been made in favour of Council. The decision does not encourage a cost application. A copy of the decision is attached to this report.

Recommendation from Management

That the report be received.

10. Attachments

- 11. Attachment 1 - Decision on A&A King Family Trust v Hamilton City Council

Signatory

Authoriser	Kelvyn Eglinton, General Manager City Growth
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BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 229

IN THE MATTER of the Resource Management Act 1991

AND of an appeal pursuant to Clause 14 of the First Schedule to the Act

BETWEEN A & A KING FAMILY TRUST

(ENV-2014-AKL-000144))

Appellant

AND HAMILTON CITY COUNCIL

Respondent

AND NEW ZEALAND TRANSPORT AGENCY

s 274 party

Court: Environment Judge M Harland
Environment Commissioner J A Hodges
Environment Commissioner KA Edmonds

Hearing: 13 – 17 June, 10 August, 8, 9, 12 & 13 September 2016 at Hamilton

Counsel: PM Lang for A & A King Family Trust
R Bartlett QC and M Mackintosh for Hamilton City Council
AMB Green and MJL Dickey for New Zealand Transport Agency

Date of Decision: 23 November 2016

Date of Issue: **23 NOV 2016**



A & A King Family Trust v Hamilton City Council

DECISION OF THE ENVIRONMENT COURT

- A: The appeal is dismissed. The Council's decision of 9 July 2014 in relation to the land now subject to this appeal is confirmed.
- B: Any application for costs is to be filed within 10 working days of the date of this decision, with any reply to be filed 10 working days thereafter.

REASONS**Introduction**

[1] This appeal is against parts of the proposed Hamilton City District Plan ("the proposed plan").¹ It concerns the planning framework that should apply to a 1.7 hectare block of land owned by the A & A King Family Trust ("the Trust") that fronts onto State Highway 1 ("SH1") at Greenwood Street (travelling north) and Killarney Road, west Hamilton. It is depicted in the map attached to this decision.²

[2] Under the proposed plan this land is zoned industrial. The Trust wishes to undertake certain commercial activities on its land but at the same time retain its industrial zoning despite having sought a commercial zoning of the land in its notice of appeal. The Trust has resource consent to construct a small supermarket on its land which it has not yet implemented. Even though it is still able to implement its resource consent, the Trust wants the supermarket to be specifically recognised in the proposed plan and to complement it with a limited amount of additional retail and office development over and above that which is already there.

[3] It is difficult, but not impossible to establish commercial activities such as these in the Industrial Zone, so the Trust proposes a tailor-made overlay with a new objective, policies and rules that make it easier for it to achieve its goal and to meet what it says is



¹ The proposed plan was notified in December 2012 and the Council's decision on it was dated 9 July 2014.

² Exhibit 1.

an unmet need for such activities in the nearby western suburbs. The Trust contends that its overlay is the most appropriate planning framework for the land.

[4] The Council and the New Zealand Transport Agency ("**the Agency**") disagree. The Council says that the objective and the new policies attached to it are outside the scope of the appeal because they were not reasonably and fairly raised in the Trust's submission or the notified plan from which the appeal emanates. If they are within scope, the Council says the notified plan provides sufficient zoned land to meet any unmet commercial need in the western suburbs without adding the Trust's land to the available pool and that the Trust's land, because of its location, is not suitable for such activities. The Agency echoes this concern with particular focus on the transport network.

[5] As well, both the Council and the Agency contend that in different ways the Trust's proposal conflicts with the strategic direction of the Waikato Regional Policy Statement ("**the RPS**") carried through into the proposed plan.

[6] Overall the Council and the Agency say that the industrial zoning of the land without the overlay is the most appropriate planning framework for it.

[7] The questions in this appeal are therefore:

- (a) are the Trust's new proposed objective and policies within scope? And if they are,
- (b) is the Council's industrial zoning or the Trust's overlay the most appropriate planning outcome for the land?

The statutory framework

[8] There is a right of appeal to the Environment Court if a person who made a submission on the proposed plan does not agree with the Council's decision in respect of it.³ By virtue of s 290 of the Resource Management Act ("**the RMA**") such an appeal is heard de novo, and the Court may confirm, amend or cancel a decision made by the



³ Clause 14, Schedule 1 of the Resource Management Act 1991.

Council, however the Court is required to have regard to the decision that is the subject of the appeal.⁴

[9] The legal framework for plan reviews is set out in sections 31, 32 and 72-76 of the RMA. The matters that need to be addressed were comprehensively set out by the Court in *Colonial Vineyard Ltd v Marlborough DC*⁵ and *Reiher v Tauranga City Council*⁶ as follows:

[10] In examining a provision under the Act, including Section 32, we must consider:

- a) Whether it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act;
- b) Whether it is in accordance with Part 2 of the Act;
- c) If a rule, whether it achieves the objectives and implements the policies of the plan; and
- d) Whether having regard to efficiency and effectiveness, the provisions are the most appropriate way to achieve the objectives of the proposed plan, having regard to the benefits, the costs and the risks of not acting.

[11] In doing so the Court must take into account the actual and potential effects that are being addressed to consider the most appropriate provisions, if any, to respond to this.

[10] As well, s 74 of the RMA requires a territorial authority to prepare and change its district plan in accordance with its functions under s 31 (among other things). These functions include the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district.⁷

[11] Because the proposed plan was notified in December 2012, the relevant s 32 provisions are those which were in force prior to the amendments which took effect from 3 December 2013. Relevantly, s 32(3) provides:



⁴ s 290A of the RMA.

⁵ [2014] NZEnvC 55.

⁶ [2014] NZEnvC 121.

⁷ Resource Management Act 1991, s31(1)(a).

- ...
- (3) an evaluation must examine—
- (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.

[12] The test under s 32 has been considered in many decisions of the Environment Court, including *Gisborne District Council v Eldamos Investments Limited*,⁸ *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*,⁹ *Colonial Vineyard Limited v Reiher* referred to above to name a few. As well, the High Court considered it in *Shotover Park Limited and Remarkables Park Limited v Queenstown Lakes District Council*.¹⁰ In *Shotover Park Limited*, the term *most appropriate* was applied as follows:

[57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(2)(a) and (b). The phrase "the most appropriate" acknowledges that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best.

[13] In addition, s 73(4) requires a council to amend its district plan to *give effect* to a *regional policy statement*, however s 74(2)(a)(i) requires a council to *have regard* to any *proposed regional policy statement*. At the time the proposed plan was notified, the RPS was also proposed, however it has now been formally declared operative.¹¹ No party took issue with the fact that the provisions of the RPS should be given effect to, but in any event the difference in the wording to reflect if an RPS is operative or proposed does not affect the conclusions we have reached.

The site and its context

[14] The 1.7ha site owned by the Trust consists of 18 lots held in 16 separate certificates of title, with each title able to be developed separately.¹² The site has one



⁸ W047/2005.
⁹ A78/2008.
¹⁰ [2013] NZHC 1712.
¹¹ As of 20 May 2016.
¹² Mr Manning, evidence-in-chief at [18].

existing access to Killarney Road and nine to Greenwood Street (two of which are not currently used).¹³

[15] Currently, yard-based retail is undertaken on most of the site, being car yards operated at 102-106 Killarney Road, 11-13, 21-25 and 27-35 Greenwood Street; a vehicle service workshop at 37 Greenwood Street and a trade-supply depot with ancillary retail at 15-17 Greenwood Street. Office activities are undertaken on the site. There is a pocket of residential activity at 110 (A, B and C) Killarney Road, which abuts the car yard at 104 and 106 Killarney Road to the south and east, and to the west abuts other residences that front onto Smith Street. Smith Street runs parallel to Greenwood Street (SH1) and can be accessed to the south from Killarney Road and to the north from Bandon Street.

[16] Most of the yard-based retail fronts onto Greenwood Street (SH1) but the properties at 102-106 Killarney Road, as the address suggests, front onto Killarney Road. The remaining car yard activity on Greenwood Street and the vehicle service workshop also abut the residential area along Smith Street on their western boundaries.

[17] All of the above was pictorially depicted in Annexure 1A to Mr O'Dwyer's evidence-in-chief and to a lesser extent in Exhibit 1 attached to this decision.

[18] Under the proposed plan, approximately 1.4ha of the 1.7ha site (83% of it) contains land uses that are provided for in the Industrial Zone.¹⁴ This is depicted in Exhibit 1, which reveals that the bulk of the site, comprising yard-based retail, could be operated as a permitted activity, the yard-based retail undertaken on the Killarney Road sites could be conducted as a restricted discretionary activity, with the offices and residential parts of the site being the only parts that would be non-complying. Food and beverage outlets (no greater than 250m²) are permitted activities, and drive-through services¹⁵ are assessed as a restricted discretionary activity in the Industrial Zone.

¹³ Mr Apeldoorn, Transportation Assessment Report, 12 July 2015 at 542.

¹⁴ Mr O'Dwyer, evidence-in-chief at [53].

¹⁵ **Drive-through services (excluding service stations within the Rotoruna Town Centre Zone)**; means any premises where goods and services are offered for sale to the motoring public, primarily in a manner where the customer can remain in their vehicle. Drive-through services can include dispensing and associated storage of motor fuels (as the primary activity) and the sale of associated goods, services, food and beverages, fast-food outlets providing on-demand meals prepared on the premises for consumption therein or take away, the provision of servicing and running repairs for light motor vehicles and any other activity of a drive-through nature, including those ancillary to the above.



[19] To the north of the site, along Greenwood Street, are a mix of commercial properties and a place of worship. Mr King referred to this portion of Greenwood Street (SH1) as "grease alley", as there are a number of fast food outlets situated there including, on the eastern side, a Carl's Junior and McDonalds, and on the northern side a KFC.

[20] To the west of the site along Killarney Road to the Dinsdale Road roundabout is residential land, much of which is earmarked under the proposed plan for residential intensification.

[21] To the east of the site, running parallel with Greenwood Street (SH1) is the main trunk rail line. Crossing points to the rail line in the vicinity are limited to Killarney Road and the Massey Street/Hall Street over bridge approximately 750m north-east of the site. Further to the east of the main trunk line is the Frankton suburban centre. The suburban centres closest to the site are Dinsdale, Frankton and Nawton.¹⁶

The relief sought by the Trust

[22] In its notice of appeal the Trust sought a Business 5 zoning over a much larger area of land, being a 5.9 ha block of land fronting onto Greenwood Street from Killarney Road in the south through to Massey Street in the north. The Trust's site comprised 1.7ha of this land. After filing its evidence-in-chief, but before the hearing the Trust amended its relief to seek a planning framework that retains the industrial zoning over the site, but applies an overlay known as the Greenwood Mixed-use Overlay ("the overlay") to it. Specifically the Trust proposes the following:¹⁷

- (a) add a new section to the purpose of the Industrial Zone (chapter 9.1k) as follows:

The Greenwood Industrial Mixed Use Overlay Area is part of the Greenwood/Kahikatea drive corridor that has a number of consented retail and office activities and has resource consent provision for a supermarket. To provide for an integrated development of that site in accordance with existing consents and compatible mixed use activities, overlay provisions for the 1.7ha site will enable a small mixed use development to occur at a scale and character that will not adversely



¹⁶ Council Ex 2

¹⁷ Mr Manning, supplementary evidence, dated 19 August.

affect industrial activities in the Industrial Zone or impact adversely on the strategic role and business hierarchy of the central city and other business centres in the City.

- (b) add a new objective (9.2.9) to reflect the purpose outlined in 9.1k) stating:

An integrated mixed use development opportunity is provided for within the Greenwood Industrial Mixed Use Overlay area of a scale and character that will not adversely affect industrial activity in the surrounding Industrial Zone and will not adversely affect the strategic role of the Central City and other business centres in the city.

- (c) add three new implementing policies for the objective, as follows:

Policy 9.2.9b

The Greenwood Industrial Mixed Use Overlay area, in providing limited retail and office development opportunities in the Industrial Zone, requires the integrated development of the site.

Policy 9.2.9c

Urban Design outcomes and Traffic Management Safety and Efficiency are best managed through the integrated development of the Greenwood Industrial Mixed Use Overlay area.

Policy 9.2.9d

Caps on the extent of retail and office development within the Greenwood Industrial Mixed Use Overlay area ensure that the viability and vitality of the Central City and other Centres within the Commercial hierarchy are not compromised.

- (d) An explanation of the above provisions is also proposed.

[23] The main elements of the overlay rule framework to implement the policy framework and which override the Industrial Zone rules (which otherwise remain in effect) involve a new activity status table¹⁸ for the overlay area¹⁹ and specific standards²⁰ and provide for:



¹⁸ Rule 9.3.5

¹⁹ Identified in Figure 6-16 in Volume 2, Appendix 6.

