

**BEFORE AN EXPERT CONSENTING PANEL**

**UNDER** the COVID-19 Recovery (Fast-track Consenting) Act  
2020

**IN THE MATTER** of an application by Silk Road Management Limited,  
Pudong Housing Development Company Limited and  
Foodstuffs North Island Limited in relation to the Dominion  
Road Mixed-use Development

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**MEMORANDUM OF COUNSEL ON BEHALF OF THE APPLICANT**

**23 June 2021**

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## MEMORANDUM OF COUNSEL ON BEHALF OF THE APPLICANT

May it please the Panel:

### 1. INTRODUCTION

- 1.1 Silk Road Management Limited, Pudong Housing Development Company Limited and Foodstuffs North Island Limited (together the “**Applicant**”) have applied for resource consents to undertake a multi-level mixed-use development including retail, commercial and residential units (“**Proposal**”) at 360 Dominion Road, 88 Prospect Terrace and 113 Grange Road, Mt Eden (“**Site**”).
- 1.2 The purpose of the memorandum is to address the legal framework for the Panel’s assessment under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (“**FTA**”) and the key themes arising from the comments received by the Panel on the Application.
- 1.3 Detailed responses to the comments received are set out in statements by the following representatives of and consultants to the Applicant:
  - (a) John Dalzell – Silk Road Management Limited.
  - (b) Sam Goddard – Foodstuffs North Island Limited.
  - (c) Rachel de Lambert – Landscape, visual and urban design.
  - (d) John Brown – Special Character.
  - (e) Todd Langwell – Transportation.
  - (f) Rhys Hegley – Acoustics.
  - (g) Duncan Thomson – Stormwater.
  - (h) Matthew Norwell – Planning.

### 2. THE PROPOSAL

- 2.1 Descriptions of the Site, its context and the surrounding locality, and the Proposal are contained within sections 5.0 and 6.0 of the Assessment of Environmental Effects (“**AEE**”) lodged in support of the Application. We do not replicate those descriptions here. Comprehensive plans, elevations and supporting materials have been provided with the

Application and is not proposed to describe the building form narratively in detail.

2.2 By way of summary, the Proposal involves the following (noting that Level 00 is the ground level, with Levels 01-05 rising above to varying heights across the Site):

- (a) 122 residential units, comprising a mix of studio, 1, 2 and 3 bedroom units split into six blocks comprising flats and maisonettes on the Prospect Terrace and Grange Road frontages, and four blocks of apartments at Levels 02 to 05.
- (b) A 2,787m<sup>2</sup> New World supermarket within the southern half of the site at Level 01 (retail and back of house areas) and Level 02 (mezzanine – supporting functions) with associated parking, access and loading;
- (c) A range of additional commercial activities including ground level (Level 00) retail and commercial units on the Grange Road and Prospect Terrace frontages, four retail units at the Dominion Road mall-style entrance/laneway, and the refurbishment of existing floor space above the Lot 1 shops for co-working, commercial and/or medical-type uses;
- (d) Landscaping both internal to the Site (northern and southern podium courtyards), and along the boundaries, including:
  - (i) A green wall to the eastern façade;
  - (ii) Retention of existing eastern boundary trees as far as practicable, with supplemental native tree and vegetation planting;
  - (iii) Construction of a flood expansion area adjacent to the eastern boundary to be planted in a way that allows it to function as part of the overland flow system through the Site;
  - (iv) Retention of five existing street trees, and replacement of one Melia street tree with three new street trees;

- (v) Formed and landscaped internal pedestrian and service vehicle laneway to rear of Lot 1 shops;
- (vi) A centralised podium courtyard for residents incorporating hard and soft landscape elements; and
- (vii) Various lighting elements.

[Nb: The tallest part of the development is Level 05 which rises to 22.7m at most, covers approximately 10% of the Site and is located in the central part of the Site (i.e.: is stepped back from all boundaries). Level 04 rises to 18.8m at most, covers approximately 26% of the Site (including the area covered by Level 05) and again is located in the central part of the Site, stepped back from boundaries.]