²⁰ Rule 9.5.11

- (a) development on the 1.7 ha site with a maximum gross floor area (GFA) of 7,000m² ²¹;
- (b) within the maximum combined total of 5,600 m² for “commercial activity” ²²;
 - (i) supermarket with a maximum of 3,600m² GFA²³;
 - (ii) total non-supermarket retail activity that is not otherwise provided for in the Industrial Zone is not to exceed 2,000m² GFA retail (non-supermarket) activity²⁴ ; and
 - (iii) total office activity is to occupy not more than 1,000m² GFA²⁵;
- (c) New supermarket activity under 3,600m² GFA is to be assessed as a restricted discretionary activity²⁶ and subject to the same provisions which apply to a supermarket in the Industrial Zone²⁷. These are:

Resource consent applications for new supermarkets in the Industrial Zone must provide a Centre Assessment report, in accordance with section 1.2.2.19 (Information Requirements), which does the following:

- (i) addresses assessment criteria H2 which reads:

Whether and to what extent the proposed Supermarket activity in the Industrial zone:	
a)	Avoids adverse effects on the vitality, function and amenity of the Central City and sub-regional centres that go beyond those effects ordinarily associated with competition on trade competitors.
b)	Avoids the inefficient use of existing physical resources and promotes a compact urban form.
c)	Promotes the efficient use of existing and planned public and private investment in infrastructure.
d)	Is located within a catchment where suitable land is not available within the business centres.
e)	Reinforces the primacy of the Central City and does not undermine the role and function of other centres within the business hierarchy where they are within the same catchment as the proposed supermarket.



²¹ Rule 9.3.5j
²² Rule 9.5.11.2.
²³ Rule 9.5.11.3.
²⁴ Rule 9.5.11.4.
²⁵ Rule 9.5.11.5.
²⁶ Rule 9.3.5.d.
²⁷ Rule 9.5.4 and Rule 9.5.6.

To demonstrate the above criteria can be satisfied an applicant must supply a Centre Assessment report. The content of the Centre Assessment report shall be prepared in accordance with clause 1.2.2.19.

- (ii) demonstrates that the proposal will not undermine the role and function of other centres within the localised catchment in the business hierarchy;
- (d) new buildings, new activities, expansion of existing buildings and expansion of existing activities are to be restricted discretionary (overriding all the permitted and controlled activities in the Industrial Zone) with matters of discretion and assessment matters addressing:²⁸ design and layout, character and amenity, hazards and safety, transportation and three waters capacity and techniques.

Along with the cross-references to the general matters of discretion and assessment matters, there are additions for design and layout and for character and amenity. These include consideration of the design and layout, the character and amenity and the transportation effects of development of the whole of the overlay area, and integration of the proposed new or expanded building or activity with the proposed full development of the overlay area. For transportation, there are the additions of the preparation of a broad integrated transport assessment (ITA) and the consideration of the maximum practical reduction in the number of vehicle crossings to ensure safe and efficient traffic management.

- (e) commercial activities over the caps specified above are non-complying activities;²⁹
- (f) add new "integrated development standards"³⁰ to require the Trust to provide an Overlay Area Development Plan with any application for resource consent to show details of the whole overlay area and to include:³¹
 - (i) title amalgamation. The proposed condition includes specific details of the lots required to be amalgamated into one certificate of title. Non-compliance with this standard results in the proposal being treated as a non-complying activity;



²⁸ Rule 9.7xvii.

²⁹ Rule 9.3.5h

³⁰ Counsel for the appellants' closing submissions at [154].

³¹ Rule 9.5.12.

- (ii) a reduction in the number of vehicle crossings (one onto Killarney Road and no more than three onto SH1 where the proposal includes a supermarket and/or results in a total GFA of development greater than 3500m²), with failure of this standard resulting in the proposal being a non-complying activity. There is also a requirement that the location, function and controls of the vehicle crossings be addressed in the required broad ITA; and
- (iii) a staging plan to show how any staging of development within the overlay area provides for the required integrated site development.

[24] Mr Manning (the planner for the Trust) referred to the above as a *commercial node*; however in reality the Trust seeks a spot zone for the site to establish a new commercial centre in the Industrial Zone whilst retaining its option to establish other industrial activities alongside it. In particular, Mr King referred to the option of a fast food drive-through being a possibility, such an activity being assessed as a restricted discretionary activity in the Industrial Zone.³²

[25] We signal that the type of commercial centre the Trust seeks does not fit within the business centres hierarchy provisions of the proposed plan because it is neither a suburban centre nor a neighbourhood centre, the two options nearest in kind to the commercial centre the overlay seeks to provide for. More will be said of this later.

Are the Trust's new objective and policies within scope?

[26] The scope issue has arisen because the Trust has re-shaped the relief sought by it over the course of the appeal, most relevantly in relation to the underlying zoning that should apply to the site. The introduction of the overlay has proved challenging because the objectives and policies of the Industrial Zone do not sit easily with what the Trust proposes, so it has put forward the new objective and policies outlined above as part of the package for consideration.

[27] The new objective and policies that are at the heart of the Council's challenge about scope. Mr Bartlett QC submitted they are an attempt to *back-fill* something that does not fit within the Industrial Zone. However, the Trust says that its relief has



³² Transcript, p 396, line 18.

remained the same in principle throughout the process. It argues that the new objective and policies emphasise that the rules apply only to this site and the issues peculiar to it.

[28] It is the parameters (or scope) of an appeal that provides the Court with the power (or jurisdiction) to hear it. If the new objective and policies are outside the scope of the appeal, then they are not able to be considered as part of the Trust's relief. This will impact on how well the Trust's proposed rules fit within the unchallenged objectives and policies of the Industrial Zone.

[29] It is useful to first outline the changes to the relief sought before analysing them against the legal principles that have developed about scope.

The changes/iterations to the Trust's relief

[30] Mr Bartlett QC provided us with a table which very helpfully set out the various changes to the relief sought by the Trust which was largely accepted as correct by Mr Manning during cross-examination. We have summarised the relevant parts of it below:³³

- (a) The relevant Trust submission on the proposed plan was dated 29 March 2013.³⁴ It opposed the proposed industrial zoning over a 5.9ha block fronting onto Greenwood Street from Killarney Road through to Massey Street (including the site) and instead sought a zone change to Business 6 (Suburban Centre Fringe) with the rules of this zone to apply as a consequence. There were no amendments sought to any objectives and/or policies of either zone.
- (b) As is usual, a section 42A report was prepared and circulated to all parties prior to the Council hearing on the proposed plan. In relation to the Trust's site, it stated:³⁵

Whilst it is acknowledged that commercial activities have occurred within the Industrial Zone as a direct result of the permissive nature of the Operative Plan, the purpose of the proposed plan is to reverse this ad-hoc dispersal trend from occurring. To re-zone large tracts of Industrial Zone to commercial would be contrary to the compact centres approach and the



³³ Transcript, p 140

³⁴ Submission number 281, agreed bundle of documents, Tab 2. Specifically, and relevant to this appeal, it sought changes to Zoning Map 43A

³⁵ Agreed bundle of documents, Tab 4.

strategic direction of the PRPS. No sufficient justification has been provided to justify change of zoning of the large extent of land proposed or any consideration given to the existing centres hierarchy. Policy 6.15, now Policy 6.16 of the RPS is quite clear that commercial development is not located on land specifically provided for industrial activities unless it is ancillary to those industrial activities. No change is therefore proposed.

(c) Mr Manning provided a statement supporting the Trust's submission at the hearing of the proposed plan before the commissioners.³⁶ Mr Manning considered it important to consider the existing surrounding environment, which he described as comprising "a vast majority of existing premises that are of a retail-commercial nature". He referred to the regeneration of the adjoining residential area to the west (Business Zone 6 - Suburban Centre Fringe); he referred to the site having approval for a *large retail development* of approximately 3,600m² with at-grade parking; and he contended that the section 32 analysis by the Council was flawed because it did not detail any rationale for retaining the area as industrial; nor did it examine any alternative zoning. Mr Manning did not analyse or refer to any of the then proposed RPS provisions.

(d) The Council decided to reject the Trust's submission to change the zoning from Industrial to Business 6. The decision was expressed as follows:

The submissions seek a change of zoning from Industrial to Business 6 zoning and are rejected as:

- It reduces the efficient and effective implementation of the Plan to achieve its objectives;
- The relief sought is not considered to be valid in the context of ensuring vitality and vibrancy of the higher order centres within the business hierarchy;
- It contains no relevant justification as to why the alternative sought would be more appropriate.

(e) On 19 August 2014 the Trust filed its notice of appeal to the Environment Court.³⁷ It sought as its relief to:



³⁶ Agreed bundle of documents, Tab 3.

³⁷ Agreed bundle of documents, Tab 6.

- (i) Apply a Business 5 or 6 zoning to the properties outlined in the 5.9ha block of land fronting Greenwood Street bounded by Killarney Road and Massey Street to the north;
- (ii) **Alternatively** to retain the industrial zoning over the land, but provide an overlay to allow for convenience retailing and for the existing/approved/ similar developments to continue to operate and grow without having to place reliance on s 10 (existing use rights);
- (iii) Such other consistent relief as appropriate to make provision for ongoing commercial use of the land and make provision for commercial use of those parts of it subject to existing resource consents for commercial activities.

(emphasis added).

- (f) After various case management steps were taken by this Court and it became evident that a hearing would be necessary, an evidence exchange timetable was directed which included Court-facilitated expert witness conferencing.
- (g) On 23 November 2015 the transport experts took part in such a witness conference. At this point the land area concerned was stated to be the 1.7ha site owned by the Trust and not the 5.9ha block originally covered by the notice of appeal. In other words, the appeal was identified as being limited to the land owned by the Trust. Various baseline scenarios were considered at the conference³⁸ upon which estimates of the traffic likely to be generated by each were discussed. The baseline scenarios used for the purposes of comparison were:
 - Scenario 1 – the permitted baseline under the Industrial zoning in the proposed plan.
 - Scenario 2 – the consented baseline with the consented supermarket in place and the remaining parts of the overall area taking the industrial baseline.



³⁸ JWS transport experts, 23 November 2016; Mr Apeldoorn, evidence-in-chief, Appendix H. The wording of the scenarios is that which appears in the JWS. The description and use of the term "baseline" is not accepted by us as legally correct, however this does not affect the figures produced.

- Scenario 3 – the proposed Business 5 zone (as referenced in the July 2015 Traffic Design Group Report – paragraph 1), assumed to have a maximum GFA of 7,000m².

The Business 5 zoning was not a change from the Business 6 zoning originally sought by the Trust; rather, it reflected the fact that both Business 5 and Business 6 zones had been merged into one Business 5 zone. For all intents and purposes, therefore, the zoning sought at this stage by the Trust remained the same, albeit for a reduced area (1.7 ha) with a maximum specified GFA of 7,000m².

- (h) On 10 February 2016, Mr Manning filed his evidence-in-chief. The relief addressed in his evidence sought to retain a Business 5 zoning over the land.
- (i) On 7 April 2016 counsel for the Trust wrote to the Court and parties outlining draft alternative relief for the 1.7ha site as follows:
- (i) to retain the Industrial Zone over the land, but to add an overlay to enable mixed use/commercial activities based on the suburban centre zone rules;
 - (ii) a cap on commercial development of 5,600m² GFA, with the remaining land to be subject to the underlying Industrial Zone rules/standards.
- (j) On 8 April 2016 counsel for the Trust proposed a further version of the alternative relief now sought by the Trust in the form of tracked changes to chapter 9 of the proposed plan which deals with the objective, policies and rules in the Industrial Zone. The tracked change amplified that which had been relayed on 7 April 2016, but added the following:
- (i) a new addition to the purpose statement for the Industrial Zone;
 - (ii) a new objective 9.2.7 and a new policy 9.2.7a together with a new explanation;



- (iii) an additional assessment criterion H entitled "Function Vitality and Amenity of Centres with particular focus on effects on the Frankton B5 Suburban Centre."
 - (iv) There was a proposed cap on commercial development of 5,600m² GFA, but with any remaining GFA subject to the Industrial Zone rules/standards, i.e. there was no overall cap for the site.
- (k) On 11 April 2016 Mr Manning filed supplementary evidence. This evidence referred to the additional objective and policies, and referred to a site development capacity of 7,000m² GFA with a 5,600m² retail/office cap. The remaining GFA was to be "supplemented by industrial development already provided for in the Industrial Zone up to the site development capacity."
- (l) On 18 April 2016 a further version of the proposed relief was circulated to the Court and the parties by counsel for the appellant in the form of tracked changes to chapter 9 Industrial Zone including proposed amendments to the Industrial Zone Purpose Statement, proposed new objective 9.2.7 and proposed new Policy 9.2.7a together with a new explanation.
- (m) On 29 April 2016 a further version of the proposed relief was circulated to the parties in the form of tracked changes to chapter 9 Industrial Zone. This included a new Rule 9.3.4 requiring a comprehensive development consent for the overlay area. This was the first time the idea of a comprehensive development consent had been raised by the Trust.
- (n) On 6 May 2016 Mr Manning filed further evidence-in-chief. This addressed the previous amendments that had occurred since his supplementary evidence of 11 April 2016.
- (o) On 9 May 2016 further tracked changes were circulated, however these changes were described as modest and on 13 May 2016 Mr Manning filed his rebuttal evidence, which included certain minor amendments.
- (p) The hearing began on 13 June 2016. On the fourth day of the hearing (16 June 2016) counsel for the Trust circulated amended and updated



proposed relief – three more policies, 9.2.9b, c and d were added; the use of a comprehensive development consent was abandoned, and a new rule was proposed in the activity status table in the list of activities to include “new buildings and activities” as restricted discretionary activities. New assessment criteria for these restricted discretionary activities were added. Standards were also included to reflect caps on commercial and office activities within the overlay. The key change to the policies was to include a reference to integrated site development in the objective and policies, as well as referencing traffic and amenity effects.