2.3 The Proposal is ideally located to help accommodate the high demand for housing, including less land-extensive dwelling typologies not typically available, in Mt Eden and similar inner-Auckland suburbs. This can be seen from recently consented developments at 428 Dominion Road (the almost complete Eden Views development) and Panuku Development Auckland's consented development on the corner of Dominion and Valley Roads. These buildings are located a short distance south and north of the Site respectively.

2.4 Further, with increasing residential intensification on the Auckland Isthmus, there is a growing need for new urban full-service supermarkets to service population growth. Potential sites for new supermarkets on the already heavily-developed Isthmus are scarce. Irrespective of any site-specific constraints or characteristics of any potential site, it is inevitable that the development of any new supermarket within the established urban environments of Auckland's inner suburbs will result in localised changes in traffic levels and patterns, and likely increased localised traffic congestion. The Applicant considers, however, that a strategic view should be taken regarding such matters. Locating essential services such as supermarkets near the source of demand (i.e.: the intensifying population) will lead to less reliance by customers on private vehicles, and shorter trips by those people who still prefer to use private vehicles.

- 2.5 In terms of the design, scale and character of the Proposal, great care has been taken in the design of the Proposal, in order to ensure a high-quality development that fits its location within the Eden Valley Special Character Business Area.

### 3. STATUTORY FRAMEWORK

- 3.1 Clause 31 of the FTA Schedule 6 sets out matters to which the Panel must have regard (clauses 31(1) – (3)), matters which the Panel may or must disregard (clauses 31(4) – (6)) and other matters relevant to decisions (clauses 31(7) – (12)). Clause 32 of the FTA sets out “*further matters relevant*” to the Panel’s consideration of the Application.

#### ***Matters to be considered***

- 3.2 Subject to Part 2 of the RMA and the purpose of the FTA, the Panel **must have regard to** the follow matters in relation to the Application and the comments received (clause 31(1), Schedule 6):

- (a) The actual and potential effects on the environment of allowing the Proposal.
- (b) Any relevant provisions of the following documents:
  - (i) National Environmental standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2012;
  - (ii) The National Policy Statement for Urban Development 2020;
  - (iii) National Policy Statement for Freshwater Management 2020;
  - (iv) New Zealand Coastal Policy Statement 2010; and
  - (v) Auckland Unitary Plan (Operative in Part) (“**AUP**”) including regional policy statement, regional and district plan provisions.
- (c) To the extent the Panel considers it to be relevant and reasonably necessary to determine the application, the Auckland Plan 2050.

- 3.3 The Panel must apply section 6 of the FTA (Treaty of Waitangi) rather than section 8 of the RMA when considering the matters set out in clause 31(1) (clause 31(2)). There are no relevant planning documents prepared under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011 applicable in the present case.
- 3.4 The Panel **must disregard** any adverse environmental effect permitted by a national environmental standard or plan and **must not have regard to** trade competition or the effects of trade competition, or any effect on a person who has given written approval. The Applicant is not arguing that there are permitted effects that the Panel must disregard. Trade competition effects have not been raised by the Applicant or any person providing comments on the Application, and no person has given written approval to the Proposal.
- 3.5 The relevant legal context was considered by the separately constituted expert panel determining Ryman Healthcare Limited's application for a comprehensive care retirement village in Kohimarama. Relevant extracts of this part of that panel's decision are set out below:

*"[32] As the Project was referred to the Panel, the Minister was therefore satisfied that the project would be consistent with the purpose of the FTA, but as acknowledged by counsel for Ryman:*

*The Panel is not bound by the referral decision and it must independently determine if resource consent should be granted.*

*[33] Section 12 of the FTA sets out the relationship between the FTA and the Resource Management Act 1991 (the RMA). The process for obtaining a consent under Schedule 6 of the FTA applies in place of the process under the RMA, but remains subject to its purpose and principles. ...*

*[41] Ryman acknowledges that the purpose of the FTA does not "trump" Part 2 of the RMA. Ryman says: "Both purposes must be considered together, on an equal footing". Counsel for KNI concurs and we agree, but we also accept that some emphasis is to be given to the purpose of the FTA.*