- (q) Further supplementary evidence and rebuttal evidence was filed by Mr Manning in July and August 2016, and on 19 August 2016 Mr Manning filed a further statement which had not been directed by the Court and had not been provided for in timetabling directions. In relation to policy 9.2.8d, reference was made to caps on “total development” for the site, and previous reference to “convenience” retail was deleted. The further relief was refined to include reference to “supermarkets” in activity status table 9.3.5(8) together with a cross-reference to the proposed standards in rules 9.5.11.2 to 9.5.11.5, which has an activity status of non-complying. A new activity j) was included in the proposed activity status table for “development in excess of 7,000m² GFA within the Mixed Use Overlay Area”, which was also identified as a non-complying activity.

[31] This process of refinement and iteration extended into closing submissions, when the amalgamation of titles and limitation of vehicle crossings to and from the site were proposed to be included in the rules. Whilst some changes can be expected in cases such as this, we consider that many of the changes (especially those made during the hearing) were proffered significantly late in the piece, were reactive to difficulties revealed during questioning and unfortunately gave the clear impression that the relief sought had not been particularly well thought out.



The legal principles

[32] The starting point is Schedule 1 of the RMA. It outlines the process to be followed when a district plan is reviewed.³⁹ The local authority that has prepared the proposed plan must prepare an evaluation report (under s 32) in respect of it, and publicly notify it.⁴⁰ Members of the public then have the opportunity to inspect the proposed plan and make a submission in respect of it, with certain limitations applying where the issue of trade competition arises.⁴¹ A summary of all the decisions requested by submitters must then be publicly notified⁴² and there is then a period provided for certain persons to make further submissions on the plan.⁴³ A hearing is then undertaken unless no person filing a submission has indicated they wish to be heard.⁴⁴ A decision *on the provisions and matters raised in the submissions* must then be made⁴⁵ and notified,⁴⁶ and there is a right of appeal to the Environment Court.⁴⁷ Only a person who has made a submission on a proposed plan may appeal to the Environment Court, but they can only do so if they referred to *the provision or the matter* in their submission on the proposed plan.⁴⁸

[33] In *Re Vivid Holdings Limited*⁴⁹ the Environment Court determined that to establish the right to appeal, a submission must first raise a relevant resource management issue and then a particular form of relief must be:⁵⁰

- (a) Fairly and reasonably within the general scope of:
- (i) an original submission⁵¹; or
 - (ii) the proposed plan as notified⁵²; or
 - (iii) somewhere in between⁵³. ...

³⁹ It also applies when there are proposed reviews of regional policy statements, regional plans and regional coastal plans.

⁴⁰ Clause 5, Schedule 1.

⁴¹ Clause 6.

⁴² Clause 7.

⁴³ Clause 8.

⁴⁴ Clauses 8B and C

⁴⁵ Clause 10.

⁴⁶ Clause 11.

⁴⁷ Clause 14.

⁴⁸ Clause 14(2)(a).

⁴⁹ [1999] NZRMA 468.

⁵⁰ Above FN 19 at [19]

⁵¹ *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408; *Atkinson v Wellington Regional Council* W13/99 is a recent example referred to by Mr Todd

⁵² *Telecom NZ Ltd v Waikato District Council* A74/97 at p.4

⁵³ *CBD Development Group v Timaru District Council* C43/99



[34] In order to determine whether or not a form of relief is within scope, the Court will need to consider the facts of the case and the inferences that can properly be drawn from those facts. We were referred to two cases which illustrate this point.

[35] In *The Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council*⁵⁴ neither the submission nor the notice of appeal made reference to the policy provisions that the appellant sought to change, which included a new policy and an amendment to an existing policy in order to provide consistency between the agreed amendments to the rules determining activity status for the demolition of certain heritage buildings and structures. In that case the Court held:

[40] Neither the appellant's submissions nor the notice of appeal raised Policy 19.2.3a in the relief sought; however, the test is not about determining whether the policy was named in the submissions or appeal documents, but whether the amendments sought are reasonably and fairly raised in the course of the submissions.

[36] As the policy framework was raised in the course of submissions, the Court found that the agreed relief was *sufficiently inferential* such that a person reading the submissions would have contemplated that those matters were at issue.⁵⁵ The amendments were determined by the Court to be within the scope of the appeal.

[37] In *The Warehouse Limited & Ors v Dunedin City Council*,⁵⁶ the Court heard two proceedings together; a reference in relation to a decision by the Council in relation to the proposed plan's zoning of the site as industrial, and an appeal against the refusal of the Council to grant a resource consent to one of the appellants to build and operate a large scale bulk retail store on the same site.

[38] In relation to the proceeding concerning the proposed plan change, the Court considered a later proposal for amendments to objectives and policies when the submission did not raise those particular matters. We were referred to in the following excerpt from the case:⁵⁷

[74] We consider that a submission or (on appeal to this Court) a reference may fail simply because it is inconsistent with wider objectives and policies of a



⁵⁴ [2015] NZEnvC 166.

⁵⁵ [2015] NZEnvC 166, at [46].

⁵⁶ C101/2001.

⁵⁷ Above fn 32 at [76].

proposed plan; each case has to be assessed on the particular wording of the plan involved...

[75] However in other cases such an approach – whether by way of submission (or resulting reference) or even by plan change or variation – might lead to a substantial weakening of a (proposed) plan. Indeed results quite other than those intended in the original plan may occur because the proposed method of implementation does not implement or achieve any of the proposed plan's objectives or policies. In such cases where no specified change has been sought to the objectives and policies, the proposed zone (or rule) is unlikely to be justifiable.

[76] In our view the correct approach when drafting a submission (or reference) on rezoning is to ensure that the relief sought covers not only the issue of rezoning itself, but also – and primarily – any necessary changes to the plan's objectives and policies.

[77] We do not overlook the power given to a local authority by clause 10(2) of the First Schedule to the Act to include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions. However in our view a change to the objectives and policies which govern zonings (which are themselves either policies (*North Shore City Council v North Shore Regional Council*) or methods of implementation) will not usually be able to be perceived as a "consequential" change. We have commented elsewhere that the tail should not wag the dog: objectives and policies drive methods of implementation; not the other way round. So we do not consider clause 10(2) can be used to widen the scope of a submission or reference. ...

[39] In that case the appellant sought to add to an objective providing for large-scale retail activity to the area affected by the plan change in circumstances where the objective referred to two other areas within the city that did not include the site. The Court considered that the only way to do this would be via s 293 of the RMA and that an application would need to be made for this to occur, with the indication that the proposed re-zoning would have to be re-notified.

[40] These cases are helpful, but do no more than highlight that each particular case will depend on its facts.



Analysis

[41] As outlined above, to establish jurisdiction a particular form of relief must be fairly and reasonably within the general scope of an original submission, or the proposed plan as notified, or somewhere in between.

[42] In the present case, the proposed plan as notified zoned the Trust's land Industrial, and the Trust's submission in respect of it sought a Business 6 zoning (now Business 5) over the land. Mr Lang's point was that the relief now proposed by the Trust is between those two ends of the spectrum of jurisdiction, being an industrial zoning but with provision for business activities similar to those that can establish within the Business 5 zone, or something in between. He submitted that the overlay as opposed to a complete zone change was an option within the bounds of the two zoning options, and was therefore *something in between*. If this is accepted, Mr Lang submitted that a site-specific modification of the objectives and policies, to create consistency between the objectives, policies and the rules of the zone was foreseeable. Mr Lang referred to the use of overlay provisions being endorsed by the Council as a way to resolve other appeals against the proposed plan. He referred to the A & A King Family Trust (Greenwood Street corridor provisions) appeal,⁵⁸ the Body Corporate 550337 (Te Rapa corridor provisions) appeal⁵⁹ and the Porters (activities on land between Maui Street and Eagle Way) appeal.⁶⁰

[43] We agree that the Greenwood Street corridor and Te Rapa corridor appeals are relevant by way of analogy, but the Porters' appeal, whilst being resolved by way of an overlay, is not, as that concerned the use of s 293 of the RMA by the Court to achieve the outcome proposed. We note that the Greenwood Street corridor and Te Rapa corridor appeals both were resolved by including dedicated objectives and policies (in the case of the Greenwood Street corridor) as well as additional permitted retail activities, and a policy in respect of the Te Rapa corridor case.⁶¹

[44] The question for us is whether the amendments sought were reasonably and fairly raised in the course of the submission or the notified decision. On balance we consider that they are. The Trust was seeking a commercial zoning over the land and the Council was seeking an industrial zoning. What has subsequently been sought by the Trust is something in between the two. Whilst Mr Bartlett QC correctly identified



⁵⁸ ENV-2014-AKL-000156.

⁵⁹ ENV-2014-AKL-000148.

⁶⁰ ENV-2014-AKL-000145.

⁶¹ See [2016] NZEnvC 101 A & A King Family Trust v Hamilton City Council.

that the original submission did not signal that the objectives and policies of the Industrial Zone would be subject to amendment, this approach has been taken without objection by the Council to other areas within the Industrial Zone that have been amended through the appeal process. We have referred to these above.

[45] In all of the circumstances we consider that there is scope for the Court to consider the new objective and policies, and that the real issue for us is whether they, together with the accompanying rules, survive the legal tests applicable to plan reviews. This decision has however been one we have considered very carefully, because the iterations to the relief sought in this case and the timing of it have been well beyond what we consider to be acceptable on appeal.

Which option best meets the legal tests for a plan review?

[46] There were two main areas which the Council contended were problematic for the Trust's argument and which favoured the Council's proposed provisions. The first concerned the very nature of the commercial activity sought to be undertaken on this site (a commercial centre in an Industrial Zone), which it said fundamentally contravened the business centres hierarchy approach and the approach to the use of industrial land in the proposed plan for which there was no factual justification. The second concerned transportation effects which it and the Agency said would be greater if the Trust's overlay was favoured, and would therefore not give effect to the RPS provisions about transport or those in the proposed plan.

[47] We deal with both the commercial and transport topics in turn, however we first provide a brief overview of the strategic direction signalled under the proposed plan with reference to the RPS provisions and then address the relevance of the existing unimplemented supermarket consent. This provides a context to both the commercial and transport topics and are needed to understand the detail of the evidence called about the need for the commercial centre on the site and the potential for adverse traffic effects to arise if the overlay is incorporated into the proposed plan.

Overview of strategic provisions in the RPS and the proposed plan

[48] The proposed plan contains specific objectives and policies which are designed to give effect to the RPS. We start therefore by outlining the relevant provisions of the RPS and the background that informed them. The purpose of providing this level of



detail is to signal that the strategic direction outlined in the proposed plan as it relates to this appeal is one which has been developed over a long period of time with significant input from all three territorial authorities within the Waikato Region (including the Hamilton City Council), the Waikato Regional Council, tangata whenua (Tainui Waka Alliance) and the Agency.