*[42] The full economic effects and duration of the pandemic remain enigmatic. Counsel for KNI look to the short duration of the FTA and suggest that short term economic benefits should not be at the expense of, "...bad long-term planning outcome". We accept that is a cornerstone of the FTA's dual purposes. ...*

*[48] The assessment of effects required under clause 31 is the same as that under s 104 RMA but also includes any offset benefits and compensation. ...*

*[49] The evaluation of those effects against operative and proposed plans, and higher order documents is also the same albeit, subject to the purpose of the FTA as well as to the purpose and principles of the RMA. ...*

*[51] Unlike listed projects, the Panel has a wide discretion to consent or decline a referred application. Adopting the well accepted approach of the Environment Court, we see this as a spectrum which, subject to the purpose of the FTA being achieved, enables us to consent acceptable component parts of the*

*application but decline unacceptable components to the extent that a meaningful project remains without being rendered nugatory.”*

3.6 The expert panel in *Ryman* effectively concluded that its consideration of an application for consent under the FTA was the same as consideration of an identical application under the RMA, but with an overriding emphasis being the purpose of the FTA. We respectfully submit that this approach was appropriate, and a similar approach should be adopted by this Panel.

3.7 We will address the dual purposes of the FTA and RMA at the end of this memorandum.

#### 4. ACTIVITY STATUS – BUNDLING OF CONSENTS

4.1 In the AEE in support of the Application, the approach taken was to bundle the activities for which consent is sought, while expressly not excluding the taking of an “*unbundled*” approach by the Panel in its consideration and determination of the Application.

4.2 C1.6 of the Unitary Plan addresses the bundling of applications and states:

##### **C1.6 Overall activity status**

- (1) *Where a proposal:*
  - (a) *consists of more than one activity specified in the Plan; and*
  - (b) *involves more than one type of resource consent or requires more than one resource consent; and*
  - (c) *the effects of the activities overlap; the activities **may be** considered together.*
- (2) ...
- (3) *Where different activities within a proposal have effects which do not overlap, the activities **will be** considered separately.*

4.3 As noted in the AEE, and the evidence of Mr Norwell, the Proposal triggers a range of “*reasons for consent*”, the majority of which are identified as restricted discretionary activities. In simple terms, the Application involves the following:

- (a) Under Part H13 – Mixed Use zone, construction of a new building (restricted discretionary activity) with heights over parts of the Site that exceed the 13m height standard (restricted discretionary activity);
- (b) Under Part H13 – Mixed Use zone, use of the building to accommodate:

- (i) Dwellings (permitted activities);
  - (ii) Commercial activities including offices (less than 500m<sup>2</sup> gross floor area), retail (less than 200m<sup>2</sup> gross floor area per tenancy) and commercial services (all permitted activities); and
  - (iii) A supermarket (2,787m<sup>2</sup> gross floor area) (fully discretionary activity, as it exceeds 2,000m<sup>2</sup> gross floor area).
- (c) A series of resource consents under Section E of the AUP covering what might be called technical matters (e.g.: excavation) and categories of environmental effect (e.g.: traffic and noise / vibration).

4.4 The matters which tip the proposal into the fully discretionary category are as follows:

- (a) The exceedance of the 2,000m<sup>2</sup> gross floor area threshold for supermarkets in the Business – Mixed Use Zone; and
- (b) Discharge of stormwater via soakage.

[Nb: the AEE incorrectly refers to the demolition of a character supporting building in the Special Character Overlay as a fully discretionary activity. The AEE has correctly identified the relevant rule (D18.4.2(A18), but it is a restricted discretionary activity.]

4.5 The Applicant's planners have taken the conservative approach of bundling all consents for consideration as a fully discretionary activity. However, we note that:

- (a) The effects that arise from the various technical consents (and particularly those related to the construction phase) typically do not overlap with the effects that may arise from the operation of the development.
- (b) While the primary effects of the supermarket (traffic effects) are related to the traffic effects generated by the residential and other commercial activities, these matters collectively require

consideration in terms of the consents required under Chapter E27 – Transport.

- (c) The provisions in Chapter H13 – Mixed Use zone relating to supermarkets are primarily concerned with the potential for distributional effects to arise (i.e.: the potential for the transfer of trade from existing supermarkets to a new supermarket to ultimately result in detrimental effects on the amenity of existing centres). These effects are quite separate from the traffic effects addressed under Chapter E27.
- (d) The potential effects associated with the stormwater solution adopted for the site (basalt soakage, with supplementary on-site attenuation) would likely arise with any development of the Site and are unrelated to the activities proposed to take place within the building(s) or the above ground bulk and height of the structures.
- (e) None of the effects discussed above overlap with the primary alleged effects of the part of the structure that exceeds the 13m zone height standard (i.e.: alleged visual dominance, overlooking and privacy effects).
- (f) The effects generated by the new building and by the parts of the building above the 13m height standard do overlap, however, albeit that the matters over which discretion is reserved and criteria relevant to those activities differ (as discussed below).

4.6 In the circumstances, a large number of the consents sought could arguably be unbundled and considered separately. For example, the restricted discretionary activity consents for the new building and the exceedance of the 13m zone height standard could be treated separately from the supermarket and/or traffic effects. That is not the approach that has been adopted, however.

4.7 The Applicant considers that whether the consents are bundled or addressed separately is unlikely to be of great practical consequence as in both cases the same AUP objectives and policies and potential adverse effects will ultimately be considered.

## **5. RESPONSE TO COMMENTS**

- 5.1 For convenience, a summary of the Applicant's response to the key issues raised in comments on the Proposal is set out below, together with commentary on relevant parts of the planning instruments.
- 5.2 The adverse environmental effects addressed in this memorandum, and in response to submitters include:
- (a) The landscape, visual and urban design effects associated with the new building and exceeding the permitted building height of 13m (accepting that any new building requires resource consent as a restricted discretionary activity, and accordingly the 13m height limit cannot be considered a permitted baseline);
  - (b) Traffic effects, primarily associated with the supermarket component of the activity;
  - (c) The effects associated with partial demolition of a character supporting building in the special character overlay; and
  - (d) Stormwater effects.

## **6. LANDSCAPE, VISUAL AND URBAN DESIGN EFFECTS**

### ***Consideration of New Buildings and Additional Building Height***

- 6.1 As noted above, the Applicant has proceeded on the basis that the overall activity status of the Proposal is fully discretionary. However, we note that:
- (a) New buildings (A45); and
  - (b) Infringement of the building height standard (Rule C1.9(2));
- in the Business – Mixed Use Zone are separately identified as restricted discretionary activities.
- 6.2 For completeness, the following paragraphs consider the differences between the assessments required for new buildings and buildings infringe the height standard.

### *Assessment of New Buildings*

6.3 The matters over which Council has reserved its discretion for new buildings (item (A45)) are set out in Rule H13.8.1(3).

6.4 The only matter in that rule over which Council has restricted its discretion that might conceivably relate to the height of a new building is item (a). All other items relate to matters of internal design (e.g.: floor to floor heights), external appearance and functionality of the building and development (e.g.: glazing, verandahs and landscaping) and aspects of infrastructure (e.g.: roads and stormwater).

6.5 Item (a) reads:

*“The design and appearance of buildings in so far as it affects the existing and future amenity values of public streets and spaces used by significant numbers of people. This includes:*

- (i) The contribution that such buildings make to the attractiveness pleasantness and enclosure of the public space;*
- (ii) The maintenance or enhancement of amenity for pedestrians using the public space or street;*
- (iii) The provision of convenient and direct access between the street and building for people of all ages and abilities;*
- (iv) Measures adopted for limiting the adverse visual effects of any blank walls along the frontage of the public space; and*
- (v) The effectiveness of screening of car parking and service areas from the view people using the public space.”*

6.6 In that regard:

- (a) Item (a) does not explicitly refer to height or even the bulk of the building. It is limited to “*design and appearance*” which, the Applicant submits, does not include height or bulk.
- (b) Those issues of design and appearance are relevant only to the extent that they relate to amenity values of “*public streets and spaces used by significant numbers of people*”. That is emphasised in items (i) to (v), each of which expressly refer to public space or street.