Future Proof Strategy

[49] The development of the Future Proof Strategy (**the strategy**) preceded the RPS.⁶¹ It is a growth management strategy and implementation plan for the territorial areas of the Waikato District Council, the Waipa District Council and Hamilton City Council (described in the strategy as "**the future proof area**"). The strategy was developed within the broad context of the Local Government Act 2002 (**LGA 2002**) with the regional council, tangata whenua and the Agency being directly involved in its development. It takes a strategic, integrated approach to long-term planning and growth management in the future proof area.⁶² The strategy's operational and implementation processes have been designed to be consistent with the RMA, the LGA 2002 and the Land Transport Management Act 2003 (**LTMA**).⁶³

[50] Having identified the future proof area as one with on-going population growth and significant levels of development, the strategy identifies 50-year land supply needs in the future proof area and sequences its release and development according to its ability to be serviced by appropriate infrastructure and equitable funding.⁶⁴ The strategic approach underpinning it is described as a "blend of compact settlement and concentrated growth". The rationale for this approach was to allow the costs of growth to be identified early so that a more cost-effective form of infrastructure could be delivered, and also because land use certainty would thereby be provided to the community, developers, local and central government.⁶⁵

[51] The strategic options for land use were publicly consulted upon, as was the draft strategy, and the settlement pattern scenario which forms the basis of the strategy was selected on the basis of public feedback and the evaluation results.⁶⁶ Whilst the strategy is currently being updated, the evidence before us was that this will not alter

⁶¹ Formally known as the Future Proof Growth Strategy & Implementation Plan 2009.

⁶² Mr Tremaine, evidence-in-chief, at [15].

⁶³ As FN 35 above, at [16].

⁶⁴ As FN 35 above, at [15].

⁶⁵ As FN 35 above, at [17].

⁶⁶ As FN 35 above, at [18].



the fundamental principles of it or the overall approach to the settlement pattern it promotes.⁶⁷

[52] The strategy contains key principles for business development, with the term “business” encompassing both industrial and commercial activities.⁶⁸ It identified that devolved or out of centre retail and office development had the potential to undermine the viability of the Hamilton Central Business District (**the CBD**), neighbourhood centres, towns and villages.⁶⁹

[53] The strategy contains the following key approaches for business development:

- (a) there is a focus on Hamilton CityHeart (being the CBD)⁷⁰ as the commercial and business heart of the future proof area, i.e. it is of regional significance;
- (b) it seeks to ensure commercial and industrial developments are not located in areas that undermine the areas of influence of the CBD, including the extensive development of retail/mall shopping in locations not identified in the strategy;
- (c) it outlines that commercial activity should aim to maximise the use of existing areas and facilities;
- (d) it seeks to discourage the development of large format retail outside of the CBD, suburban and town centres.⁷¹

[54] The strategy contains actions to give effect to these matters. These include:⁷²

- providing for suitable business and employment opportunities close to where people live;
- agreed locations for business land; and



⁶⁷ As FN 35 above, at [22].

⁶⁸ As FN 35 above, at [23].

⁶⁹ As FN 35 above, at [25].

⁷⁰ Whilst the strategy refers to Hamilton CityHeart, we refer to it as the CBD for consistency reasons.

⁷¹ As FN 35 above, at [26].

⁷² As FN 35 above, at [27].

- developing a strategic approach to office and retail development and ensuring that settlement patterns do not adversely impact upon the benefits of the Waikato Expressway.

[55] Mr Tremaine, the implementation advisor for the strategy, gave evidence that the Industrial Zone provisions of the proposed plan are consistent with these approaches. His evidence was not challenged.⁷³

The RPS

[56] The RPS implements key aspects of the strategy, including the settlement pattern and gives statutory effect to its principles, approaches and actions.

[57] The RPS identifies issues relating to managing the built environment in Issue 1.4. It directs specific attention to the following matters:

- (a) high pressure for development in Hamilton City;⁷⁴
- (b) increasing conflict with and demands for new infrastructure;⁷⁵
- (c) the need to use existing infrastructure efficiently and to manage and enhance that infrastructure;⁷⁶
- (d) unplanned dispersal of retail and office development having had consequential effects on the function, amenity and vitality of some elements of the CBD;⁷⁷ and
- (e) the integrated relationship between land use and development, and the transport infrastructure network.⁷⁸

[58] The Explanation to Issue 1.4 outlines that:

...

Efficient and effective infrastructure is crucial for our economic progress in social and visible wellbeing. However, land use change can adversely affect this, for



⁷³ As FN 35 above, at [28].

⁷⁴ Issue 1.4 a).

⁷⁵ Issue 1.4 c).

⁷⁶ Issue 1.4 ca)

⁷⁷ Issue 1.4 f).

⁷⁸ Issue 1.4 g)

example ribbon development along arterial roads can result in the slowing of traffic and may consequentially affect the efficiency of transport along these routes. ...

Hamilton Central Business District's continued viability, vibrancy and accessibility is significant to the entire region. The previous planning framework has enabled an unplanned dispersal of retail and office development which has contributed to the under-performance of some elements of the Central Business District with consequential effects on its function, amenity and vitality.

[59] The relevant objective addressing this issue is:

Objective 3.12 Built environment

Development of the **built environment**⁷⁹ (including transport and other infrastructure) and associated land use occurs in an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes, including by:

...

c) integrating land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors;

...

e) recognising and protecting the value and long-term benefits of **regionally significant infrastructure**⁸⁰;

...

g) minimising land use conflicts, including minimising potential for reverse sensitivity;

...

j) promoting a viable and vibrant central business district in Hamilton city, with a supporting network of sub-regional and town centres; and

k) providing for a range of **commercial development** to support the social and economic wellbeing of the region.



⁷⁹ The RPS bolds terms that are defined in its glossary.

⁸⁰ The RPS defines "regionally significant infrastructure" to include "significant transport corridors as defined in Map 6.1 and 6.1A".

[60] Policy 6.16 of the RPS deals with commercial development in the future proof area. "Commercial development" is defined in the glossary to the RPS as:

The range of commercial activities including office, retail and commercial service provision.

[61] Particularly relevant to this appeal are the following parts of Policy 6.16:

Policy 6.16 - Commercial development in the Future Proof Area

Management of the built environment in the **Future Proof area** shall provide for varying levels of **commercial development** to meet the wider community social and economic needs, primarily through the encouragement and consolidation of such activities in existing commercial centres, and predominantly in those centres identified in Table 6-4 (Section 6D). Commercial development is to be managed to ...

- b) support and sustain existing physical resources, and ensure the continuing ability to make efficient use of, and undertake long-term planning and management for the transport network, and other public and private infrastructure resources including community facilities;...
- f) maintain Industrial Zoned land for industrial activities unless it is ancillary to those industrial activities, while also recognising that specific types of commercial development may be appropriately located in industrially zoned land; and
- g) ensure new commercial centres are only developed where they are consistent with a) to f) of this policy. New centres will avoid adverse effects, both individually and cumulatively, on:
 - (i) the distribution, function and infrastructure associated with those centres identified in Table 6-1 (Section 6D);
 - (ii) people and communities who rely on those centres identified in Table 6-4 (Section 6D) for their social and economic wellbeing, and require ease of access to such centres by a variety of transport modes;
 - (iii) the efficiency, safety and function of the transportation network; and
 - (iv) the extent and character of industrial land and associated physical resources, including through the avoidance of reverse sensitivity effects.

(underline added for emphasis)



[62] Table 6-4 sets out a hierarchy of major commercial centres which identifies the CBD as the primary centre in the region for commercial, civic and social activity and the Te Rapa North Commercial Centre (The Base shopping centre) as the primary sub-regional centre and Chartwell as a secondary sub-regional centre. Table 6-2 sets out the number of hectares allocated for industrial land allocation within the future-proof area and the timing or staging of its release. Industrial development is to be *primarily* located in the strategic industrial nodes (Policy 6.14 c)) outlined in Table 6-2. The overlay area is not one of these.

[63] The implementation methods in respect of Policy 6.16 include a requirement that any new commercial development is managed in accordance with Policy 6.16 through the Council's district plan.⁸¹

The proposed plan

[64] Mr O'Dwyer, the Council's city planning manager, gave evidence about the role and influence of the strategy in the plan review and also addressed how the proposed plan gives effect to the RPS provisions, which he described as being "directive about the preservation of the industrial land resource in Hamilton". He described the introduction of the centres hierarchy within the proposed plan as also giving effect to the relevant provisions of the RPS.⁸² Mr Manning did not fully address the ways in which the Trust's most recent proposal gives effect to the RPS.

[65] The proposed plan involves a substantial shift in the policy approach to retail and commercial provision from the operative plan, reflecting concerns about the outcomes of the approach in the operative plan which enabled dispersed, ad hoc office and retail development across the city, including within the Industrial Zone and outside the CBD. This, coupled with the strategy's proposed land use pattern embedded in the RPS (which was developed at around the same time as the proposed plan), and the specific policies about industrial and commercial development, have influenced the strategic direction of the proposed plan.

[66] Mr O'Dwyer gave evidence of the policy shift and the reasons for it.⁸³



⁸¹ Policy 6.16.1.

⁸² As FN 10 above, at [26], [27].

⁸³ As FN 10 above, at [22] – [28]. In this quote the PDP refers to the proposed plan and the ODP refers to the operative plan.

In contrast to the PDP, the ODP provided for a much wider set of land uses in the Industrial Zone which enabled general office and retailing activities. This has contributed to the distribution of these activities away from the established and planned for commercial and business centres in Hamilton over a 10 to 15 year period, while simultaneously diluting the industrial land resource and making it harder to effectively plan and manage integrated infrastructure development.

Against that background, the most significant elements in the PDP that are relevant to this appeal relate to introduction of a centres hierarchy to proactively manage the location and distribution of office and retail development across the city, and the preservation of industrial land for industrial purposes. ...

The decisions version of the PDP includes objectives, policies and land uses in the Industrial Zone to ensure that Industrial land is primarily preserved for industrial land uses.

The strategic direction of maintaining industrial land for industrial purposes also gives effect to the relevant provisions in the Waikato Regional Policy Statement (WRPS) that are directive about the preservation of the industrial land resource in Hamilton.

The introduction of a centres hierarchy within the PDP is directly linked to the policy position to preserve industrial land and also gives effect to the relevant provisions of the WRPS which is now operative.

[67] The proposed plan gives effect to the RPS through the objectives, policies and methods in chapter 2 Strategic Framework, chapter 6 Business Zones, chapter 7 Central City Zone and chapter 9 Industrial Zone and through the city-wide transportation provisions.

[68] Chapter 1 of the proposed plan is entitled Plan Overview. At 1.1.3 Plan Structure, the following is outlined:

b) Strategic Chapter

This outlines the strategic objectives and policies for the future direction of the City. It is intended that the Objectives and Policies of this chapter provide a hierarchy of district-wide strategic considerations that **sit over** the Objectives and Policies of specific zones, sites and features.

(emphasis added)



[69] Chapter 2 Strategic Framework of the proposed plan is clear, unambiguous and self-explanatory. We set out the relevant parts of it as follows:

2.1 Purpose

a) The principal purpose of this chapter is to provide clear and strong links between the District Plan and the City's Strategies, which are listed in Chapter 1: Plan Overview, Section 1.1.2.2 – Integration of the Plan with Other Plans and Documents. To this end, this chapter sets out the strategic objectives and policies for Hamilton City. Other chapters contain objectives, policies and rules that implement and support this strategic policy framework.

b) One of the key approaches to achieving a compact city and sustainable management of physical resources is to recognise the existing and distinctive business centres that will make up a business hierarchy. The overall aim is to maintain the primacy of the Central City as a viable and vibrant metropolitan centre.

...

Objective 2.2.4

Establish and maintain a hierarchy of viable and vibrant business centres that provide a focus for retail, commercial and entertainment activities and serve the social, cultural, environmental and economic needs of the community

Policy 2.2.4

2.2.4a) Business activity and development shall locate in the most appropriate centre for its role, according to the following hierarchy:

- i. The Central City is the primary business centre, serving the City and wider region, and is the preferred location for significant office, commercial, retail, entertainment and civic activities.
- ii. Chartwell and Te-Rapa North complement the Central City, to serve large parts of the City and adjoining districts, and contain primarily retailing, entertainment and services.
- iii. Suburban centres, to provide convenience goods, community services, facilities and employment to service immediate suburban catchments.⁸⁴
- iv. Ruakura Retail Centre, to serve the Ruakura Structure Plan area and adjacent catchment.



⁸⁴ The suburban centres are noted on Figure 2.1a "Hamilton's Plan at a Glance", p 2-2.

- v. Neighbourhood centres, to contain retailing and service activities to serve immediate residential catchments.

2.2.4b) The distribution, type, scale and intensity of activities outside the Central City does not undermine the viability, vitality and vibrancy of the Central City, its amenity values, or role in meeting the needs of the region

...

Policy 2.2.5

...

2.2.5c) Industrial Zoned land shall be safeguarded for industrial purposes.

[70] The strategic framework then drives the other provisions of the proposed plan as referred to above, relevantly here chapter 9 Industrial Zone. Any discretionary or non-complying activity has to consider the strategic framework objectives and policies, which is a strong signal of their importance.⁸⁵

The relevance of the unimplemented supermarket consent

[71] As outlined above, the Trust's intention is to establish a small-scale convenience shopping and service centre to serve the western suburbs and passing traffic, with a supermarket as the "anchor" activity.

[72] Resource consent to allow a supermarket development on the site was granted on 12 February 2013 by the Council. Although Mr Swears (the transport expert for the Agency) did not support the application, the Agency gave affected party approval to the application.⁸⁶ If not implemented, that consent lapses within 6 years, which now leaves a life of 2.5 years.⁸⁷

[73] The supermarket consent has not been implemented. Mr King explained that he intends to implement the consent, which will either take the form of a small supermarket (such as a Four Square or Fresh Choice) or an ethnic supermarket.⁸⁸ We were told during the course of the hearing that the approved supermarket is 3,600m² and covers 75% or 80% of the overlay area. Any change to the size of the supermarket may involve an application to vary the conditions of the existing consent or a new



⁸⁵ As in the proposed plan and stated directly under the heading of chapter 2.2 Objectives and Policies: Strategic Framework.

⁸⁶ The Agency's opening at [5.1], [5.3].

⁸⁷ The appellant's closing, 13 September 2016 at [88], Agreed bundle of documents volume 2, p 22.

⁸⁸ Transcript, p 379.

consent. We were provided with a copy of the decision on the application to allow the supermarket development at the site, but not all of the background documents or plans referred to in the decision.

[74] There are requirements for a suitably qualified person to prepare for approval by the Council a Landscape and Planting Plan before the consent is implemented (conditions 20-22). That plan is to generally screen and soften the carparking area fronting Greenwood Street and Killarney Road with a minimum of 2m wide amenity planting and provide solid or wide screening in a minimum 2m area along the western Amenity Protection Area boundary abutting the Residential Zone. One tree is to be planted for each 15 car parking space.

[75] Conditions (6, 7 and 8) require a minimum of 180 vehicle parking spaces, with four accessible needs parks and loading bays.

[76] There are conditions that relate to access:

- (a) left-in, left out, right in access to Greenwood Street, the detailed design of which is subject to approval by the Agency (conditions 10 and 13);
- (b) left-in, left-out access to Killarney Road, the detailed design of which is subject to approval by the Council (condition 11);
- (c) yellow no-stopping lines along the site frontage on the western side of Greenwood Street (condition 12); and
- (d) a heavy/service vehicle exit to the north on Greenwood Street (condition 14) with a sign advising operators not to use Bandon, Smith, Allen and Primrose Streets (condition 15).

[77] Mr Apeldoorn, the traffic expert for the appellant, prepared a Transport Assessment Report (TAR) which included two plans showing two possible design layouts which he considered would meet the above conditions. The accesses to the supermarket have never been submitted to either the Council or the Agency for approval. For this reason, it cannot be assumed that either of the layouts will be approved.



[78] The unimplemented supermarket consent has not, in our view, reached the stage where it could be considered as a permitted baseline, which in any event is not a relevant consideration when considering a plan change appeal. In terms of this appeal, however, we do not agree that it should be used as a springboard for further commercial activity, or that the fact that consent was granted for it under a more permissive planning regime means it should be given any particular weight when assessing which proposal is the most appropriate.

The proposed commercial centre

[79] Apart from the strategic framework referred to above (the purpose set out in chapter 2.1, Objective 2.2.4 and its related policies), an issue arose about whether or not the objectives and policies in chapter 6 Business Zones and chapter 9 Industrial Zone would apply to the proposed overlay. We heard a considerable amount of evidence and submission on this topic, and without intending any disrespect to the parties or counsel we have formed the view that the arguments somewhat miss the point. This is because what the Trust proposes does not neatly fit within the Business or Industrial Zones' objectives and policies. The commercial centre is something more than a neighbourhood centre, and considerably less than a suburban centre.⁸⁹

[80] Mr Manning, the planning witness for the appellant, said he based the proposed overlay and particularly the rule regime on the suburban centre provisions (with some exceptions in terms of activity provision) which provided for a supermarket (unlike the neighbourhood centre provisions which did not).⁹⁰

[81] In terms of the Suburban Centres (Business 5 Zone) Mr O'Dwyer said:⁹¹

The City's residential neighbourhoods are served by numerous existing suburban centres, being medium sized shopping centres also supporting community services and facilities. Further, new centres are proposed as part of planned residential expansion in the Rotokauri, Rototuna, and Peacocke Structure Plan areas. Some of these centres are zoned at present (such as for Rotokauri) while others are identified and clearly provided for as part of detailed structure plans.



⁸⁹ The business centres hierarchy comprises five tiers and is set out in chapter 6 of the proposed plan at 6.1e) listed above.

⁹⁰ Chapter 6 Business Zone Suburban Centres Objective 6.6.2 and its accompanying policy; Neighbourhood Centres – Objective 6.2.3 and accompanying policies.

⁹¹ Evidence in chief, at 111-114.

These centres are medium sized centres (ranging in area from 10,000-20,000m² GFA). The centres are dispersed throughout the residential suburbs, and generally (although not exclusively) located on higher order transport corridors (major and minor arterial roads) and accessible to a large vehicle-oriented travelling public. Supermarkets commonly anchor these centres supported by limited office, community and other services to a suburban population

[82] Even if we were to evaluate the proposed overlay against the Suburban Centres objectives and policies, there is still a need to understand the Business 5 zone in the round – its purpose, function and nature and the reasons for the rule framework including its activity mix, and the anticipated outcome. Mr Bartlett QC referred to it not being a “pick and mix” exercise.⁹² There was no principled analysis to explain why Mr Manning only selected the items he did, neither was any comparison of the rule framework with the proposed overlay undertaken. Our analysis of the rule framework is that a suburban centre is intended to be more than just retail and offices.

[83] If considered against the Industrial Zone provisions, the overlay would clearly not be the most appropriate outcome, however the reality is that what is proposed does not properly fit with the Business Zone objectives and policies and particularly those that relate to suburban centres. We cannot see how it would therefore, be relevant to evaluate the overlay against these provisions. It is therefore not surprising and indeed we would have thought crucial to the Trust's case for there to be a new objective and policies justifying the inclusion of the overlay within the Industrial Zone. A critical question is, however, how the new objective and policies fit within the strategic framework of the proposed plan. We return to this question after considering the commercial and particularly retail and transportation effects that could arise if the overlay is included in the proposed plan.

Commercial and particularly retail considerations

[84] Mr Robert Speer and Mr Fraser Colegrave for the appellant and Mr Tim Heath, Mr Mark Tansley and Mr Phil Osborne for the Council as retail and economic experts, and Mr Manning, Mr Speer and Mr O'Dwyer as planning experts, gave evidence about potential commercial and retail implications.



⁹² Transcript, p 150 (8 September 2016).

[85] We have felt it necessary to record our concern about the retail and economic evidence provided to us. There was little attempt to present the evidence in a way that facilitated evaluation on an "apples with apples" basis, for example by defining a "catchment" and "core catchment" and their physical location. A much sharper identification of the issues and evidence addressing these would have shortened proceedings and been of greater assistance. This lack of focus resulted in considerable time spent in cross-examination on matters that, in the final analysis, we have concluded are not material to our decision, with the result that we do not intend to traverse them in detail.

[86] A large part of the case for the appellant was that the overlay proposal would meet a potential and unfulfilled demand for retail in the western part of the city and that there was insufficient supply of suitably zoned and available land to meet that demand. That would mean the proposal would not conflict with the objective and policies for suburban centres.

[87] While the appellant's witnesses considered the proposed new commercial centre within the overlay to be a suburban centre and their evidence was based on this, as outlined above, we have concluded that it is not. However, we accept that the potential effect of the proposed new commercial centre on suburban centres in the western suburbs is a relevant consideration. It may be that the new commercial centre within the overlay would have potential effects on neighbourhood centres in the western suburbs, but we had no argument or evidence on this point. There was no suggestion that it would undermine the primacy, function, vitality, amenity or viability of the CBD, an important plank in both the RPS and proposed plan policy framework.

[88] Another key issue was the effect on Frankton, the suburban centre in relatively close proximity to the proposed overlay area. The appellant's case was that a new commercial centre within the proposed overlay would not reduce the current trading patterns at Frankton or inhibit the consolidation, or growth of it as a suburban centre. A further key issue was whether there is a shortage of zoned land for retail in the western suburbs.

[89] We understand the evidence to be that the provision of 1,000m² GFA of offices is unlikely to have any significant adverse effect on centres in the business hierarchy,



given that there is approaching 1,000m² GFA of office available on the site currently.⁹³ We set this issue aside as it is not determinative.

What are the likely implications for Frankton?

[90] As signalled above, Frankton is zoned as a suburban centre. Mr Heath gave evidence that, from the whole of the western catchment, the Frankton suburban centre derives 13% of its retail trade and attracts 1% of the retail spend from that catchment.⁹⁴ It has been dominated by Forlongs department store with its household goods and homeware for many years and most recently at the replacement outlets selling similar products but established under a different business model. It has no supermarket.

[91] The appellant's witnesses gave evidence that the provision of supply to meet the convenience shopping demand from the western suburbs is not one of Frankton's actual roles. Its retail function is to meet the demand from the surrounding workforce and a broader city-wide demand for destination shopping for household goods and homeware, formerly at the Forlongs department store. Mr Speer also considered there are a number of constraints against Frankton as a convenience shopping destination for western suburbs residents, particularly poor accessibility and more easily accessible locations by vehicles to other parts of the city.

[92] The Council's witnesses urged us to look beyond today's snapshot of Frankton and to the future when considering the potential for adverse retail effects on it. Mr Heath and Mr Tansley gave evidence that the Frankton Suburban Centre is an underperforming centre with sufficient capacity to meet any unmet retail demand. Both considered that the failure of Frankton to attract custom from the western suburbs is the product of its current physical state and the specialisation in its retail offering of household goods and homeware. Both had a concern that introducing another "centre" could have an adverse impact on Frankton's ability to perform to the level envisaged for an existing suburban centre. We took from their evidence that Frankton is an appropriate location to promote supply to meet the demand from the western suburbs; there are opportunities for revival and the need to give it a chance. However, our assessment of their evidence is that this will be a challenging prospect, particularly without a supermarket.



⁹³ Transcript, p 399 (13 June 2016).

⁹⁴ Mr Heath, evidence-in-chief, at [77], p 122.

[93] The Council considers that Frankton has the potential and opportunity to regenerate and it has embarked on a planning project to enable it to realize that potential. The Council produced a plan entitled "Discover Frankton: The Frankton Neighbourhood Plan" post-decision making on the proposed plan and we were provided with a copy of it. We take it as no more than an indication of the Council's interest in promoting and regenerating Frankton.

[94] We accept from the evidence that the future area of influence from the overlay proposal includes Frankton. We also infer from the evidence that the potential regeneration of Frankton is likely to take some years and therefore extend beyond the life of the proposed plan. While it may not be set back by the commercial development of the overlay area (even under the most severe of the predictions by the retail witnesses), there is still some uncertainty about that and it raises the question of the need to take that risk.

Is there a shortage of zoned land in the western suburbs?

[95] Mr Heath relied on the existence of the wider western Hamilton catchment's established network of centres designed to accommodate the area's future convenience retail and commercial services requirements as providing an adequate supply. Mr Colegrave was critical of this, pointing out the Marketview data presented by Mr Heath showed that western suburbs retailers currently capture only 22% of total retail spend.⁹⁵ Mr Speer's evidence also made much of the under-supply of retail in the western suburbs. Messrs Speer and Colegrave both referred to market research based on vehicle customer surveys at Dinsdale and Newton centres showing a strong fall off in customer support at the railway lines.⁹⁶

[96] None of the witnesses for the appellant made any evidential link to an alleged shortfall of retail supply in the western suburbs with a lack of zoned capacity. No land use study has been undertaken to show that there is insufficient zoned opportunity. Mr Colegrave conceded that his analysis could not be relied upon to conclude that there is a shortage of available zoned land for retailing in the western area⁹⁷ and



⁹⁵ Mr Colegrave, rebuttal evidence at [78].

⁹⁶ Economic – Expert Witness Conferencing Statement, dated 25 February 2016, p 2.