- (c) In this case, the areas relevant to item (a) include Dominion Road, Prospect Terrace and Grange Road. Item (a) does not relate to private properties.
- 6.7 Accordingly, it is submitted that if consent was sought for a proposal on the Site that did not include any fully discretionary elements (i.e.: supermarket and stormwater aspects of the Proposal) and that complied with the height standard, the Council could not impose conditions that reduced the height of the building below the zone height standard (13m), because the discretion is limited to “*design and appearance*”. The Council could, however, impose conditions that would alter the exterior appearance of the building.<sup>1</sup>
- 6.8 While that does not constitute a “*permitted baseline*” (because consent is required for any new building) the Applicant submits it remains reasonable and appropriate for the Panel to recognise that the Unitary Plan enables buildings of up to 13m in the Business – Mixed Use Zone, when considering the effects of additional building height proposed by the Applicant.

*Assessment of buildings that exceed the 13m height standard*

- 6.9 The approach of the AUP to applications for infringements of standards in the Business – Mixed Use Zone is to provide broad discretion on the part of the consent authority to consider (Rule H13.8.1(7)):
- (a) Any policy which is relevant to the standard;
  - (b) The purpose of the standard;
  - (c) The effects of the infringement of the standard;
  - (d) The effects on the amenity of neighbouring sites;
  - (e) The effects of any special or unusual characteristic of the site which is relevant to the standard;

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<sup>1</sup> This approach is consistent with the High Court’s approach in *Official Bay Heritage Protection Society v Auckland City Council* HC, 16 July 2007, CIV-2006-404-005947 see [28]-[29] and [32]; *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 202 at [32] (HC) and [2000] 3 NZLR 513 at [19](CA)

- (f) The characteristics of the development;
  - (g) Any other matters specifically listed for the standard; and
  - (h) Where more than one standard will be infringed, the effects of all infringements.
- 6.10 The assessment criteria in H13.8.2(7), relating to buildings that do not comply with the height standards, are policies H13.3(3)(a), (3)(b), 3(8), 3(13), 3(14) and 3(21). Those policies refer respectively to:
- (a) Requiring the development to be of a **quality and design** that positively contributes to:
    - (i) Planning and design outcomes identified in the AUP for the Business – Mixed Use Zone (Policy 3(a); and
    - (ii) Visual quality and interest of streets and other public open spaces (Policy 3(b).
  - (b) Requiring development adjacent to residential zones to maintain the amenity values of those areas, having specific regard to dominance, overlooking and shadowing (Policy 8). This policy is not relevant to new buildings that comply with the zone height standard. The policy enables the Council to consider effects on neighbouring residential zones (as opposed to public spaces) where the height standard is exceeded.
  - (c) In identified locations, enabling greater building height having regard to certain matters (Policy 13 – not relevant).
  - (d) In identified locations, reducing building height below the standard zone height, where the standard zone height would have significant adverse effects on identified special character, identified landscape features or amenity (Policy 14). This is the policy that has informed the 13m special height control on the Site.
  - (e) Requiring activities adjacent to residential zones to avoid, remedy or mitigate adverse effect on amenity values of those areas (Policy 21). Again, this policy is not relevant to new buildings that comply with the zone height standard but enables

the Council to consider effects on neighbouring residential zones (as opposed to public spaces) where the height standard is exceeded.

- 6.11 Accordingly, the Applicant submits that the Panel, when assessing the effects of the Proposal in terms of the height of the proposed buildings, should focus on those effects associated with the part(s) of the building that *exceed* the 13m zone height standard, notwithstanding the fact that the application, overall, is a fully discretionary activity as a result of the supermarket component and stormwater design.
- 6.12 In our submission, the application documents and evidence provided to the Panel demonstrate that the effects of additional height proposed are appropriately avoided, remedied or mitigated.