⁹⁷ Transcript p 473, lines 6-8.

confirmed that he had no information to suggest a present shortfall of zoned opportunity.⁹⁸

[97] When questioned about his conclusion that there is a lack of available capacity within the suburban centres in the vicinity of the overlay area, Mr Speer acknowledged that he had no objective information or data to support this proposition, other than having walked around and looked at what may happen and what may be available.⁹⁹ Furthermore, he had not taken any advice from existing operators within these centres about what they consider to be their long-term options in terms of peripheral acquisitions, building and reconfigurations.¹⁰⁰

[98] During the hearing the Council drew our attention to the "Suburban Centres Review August 2011", an assessment of the suburban centres and evaluation of the current employment composition, the current and future retail floor space provisions and land requirements of each centre. The Suburban Centres Review estimates the level of provision required or that can be sustained by each localised catchment by 2041, factoring in both the retail and commercial sectors and their estimated growth in demand. The "at grade" suburban centre land area forecasts (said to be more likely than two-storey development for the centres in the western suburbs) involve a forecast land area increase for Dinsdale from 2.4ha¹⁰¹ to 4.6ha, Nawton 1.2ha to 2ha and Frankton 1.5ha to 3ha.¹⁰²

[99] In closing, Mr Lang submitted that the Suburban Centres Review does not address the question of supply to meet the additional demand, only the predicted future demand. He highlighted Mr Speer's evidence where he said that he had recommended to the Council (in a report prepared for the Council in 2009) that further work needed to be done in relation to suburban commercial locations to address future demand. He submitted that although the review considered likely future demand, it was not specific about how that would be met through expanding existing commercial zones, new commercial zones or other methods. However, we had no evidence about this.

[100] Mr Speer's evidence was that the new commercial centre proposed for the overlay area made sense because it filled what he considered to be a "gap" in the

⁹⁸ Transcript p 481, lines 19-23.

⁹⁹ Transcript, p 435, lines 1-8.

¹⁰⁰ Transcript, p 435, lines 9-12.

¹⁰¹ Given the 2011 current retail and commercial estimates, it seems unlikely that the Countdown expansion in Dinsdale of 900m² has been factored in.

¹⁰² Suburban Centres Review, August 2011. Table 8 at [19].



centres hierarchy and complemented and helped the hierarchy to be implemented in a full way.¹⁰³ There was, however, a lack of thorough analysis by Mr Speer and other witnesses as to the basis for this proposition and no/little systematic identification and review of other potential locations for such a new centre with an analysis of their respective costs and benefits.

[101] Even if there proved to be a shortage of zoned retail capacity (and we did not have evidence to make a finding to that effect), the appellant did not adequately consider the options for meeting that demand. The appellant relied on the existence of the supermarket consent (a matter we have already discussed) and the immediate availability of the Trust's land in one ownership to provide the basis for justifying this location for a new commercial centre.

[102] In our view land could be acquired or otherwise arranged to accommodate such a purpose elsewhere to meet any need.

[103] We conclude that we should not lightly set aside the new approach to the allocation of business/commercial centres and industrial land in the proposed district plan, as this approach has been the subject of considerable focus through Future Proof, the RPS and now the proposed plan. This process has sought to address the issues facing Hamilton about the unplanned dispersal of retail and office development and has developed strategy and policy to deal with them.

Traffic and transportation

General background

[104] The key traffic and transportation issues to be considered are the effects on the road hierarchy, the need to integrate land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors, and consistency with the relevant objectives and policies.

[105] Evidence was provided by the following transport experts: Mr Mark Apeldoorn for the appellant, Mr Alistair Black for the respondent and Mr Robert Swears for the



¹⁰³ Transcript p 424, lines 23-30.

Agency. Mr Andrew McKillop from the Agency and Mr Dylan Gardiner (a planner) also gave evidence for the Agency.

[106] The Agency has the sole power to control and manage all state highways for all purposes. This includes the Greenwood Street section of SH1. In addition, the Agency funds 51% of the cost of maintenance and operations, renewals and capital works associated with the Council's local road network. Mr McKillop advised that the Agency has:¹⁰⁴

...a significant interest in seeing that land use planning for the City is integrated with the transport network" and "an interest in present and future land use decision-making to ensure that the public receive value for money transport outcomes from our investment.

[107] The Council is responsible for the local road network, which includes Killarney Road and a number of other local roads in the vicinity of the site.

[108] As we have noted, the site is located on the corner of SH1 at Greenwood Street and Killarney Road. The average current traffic volume on Greenwood Street south of Killarney Road is approximately 25,000 vehicles per day (**vpd**) and this is projected to increase to just over 30,000 vpd in round terms by 2041, with the new Southern Links project (assuming it is built) in place. Average current traffic volume on Killarney Road on the western side of Greenwood Street is 15,400 vpd and this is projected to increase to around 18,600 vpd by 2041 with the new Southern Links project in place.¹⁰⁵

[109] Much of the evidence presented to us addressed the effects of traffic on the road network and was more aligned to evidence that would be presented at a resource consent appeal hearing than at a plan review appeal hearing.

Overall strategic transport planning framework

[110] It is clear to us from the evidence and from our reviews of the relevant planning documents that comprehensive transport planning in Hamilton has been undertaken in a manner very closely linked to land use planning over a number of years, with input from the Council, the Waikato Regional Council, the Agency and other councils and



¹⁰⁴ Mr McKillop, evidence-in-chief, paragraphs [4.2] and [4.3].

¹⁰⁵ Transport Assessment Report dated July prepared by Traffic Design Group, Mark Apeldoorn, evidence-in-chief, Appendix E.

road controlling authorities in the general locality. This planning has included a progression of inter-related and cascading processes starting with the Future Proof Growth Strategy, the Hamilton Urban Growth Strategy, the Access Hamilton Integrated Land Transport Strategy, the Waikato Regional Land Transport Strategy, the RPS and the proposed plan.

[111] The evidence,¹⁰⁶ particularly that of the Agency, emphasised the importance of the road hierarchy and the significance of SH1 in that hierarchy. The Upper North Island Freight Story:¹⁰⁷

...highlighted the **constraint** to inter-regional freight traffic caused by delays along sections of SH1 through Hamilton, including the western corridor [which includes Greenwood Street], and recognised that the effects of this constraint are felt at an upper North Island scale.

Mr McKillop stated that SH1 is already under significant pressure which will not be relieved by the completion of the Waikato Expressway alone.¹⁰⁸

[112] The Regional Council is responsible for regional transport planning, and the relevant objectives and policies set out in the RPS place a strong emphasis on the integration of land use and infrastructure and the road hierarchy's role in achieving that outcome.¹⁰⁹ For example, Objective 3.12 states:

Development of the built environment (including transport and other infrastructure) and associated land use occurs when an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes, including by

...

- c) integrating land use and infrastructure planning, including by ensuring that development of the built environment does not compromise the safe, efficient and effective operation of infrastructure corridors;

...

- e) recognising and protecting the value and long-term benefits of regionally significant infrastructure.



¹⁰⁶ Mr McKillop, evidence-in-chief, at [5.4].
¹⁰⁷ "Upper North Island Freight Story", 2013, Upper North Island Strategic Alliance.
¹⁰⁸ Mr McKillop, evidence-in-chief, at [5.6].
¹⁰⁹ Mr Gardiner, evidence-in-chief, paragraphs [22] and [24].

[113] Along with objectives and policies, the RPS also contains implementation methods directing specific action in district plans. As outlined above, we are required to *give effect to* an RPS or *have regard to* the provisions in a proposed RPS when considering the options for the zoning of this site.

[114] We are also required under s 74 (2) (b) (i) of the Act to have regard to any management plans and strategies prepared under other Acts. The proposed plan identified the need to have regard to the following Waikato region strategies and plans relating to transport:¹¹⁰

- (a) The Regional Land Transport Strategy (**RLTS**);
- (b) The Regional Public Transport Plan;
- (c) The Regional Road Safety Strategy; and
- (d) The Regional Walking and Cycling Strategy.

[115] We have considered the relevant provisions of the RLTS, as well as the relevant provisions of the RPS and the proposed plan, which we analyse in more detail later in this section, but the remaining documents listed in (b) to (d) above are not material to our decision.

Evaluation

[116] We now evaluate the potential traffic and transportation effects arising from both proposals in light of the strategic transport planning framework we have outlined above.

Existing traffic environment

[117] The existing traffic environment is described in the Transport Assessment Report (**TAR**) dated July 2015, which was prepared by the Traffic Design Group and included as Appendix E to the evidence-in-chief of Mr Apeldoorn.

[118] Table 2 of the TAR shows that the existing activities on the site are generating an estimated 259 to 266 vpd. To provide some context, this represents less than 1% of the existing daily traffic volumes on Greenwood Street and Killarney Road.



¹¹⁰ Hamilton City Council Proposed District Plan dated 13 November 2012, section 1.1.2.2 f)

[119] The road safety history in the locality of the site was considered in the TAR for the period 2009 to 2013 inclusive. In broad terms, the study area included the Greenwood Street/Killarney Road intersection and both road frontages of the site including the intersections of Killarney Road with Higgins Road and Killarney Lane.

[120] In paragraph 3.1 of the TAR it is noted "...that the Greenwood Street/Killarney Road intersection has a typical crash rate of 1.1 injury crashes per annum and is therefore performing marginally better than typically expected." No other information is provided in the TAR on the relative safety performance of the road network in the locality compared to other localities, other than a note stating "Mitigating the risk of these sorts of crashes has been considered in the access designs that are proposed in the following section."

Future traffic environment

[121] The TAR also considered possible future traffic environments, analysing three possible future scenarios which were described as;

- (a) Scenario 1 – the permitted baseline under industrial zoning in the proposed plan;
- (b) Scenario 2 – the consented baseline with the consented supermarket in place and the remaining parts of the overall site taking the permitted baseline; and
- (c) Scenario 3 – the proposed Business 5 zone, assumed to have a maximum of 7,000m² GFA.¹¹¹

[122] The transport experts agreed the likely range of trip generation associated with each scenario at expert conferencing prior to preparation of the TAR, and these were used as the basis of preparing the TAR. In response to questions from the Court, Mr Swears confirmed that the other traffic experts agreed with the basic predictions of future traffic volumes contained in the TAR.¹¹²



¹¹¹ Traffic Expert Joint Witness Statement dated 23 November 2015, paragraph [16], included as Appendix H to Mr Apeldoorn's evidence-in-chief.

¹¹² Transcript, p 336.

[123] The projected future traffic growth on Greenwood Street was set out in Table 3 of the TAR. The traffic flows from Greenwood Street and Killarney Road are summarised above.

[124] Extra trips arising from five different development scenarios at the site were set out in Tables 1 and 2 of Mr Apeldoorn's supplementary evidence dated 15 July 2016. We have summarised these below by referring to the scenario's listed in paragraph [122] and two overlay options:

Scenario 1	2,417;
Scenario 2	4,043;
Scenario 3	4, 969;
The proposed overlay	4,004; ¹¹³
Proposed overlay and consented supermarket area only, plus permitted baseline elsewhere	5,028. ¹¹⁴

[125] The TAR used Scenario 3 with a GFA of 7,000m² as the basis to assess traffic effects on the road network. The appellant now proposes that the total GFA on the site with the proposed overlay and remaining areas of the site permitted under the Industrial Zone rules be capped at 7,000m² before non-complying activity status would apply. In our view, the bases are broadly similar and the TAR traffic generation figures are indicative of the overlay figures within the current bounds of estimating accuracy. Accordingly, we consider that the TAR provides an appropriate basis for us to assess the overlay proposal.

Traffic effects considered in our evaluation of the proposed overlay in terms of the relevant objectives and policies

[126] While we do not give the existing supermarket consent any particular weight when assessing which plan proposals are the most appropriate, it is useful to consider associated traffic volumes given the proposed overlay provides for a supermarket up to a cap of 3,600m² GFA to be assessed as a restricted discretionary activity.



¹¹³ Provides for overlay but does not include traffic from remaining areas of the site permitted under the Industrial rules.

¹¹⁴ Provides an assessment of the maximum number of vehicles that could be generated with the overlay and from remaining areas of the site permitted under the Industrial rules.

[127] We record the following findings in the TAR and related evidence that we consider to be particularly relevant to our assessment under this topic:

- (a) The full overlay development of the proposed site is projected to increase existing traffic volumes by more than the normal average level of variation (set at 4% in terms of existing traffic volumes) between Kahikatea Drive and Massey Street on Greenmount Street and between near Campbell Street and Lake Rotoroa on Killarney Road;¹¹⁵
- (b) The potential for reductions in access crossings from seven to three on Greenwood Street and from two to one on Killarney Road are agreed as positive by all traffic experts if the traffic volumes are the same;
- (c) Traffic growth without either the consented supermarket or the overlay, will result in levels of service at the Greenwood Street/ Massey Road Intersection in 2041 being typically F (lowest level of service) in the evening peak.¹¹⁶
- (d) Addition of either the consented supermarket or the overlay will increase evening peak delays and 95th percentile queue lengths by 25% (circa 20 seconds and 80 metres respectively) for the southern leg in 2015.¹¹⁷ By 2041 the total evening peak delays on the same leg will increase by 48 to 63 seconds (to almost four minutes) and by 93 to 117 metres (to almost 800 metres) for the consented supermarket and overlay respectively.¹¹⁸
- (e) We also took into account paragraph 41 of the joint witness statement by the experts dated 23 November 2015, in which they agreed that "...where a transport network (or portions of a transport network) is operating at a poor level of service, a small increase in traffic volumes can create very significant adverse effects." This was confirmed by Mr Apeldoorn in response to our questions, when he stated that "...when the system, for example the intersection gets close to its operating capacity then very small increments and additional traffic do very quickly ramp up the level of the delay."