### ***Response to comments***

- 6.13 Ms de Lambert has comprehensively addressed the comments received from Auckland Council, Eden We Love Society Incorporated (“**EWL Inc**”) and other residents in relation to the landscape, visual and urban design effects of the Proposal. She concludes that:
- (a) The scale of the development easily fits within the established character and scale of Dominion Road.
  - (b) The development is designed in a way that avoids a “*monotonous*” elevation, and which relates well to older buildings along Dominion Road.
  - (c) The analysis of sightlines and the potential for overlooking confirms that the residents’ fears in respect of loss of privacy and overlooking are misconceived, as development is set well within the relevant height in relation to boundary control along the well-vegetated eastern boundary, with upper-level apartments further stepped back to reduce the potential visibility of these upper levels from neighbouring properties. Further, the orientation of north and south-facing dwellings along the Prospect Terrace and Grange Road frontages, and angle of any views to existing residences’ front yards, means that any effect will be in the nature of any other interface between residential neighbours across a street.

- (d) The Proposal adopts “*tried and true*” design techniques to avoid adverse interface effects and enable intensification alongside the traditional neighbourhood comprised in Prospect Terrace and Grange Road.
- (e) The proposal will enhance CPTED qualities of the site.
- (f) The proposed laneway will provide an attractive alternative to the street network, with a quality amenity and level of convenience for pedestrians particularly during inclement weather.
- (g) On the whole, the Proposal will represent a significant change to the immediate locality, but the design has addressed the potential for adverse effects and avoided unacceptable outcomes.

## **7. TRAFFIC EFFECTS**

### ***Strategic Observations***

- 7.1 The Applicant acknowledges that there will be localised traffic and congestion effects in relation to the Proposal but asks the Panel to take a strategic view when considering those effects given the level of intensification enabled by the AUP, the content of the national policy direction in terms of enabling intensification and dynamic urban environments, and in light of the purpose of the FTA.
- 7.2 Through the application of zones and a generally permissive policy and rules framework, the AUP encourages and enables significant intensification of development within (particularly) the Auckland urban area. The result of that enablement is evident in many locations across urban and suburban Auckland. It is an inevitable consequence of intensification that additional transport demand will be generated, which will be met in part (and increasingly over time) through increased patronage and improved provision of public transport. In the immediate future, however, intensification will continue to generate increased private vehicle use and thereby traffic congestion.
- 7.3 Through the AUP process, the Council did not assess or require specific mitigation in relation to the implications of such zonings for traffic congestion. The implication was that, over time, intensification and the

congestion that flowed from it would produce mode change and thereby a more efficient, compact city.

- 7.4 Supermarkets are an extremely efficient way of distributing groceries to members of the public. These are goods that need to be replenished regularly and can typically occupy a significant amount of space when purchased. For many customers in the intensifying city, one of the last trips for which they will *need* to use a private vehicle will be their regular trip to the supermarket to purchase food. It may continue to be inconvenient if not impossible for some customers to use public transport for that purpose.
- 7.5 While they are made regularly, customers' supermarket trips can generally be made at the customer's discretion. That is, customers choose the time of day or week when they visit the supermarket. Traffic congestion patterns during peak hours are likely to discourage some customers from travelling to the supermarket. The Applicants expect that, as congestion worsens, that tendency will increase. Affected customers will generally make their shopping trips at off-peak times unless they do not need to use a private vehicle. Notably, other major traffic generators such as workplaces or educational institutions generally do not share this discretionary characteristic.
- 7.6 As discussed in Mr Goddard's evidence, the goods purchased at, and the shopping experience provided by, supermarkets are generic in the sense that they are largely replicated in a large number of supermarkets and across brands. Accordingly, customers tend to value convenience and patronise supermarkets that are close to their home, workplace or the route between.
- 7.7 In that context, adding a new supermarket to the existing network may generate additional congestion in the immediate vicinity of the supermarket but will, overall, reduce traffic congestion. That is because those customers who live closer to the new site than to any existing supermarket will have the option of patronising a more convenient store and reducing their vehicle travel. Put another way, a new supermarket does not generally add to the total number of customers or purchases in the market. Instead, it makes those trips more convenient for a portion of the public. The supermarket is a consequence and symptom of population and expenditure growth, not a catalyst for it.