¹¹⁵ TAR paragraph 7.1 and Figures 7, 10 and 12.

¹¹⁶ TAR Table 13.

¹¹⁷ TAR Table 15.

¹¹⁸ TAR Table 17.

[128] There was no evidence to enable us to compare road safety with the reduced number of access crossings and the increased traffic numbers from either the consented supermarket or the proposed overlay. While Mr Apeldoorn considered that design options exist to address safety concerns, Mr Black and Mr Swears identified a number of safety issues that concerned them. We did not get the impression that they considered these concerns to be insurmountable but, in the absence of a firm proposal put to them, they did not feel able to form a view on safety issues.

[129] We infer from Mr Apeldoorn's evidence that a range of options exist to address safety concerns in the vicinity of the Greenwood Street/ Killarney Road intersection and also to ensure levels of service can be maintained or improved at that intersection. However, that is only one of a number of issues we must consider, for example the effects on evening peaks at the Greenwood Street/ Massey Road Intersection.

[130] The appellant advanced the proposition that if a proposal is put forward when the first application restricted discretionary activity consent is made and it fails to address traffic/transportation issues to the satisfaction of the Council (and the Agency in relation to SH1), then appropriate modifications to the proposal could be required or the consent declined by the Council, however there is no certainty that this would be the case. We do not consider that we could or should rely on this submission as providing a solution to the potential problem, particularly in view of the matters we refer to in paragraph [157].

Significance of Greenwood Street and Killarney Road in terms of the road hierarchy

[131] Considerable emphasis was placed on the implications of the various options on the Greenwood Street section of the network (in particular) and also on Killarney Road.

[132] There were references in the evidence to the various descriptions of where Greenwood Street fits within the road hierarchy. It was described as being part of SH1, a major arterial transport corridor; a national road corridor, a significant transport corridor, regionally significant infrastructure and a regionally significant corridor.

[133] Killarney Road was described variously in different planning documents as a minor arterial transport corridor, an arterial road corridor, a significant transport corridor and regionally significant infrastructure.



[134] It is evident to us from the various descriptions and definitions set out in the different planning documents that both Greenwood Street and Killarney Road have considerable importance in the road hierarchy, particularly Greenwood Street with its function as a state highway that extends both within and beyond Hamilton. It is also evident to us from the various planning documents that there is a requirement to manage land use to take into account the road hierarchy.

[135] While we have reviewed carefully all of the definitions for the different road categories referred to above as well as the evidence of different witnesses, we consider the following matters relating to Greenwood Street to be particularly relevant to our decision:

(a) The traffic experts agreed that the principal function of Greenwood Street.¹¹⁹

...is the movement of significant levels of goods and people between parts of the City and beyond.Property access is either non-existent or heavily controlled.

(b) Mr McKillop stated that SH1, of which Greenwood Street forms part, is a transport corridor of national and regional strategic importance.¹²⁰

(c) National road ... corridors are those roads ... that make a significant contribution to the social and economic wellbeing of New Zealand by connecting major population centres, major ports or international airports.¹²¹

(d) Desired RLTS investment outcomes for Greenwood Street for years 1 to 10 and 11 to 30 of the strategy are, respectively:

(i) Access, travel time reliability, safety and maintenance to improve safety and support economic growth.

and

(ii) Access, travel time reliability, safety and maintenance.¹²²



¹¹⁹ Traffic Joint Witness Statement dated 23 November 2015, at [9].

¹²⁰ Mr McKillop, evidence-in-chief, at [4.5].

¹²¹ One Network Road Classification system developed by Local Government New Zealand and the Agency defines Greenwood Street as a National Road Corridor.

¹²² Waikato RLTP, Function and desired investment outcome for Auckland and inter-regional corridors, referenced in EIC of Mark Apeldoorn, paragraph 35

- (e) Greenwood Street is the sole arterial route carrying traffic through this section of the city and there are no alternatives on the planning horizon.¹²³
- (f) No physical intervention measures are proposed in Greenwood Street or Killarney Road within the 30 year planning period of the Waikato Regional Land Transport Plan 2015 to 2045.¹²⁴
- (g) Mr Swears considered that SH1 in the vicinity of the site is the most vulnerable of any portion of the state highway through Hamilton.¹²⁵

[136] We accept, therefore, that the section of Greenwood Street/SH1 past the Trust's site is a road of both national and regional significance that sits near or at the top of the roading hierarchy. The RPS and proposed plan contain objectives and policies (and in the case of the RPS implementation methods) that require us to recognise this.

Constraints on access to SH1

[137] While the majority of SH1 through Hamilton is a Limited Access Road (**LAR**), the joint witness statement by the traffic experts confirms there is no LAR control on Greenwood Street.¹²⁶ Similarly, there is no LAR on Killarney Road. Therefore, a permitted activity on any of the existing sites within the Trust site can access Greenwood Street under the proposed plan provisions without the need for a resource consent if the land use and traffic generation is within/below the trigger thresholds specified in Rule 25.14.4.3.¹²⁷

[138] Mr Swears placed considerable emphasis in his various briefs of evidence on avoiding or minimising access to SH1 from the site. For example, in paragraph 6.34 of his evidence-in-chief, he stated:

Although existing properties with direct access to SH1 are entitled to their accesses, I consider it preferable for accesses along the SH1 frontage of the King Appeal site to be minimised and, if possible, eliminated altogether; regardless of the zoning (or Overlay as appropriate) for the Site.



¹²³ Mr Gardiner, evidence-in-chief, at 56 (a).

¹²⁴ Mr Apeldoorn, evidence-in-chief, at 33.

¹²⁵ Transport, p 26, (last part of hearing).

¹²⁶ At 11.

¹²⁷ Mr Apeldoorn, evidence-in-chief, at [26].

[139] Mr Apeldoorn noted that the desired investment outcomes for the Western Corridor (Greenwood Street) in the WRLT are “access, travel time reliability, safety and maintenance to improve safety and support economic growth.” He considered it significant that access features as an outcome for Greenwood Street, but no other such nationally significant corridor.¹²⁸

[140] As a result of historical factors, it would seem that Greenwood Street’s ability to function as a nationally significant corridor is partly compromised by the inability to fully control access points to and from it. This is not something that can be remedied by us, but it is a relevant factor that we consider should be taken into account when assessing the two options before us. We consider a cautious approach is required given the importance of Greenwood Street (SH1) in the roading hierarchy.

[141] In closing submissions, counsel for the appellant proposed a new rule 9.5.12 b) to address the number of access crossings onto Greenwood Street. The rule proposes that such accesses would be limited to three (from the current seven) once the level of development reached 3,500m² GFA. Whilst we acknowledge that this accords with the traffic experts’ opinions that the site should be developed comprehensively so that the number of vehicle crossings on each road frontage is minimised,¹²⁹ some important questions remain unanswered particularly with regard to traffic safety and what happens until the 3,500m² GFA threshold has been reached.

Requirement to undertake an Integrated Transport Assessment (ITA) at the time of assessment of a proposed plan review

[142] Ms Dickey and Mr Bartlett QC submitted that Implementation Method 6.3.8 in the RPS required the Trust to prepare an Integrated Transport Assessment (ITA) to support of the proposed overlay, and that the TAR was no substitute for it. An “integrated transport assessment” is defined in the glossary to the RPS as “a comprehensive review of all the potential transport impacts of a development proposal”.

[143] As outlined earlier in our decision, Policy 6.3 of the RPS relates to co-ordinating growth and infrastructure. Section 6.3.8 of the RPS is an Implementation Method, not a policy, and states:



¹²⁸ Mr Apeldoorn, evidence-in-chief, at [35].

¹²⁹ Traffic Joint Witness Statement dated 23 November 2015, at [30].

Territorial authorities should ensure an **Integrated Transport Assessment**¹³⁰ is prepared to support a structure plan, plan change or resource consent application where the development may result in additional major trip-generating activities.

(underline emphasis added)

[144] It is clear that some of the implementation methods attached to Policy 6.3 are mandatory (evidenced by the use of the word *shall*); for example Implementation Method 6.3.1 which we have outlined in paragraph [113] above. However, some of the other implementation methods outlined in relation to Policy 6.3 and some district plan transportation provisions are not mandatory, as evidenced by the use of the word "*should*" and not "*shall*".

[145] Despite the above, Policy 25.14.2.1f of the proposed plan requires an ITA to be undertaken "for new subdivision, use or development of a nature, scale or location that has the potential to generate significant adverse transportation effects".

[146] It is unclear to us if the intent of Implementation Method 6.3.8 is that an ITA *should* be undertaken at the time of a plan change, or as an alternative *could* be undertaken at the time of a resource consent application. Either way, we are satisfied that it was not necessary for the appellant to prepare an ITA in this instance otherwise taken to its logical conclusion, this would mean that an ITA would have had to be prepared for every site or area to support the zoning attached to it in the proposed plan if major trip-generating activities would be the result. There was no evidence to suggest that this was required of either the Council or any other appellant in a similar situation to the Trust.

[147] We are satisfied that the TAR provides sufficient information for us to gain an appropriate understanding of the traffic implications arising from the overlay proposal. Accordingly, we do not see the absence of an ITA at this time as fatal to the Trust's case.

Extent to which the proposed overlay could affect ability to meet relevant transport objectives and policies

The Regional Land Transport Strategy

[148] We have reviewed the RLTS, but consider that most of the objectives and policies in it are not sufficiently specific to assist us. Objectives and policies, which are consistent with and inform our reading of the documents that follow, are:



Policy P8 - Develop, maintain and protect key strategic corridors as defined in section 4 of the plan in a manner consistent with their functions and desired investment outcomes outlined in this section.

Policy P40 - Protect and promote SH1/29 as the preferred strategic road freight corridor for investment between Auckland, Waikato and the Bay of Plenty regions.

The RPS and proposed plan

[149] There are a number of common themes throughout the RPS and proposed plan that are relevant to transport and traffic issues. These can be summarised in broad terms as:¹³⁰

- (a) The need to integrate land use and transport planning;
- (b) The management of effects on the function of transport infrastructure and the transport hierarchy;
- (c) The importance of the safe, efficient and effective operation of infrastructure corridors and regionally significant infrastructure.

[150] The new objective, policy and rules included in the overlay would increase traffic volumes on nationally or regionally transport corridors, which in our view would result in less appropriate outcomes in terms of the overall transportation framework than those that would occur under the proposed plan.

[151] We consider the proposed overlay could have some benefits in terms of Policy 2.2.1b I of the proposed plan which relates to development being designed and located to minimise energy use and carbon dioxide production by minimising the need for private motor vehicle use (reflecting such matters expressed in the RPS). In an overall context, we consider these benefits would be small and not material to our decision.

¹³⁰ In particular see Waikato RPS Objective 3.12 c and e and Policies 6.1 b and d and 6.6 a and Implementation Method 6.6.1 a – c; District Plan Objectives 2.1.12, 2.2.2, 2.2.13, 18.2.1, and 25.1.2.1 relating to development suitability and Policies 2.2.1bi, 2.2.13a, 2.2.13c, 18.2.1a, and 25.1.2.2aiii relating to development suitability. In the Transport Chapter 25: City-wide Transportation Objective 25.14.2.1 and Policies 25.14.2.1e, Policy 25.14.2.1f relating to Integrated Transport Assessments, and the transportation Appendix (15) such as under the heading function in section 15.5 and the plan showing the sensitive transportation network in 15.9.



[152] The principal issue of concern from a transport and traffic perspective is the inability of the overlay to pass the "avoid" threshold in Policy 6.16 of the RPS which states:

New centres will avoid adverse effects, both cumulatively and individually, on

....

iii) the efficiency, safety and function of the transportation network."

(emphasis added)

And Implementation Method 6.16.1 entitled "District plan provisions" requires that:

Hamilton City Council, Waipa District Council and Waikato District Council district plans shall manage new commercial development in accordance with Policy 6.16."

(underline emphasis added)

[153] The overlay clearly provides for new commercial development by proposing a new commercial centre, but its provisions do not *avoid* adverse effects on the efficiency, safety and function of the transportation network. This is because:

- (a) the proposed overlay would adversely affect the efficiency of operation of the Greenwood Street/Massey Road Intersection and possibly other intersections to lesser extents;
- (b) any additional local traffic generated from the overlay area would not avoid adverse effects on the principal function of Greenwood Street which the traffic experts agree "*...is the movement of significant levels of goods and people between parts of the City and beyond.* Similarly, any additional local traffic generated from the overlay area does not avoid adverse effects on the function of Killarney Road; and,
- (c) effects on safety of the transportation network, while potentially minor, are unlikely to meet the "avoid" test with increased traffic numbers over a number of intersections.

[154] Regardless of the uncertainty relating to safety, there is a real risk that the provisions contained in the overlay would result in development outcomes that are unlikely, in our view, to meet the "avoid" test contained in Policy 6.16 of the RPS. That is an additional reason for concern when contemplating a proposal for a new



commercial centre that does not neatly fit within the commercial centres hierarchy established under the proposed plan.

Overlay policy and rule framework

[155] We now consider the overlay policy and rule framework and its implications, including its workability.

[156] Aside from the additional activities that are restricted discretionary activities (RD), the only difference from the Industrial Zone is that all new buildings and activities, or changes to the existing ones, require RD consent at minimum (which means that there are no permitted/controlled activities). That RD consent is in addition to any RD consent that may be required under the Industrial Zone framework or under the City-wide provisions of the proposed plan.

[157] Any RD consenting process would need to consider the objective and policies for the overlay area. It is likely to take the caps provided for supermarket, retail and office activity as indicating that these activities are suitable, given that the overlay applies to a confined area and considering the objective and policies (particularly Policy 9.2.9d referring to the caps). It is unclear as to what the basis for declining consent would be, even for transportation effects.

[158] We accept the Council's submission that the only way to provide certainty that an integrated approach to the development of the site occurs, is to apply for resource consent for the whole area once. That is not required by the rules contained within the proposed overlay. There is nothing to prevent the appellant applying successively for resource consent for different proposals at different stages on the site. If the supermarket is developed, however, and it comprises 3,600m² GFA, it would occupy approx 75% - 80% of the overlay area. Even a smaller supermarket than this would mean the possibilities for integration may be limited.

[159] We conclude that the title amalgamation threshold requirement or condition, as presented in the closing stages of the hearing, is uncertain. The Agency questioned whether it was intended to be in perpetuity or until the land is fully developed and also asked what the subdivision rules require. Would the decision-maker be in a position to decline or grant consent to subdivision and for what reasons? We did not have any evidence on these points.



[160] We now consider the additional discretion/assessment criteria offered by the appellant as part of the overlay. We accept the Council's arguments that there are no material benefits gained by the additional discretion/assessment criteria offered.

- (a) In the current Industrial Zone the Council can already exercise discretion over transportation matters in terms of trip generating thresholds and RD status that would trigger an ITA and require consideration against the same transport discretion/assessment criterion G. While we accept that there would be benefits in confining the number of vehicle crossings in a new threshold requirement or condition, we also accept the Council's point that it is unlikely that there would be the worst case scenario portrayed by the appellant would arise, because the conditions attached to the consented supermarket require the number of vehicle crossings to be reduced in any event.
- (b) The Industrial Zone has design and layout as a controlled activity for new buildings, alterations and additions, light industrial, service industrial and ancillary residential unit as controlled activities. Policy 9.2.3 provides the policy basis and Rule 9.6 constrains the matters of control – assessment criterion B. Mr O'Dwyer gave evidence that there was a deliberate choice by the Council to accept a lower threshold of amenity in the Industrial Zone.¹³¹

For these reasons we agree that the additional RD discretion/assessment matters proposed are not necessary.

[161] For these reasons, too, we do not find the overlay proposal the most appropriate approach.

Does the proposed overlay give effect to the RPS?

[162] A lot was made of this during the hearing and we have already covered some of the arguments in preceding paragraphs. Mr Lang submitted that we must consider the RPS is a high level document that does not assist in addressing the matters we must consider. We agree with this submission up to a point, particularly given that the centres hierarchy policy (Policy 6.16) is largely directed at protecting the CBD and sub-



¹³¹ Transcript, p 299, lines 1-3.

regional centres as we have identified. However, there is more to the policy in the RPS than that.

[163] We accept that Policy 6.16 does not confine new centres to existing commercial centres or greenfield centres, however there is some support for protecting existing centres in Policy 6.16b). As well, Policy 6.16f) provides that commercial development is to be managed to maintain industrially zoned land for industrial activities unless it is ancillary, whilst also recognising that specific types of commercial development may be appropriately located in industrially zoned land, even though it does not specify what these types of commercial development might be. The most telling provision is Policy 6.16g), which anticipates the prospect of new commercial centres if certain things can be met, but it does not specify where these new commercial centres are to be located. The problem with the appellant's proposed overlay is that it will not "avoid" adverse effects on "the efficiency, safety and function of the transportation network".

[164] When it comes to the question of whether the appellant's proposed overlay gives effect to Policy 6.16 for the future proof area, we simply conclude that it does not. We do not accept there is any certainty in Mr Lang's propositions that the proposed overlay would involve minor or transitory effects on the efficiency, safety and function of the transportation network, or be an enhancement.¹³² Neither do we consider that the district plan provisions are sufficient and should be relied on to allow this fundamental matter to be dealt with at a later stage.

[165] As to other provisions of the RPS, our attention was drawn to:

Policy 6.1 Planned and co-ordinated subdivision, use and development

Subdivision, use and development of the **built environment**, including transport, occurs in a planned and co-ordinated manner which:

- a) has regard to the principles in section 6A;
- b) recognises and addresses potential cumulative effects of subdivision, use and development;

¹³² Mr Lang drew on *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* NZSC38 [17 April 2014] at [145] in his closing: "It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area."



- c) is based on sufficient information to allow assessment of the potential long-term effects of subdivision, use and development; and
- d) has regard to the existing built environment.

[166] Implementation methods (6.1.1) include local authorities having regard to the principles in section 6A when preparing, reviewing or changing district plans and development planning mechanisms such as structure plans, town plans and growth strategies. We considered the "General Development Principles" set out in section 6A, particularly with reference to transport, but nothing hinges on this policy.

[167] Overall, for the reasons we have expressed, we cannot be satisfied that the proposed overlay gives effect to the RPS. Even if the version of the RPS we were required to consider was the proposed RPS and we had to have regard to it, we could not be satisfied that the overlay provisions, particularly as they relate to transportation effects, would be preferable to those which appear in the Industrial Zone.

Is the proposed overlay the most appropriate approach?

[168] We also conclude that the proposed overlay does not achieve the strategic objectives and policies in the proposed plan. In summary our reasons are:

- It does not achieve Objective 2.2.5 and the associated policies and in particular does not safeguard Industrial Zoned land for industrial purposes and may result in other similar approaches elsewhere in the city;
- It cuts across Objective 2.2.4 and supporting Policy 2.2.4 and the hierarchy of business centres, and has the potential to encourage other such development to adopt similar approaches elsewhere in the city;
- It does not adequately integrate land use and development with the provision of infrastructure under Objective 2.2.12 and has the potential to allow development that compromises the safe, efficient and effective operation and use of existing and planned infrastructure under Policy 2.2.13a, and results in incompatible adjacent land uses under Policy 2.2.13d.



[169] We have also found there are deficiencies in the objective, policies and rules associated with the proposed overlay, including the integrated development proposition. Those would also militate against the proposed overlay achieving efficient use and

development of natural and physical resources, especially land, buildings and infrastructure under Objective 2.2.12 and Policy 2.2.12d on development enabling and encouraging the efficient use of resources.

[170] The Council submitted that the new policy direction contained in the proposed plan should be given a chance on its “first road test”. In opening Mr Bartlett QC submitted:¹³³

To summarise, each zone in the PDP has a purpose and a function which is designed to mutually support other centres and implement the centres hierarchy. In turn, the hierarchy seeks to ensure an integrated approach to giving effect to the WRPS and achieving the purpose of the RMA. Undermining the hierarchy at this point in the PDP's development and implementation will not only fail the test in section 32, it will conflict with the function of the Council with respect to its responsibility under section 31 of the RMA.

[171] We take the Council's point. We are mindful that the planning framework of the proposed plan review has been designed to ensure that the poor outcomes resulting from the operative plan, particularly the effects arising from ad hoc commercial development, are not repeated.

[172] As we have said, the overlay does not provide for a suburban centre or neighbourhood centre but creates a new kind of commercial centre. The overlay proposal is not similar in nature to those contained in the Industrial Zone – either the Te Rapa Corridor or the Greenwood Street Corridor which in our view are confined to limited commercial activities largely reflecting the existing commercial activities established within these corridors for some time. While the proposed relief of the 2,000m² GFA retail might be characterised as a “drop in the bucket”, the potential cumulative effects of the proposal and new type of centre proposed in light of the proposed plan policy present in our view a significant risk to the new centres hierarchy policy approach.

[173] We do not agree with Mr Lang that the history of and (presumably exceptional) reasons for applying the mixed use overlay to the site would be clear. We agree with the Council that there is potential for the proposed overlay to encourage other non-standard approaches to development in the Industrial Zone (and perhaps even a business centre-based approach to something between a suburban and neighbourhood



¹³³ Council opening, at [35].

centre). The undesirability of that outcome is also based on our consideration of the deficiencies of the proposed mixed use overlay proposition advanced by the appellant.

Outcome

[174] For the reasons expressed above, we have decided that the appellant's proposal for the site, a spot-zoned commercial centre within the Industrial Zone, is not the most appropriate planning method to achieve the objectives of the proposed plan. In particular, the overlay and what is proposed within it do not meet the strategic objectives of the proposed plan. The new objective and policies were introduced late in the piece to fill the gap created by the rule framework provided by the appellant as part of its initial overlay proposal. Whilst we determined that the new objective and policies were within scope of the appeal, they do little to address the wider strategic framework of the plan which we have addressed in this decision in considerable detail. This strategic framework has not been something that has been simply developed by the Council in a vacuum. The genesis for the approach was developed some years ago with input from other significant regional players, who it would seem for a variety of very good reasons recognised the need to collaborate to try and address concerns about the lack of integrated land use and infrastructure planning, ad hoc commercial and industrial development, and the difficulties that are caused as a result. This collaborative approach was led politically, but also included the Regional Council, the Agency and tangata whenua. The strategic approach was publicly consulted upon and was implemented through the RPS. The RPS was also a publicly consulted document.

[175] The reason we have felt the need to mention this is because the strategic direction implemented through the district plan (as directed by the RPS) has been one which has been developed over a lengthy period of time with considerable involvement from others.

[176] We mention the above because the Trust's proposal cannot, in our view, simply be seen as a site-specific proposal, even at a proposed plan review stage. It must be seen within the wider context.

[177] We have decided that the fact of the supermarket consent should not be given any particular weight when considering the most appropriate planning response for this site, and we acknowledge that there is already existing office activity on the site and that the retail component within the scheme of things is not significant. We have found



that the other overlay provisions that have been applied to sites within the Industrial Zone (the Greenwood corridor, Te Rapa corridor and Porters Mixed Use Overlay) are all distinguishable and more limited than that which is proposed for this site.

[178] We have also found that, whilst there might be a shortfall of commercial supply in the western suburbs, there is no evidence to support the proposition that there is insufficient zoned land available to meet this need. Furthermore, the strategic policy direction signals any unmet need occurring around existing centres, and we are not satisfied on the evidence before us that this would not be a possibility.

[179] There is also the question of whether this site would be the best option for a new commercial centre. The fact that the site fronts onto SH1 is problematic for the Trust given Policy 6.16 g) of the RPS. Whilst the evidence establishes that a supermarket is likely to be the largest generator of traffic, and despite the fact that there is likely to be some solution to matters of access and design to mitigate adverse traffic effects, this begs the question about whether or not, at this stage, it is appropriate that a new commercial centre that does not neatly fit within the commercial centres hierarchy established under the proposed plan, should be included in the proposed plan. The evidence provided to us was not compelling enough for this to be, in our view, an appropriate outcome.

[180] When considering the law that applies for plan review, we therefore find that the Council-proposed zoning and provisions for the site are the most appropriate way to achieve the objectives of the proposed plan. We are not persuaded that the proposed overlay provisions would be effective or, indeed, efficient. Whilst we can see that there would be benefits to the Trust, and perhaps to local residents, we do not agree that these overall benefits outweigh the strategic objectives of the proposed plan. We do not consider there will be any costs or risks associated with not accepting the overlay that would outweigh the above benefits either.

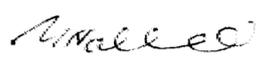
[181] In conclusion we record that we have had regard to the Council's decision under s 290A of the RMA. That regard has been fleeting given that the proposal before us has significantly changed since the hearing held in respect of the proposed plan.

[182] The appeal is dismissed and the Council's decision in relation to the land now subject to this appeal is confirmed.



[183] We do not encourage any application for costs. If costs are sought, any application is to be filed within **10 working days** of the date of this decision, with any reply to be filed **10 working days** thereafter.

For the court:



M Harland
Environment Judge