### **The 2007 “Stonefields” Decision**

7.8 The need to see Auckland’s traffic issues in a wider context is a matter that the Environment Court addressed in *Landco Mt Wellington Limited v Auckland City Council*<sup>2</sup> where it was asked to consider the potential adverse effects on the roading network created by the additional traffic generated by residential development at the former Mt Wellington Quarry (now “Stonefields”).

7.9 The Court noted at paragraphs 9 to 12 and at paragraph 18 (emphasis added):

*“That Auckland City has major and seemingly ever increasing traffic problems comes as news to no one. Proposed solutions seem to come and go, being discarded as inadequate, unworkable or unaffordable, while the volume of cars and trucks on the roading network continues to grow.*

*We need to begin this part of our decision by stating three clear premises. First, this appeal is not the opportunity to solve the traffic problems of Auckland City or even just the Tamaki Edge. The proposal stands or falls on its own merits, and its proponents are not required to resolve infrastructure problems outside its boundaries although they may be required to contribute, by way of financial contributions, to the cost of doing so.*

*Secondly, Auckland’s population growth seems inexorable, and will occur over the projected timeframe, whether or not this proposal goes ahead. We understand those who say that we should not approve this proposal until the wider traffic infrastructure, already under pressure, has been upgraded sufficiently to absorb its projected output. In an ideal world that might be a viable course of action, but the world is not ideal. If 6,000 people cannot be housed in Stonefields, the simple consequence will be that they will go elsewhere, almost certainly further away from the hubs of employment, education and recreation the City provides. They will have to travel further and for longer, placing even greater demands on the roading network and other transport infrastructure. That factor is no doubt one of those which led to the Stonefields site being identified as priority 1 for residential growth.*

*Thirdly, the evidence from the traffic engineers is that, as embodied in the Auckland Regional Land Transport Strategy 2005, it is accepted as no longer possible to continue to provide road space to vehicles, sufficient for congestion free movement. The corollary is that the region needs to introduce measures that reduce demand for travel, particularly by private vehicles. To that end, they regard congestion as, partly, an educative and motivating process to encourage non-car travel.” (paras 9 - 12)*

*“We are certainly not sanguine about the traffic situation, but then nobody is. The best that can be said about it is that the expert evidence is that the traffic effects within and immediately surrounding Stonefields*

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<sup>2</sup> Et Ct decision A35/2007

can be managed effectively. It is for the Council and the other roading and transport organisations to manage the wider network, and public transport, to cope with the present loads and future growth, wherever in the region that might occur.” (para 18)

- 7.10 The Applicant submits that the principles expressed in that decision are applicable to the current case and are amplified by the intensification strategies implemented through the AUP since the *Stonefields* decision was issued 14 years ago.

***The approach taken by Auckland Transport / Auckland Council***

- 7.11 Auckland Transport has focused on the impacts of the supermarket in the immediate environment of the site. The Applicant considers that, in doing so it has:

- (a) Ignored the inevitable consequences of intensification in Auckland in terms of:
  - (i) Increased traffic congestion generally;
  - (ii) The increased demand for supermarket and other retail and service activities; and
  - (iii) The scarcity of sites within the isthmus on which new supermarkets can be provided (because supermarkets require large sites and, in any event, such sites are also attractive for competing uses such as residential).
- (b) Disregarded the positive consequences, in terms of reducing the length of trips and hence the contribution of supermarket traffic to congestion in the region, of developing a new supermarket:
  - (i) Within the existing supermarket network, in close proximity to intensifying residential areas that will otherwise generate additional traffic to existing supermarkets; and
  - (ii) On a major arterial road where it can easily serve pass-by traffic (i.e.: customers who are already travelling past the site and are able to take advantage of the supermarket without generating additional trips).

- (c) Apparently concluded that traffic conditions on some parts of the road network (i.e.: local roads) should not change, despite the fact that the Unitary Plan enables intensified development within the region that will necessarily generate additional congestion (including for trips to supermarkets).
- (d) Identified adverse effects that might be generated by this new activity but made no effort to identify ways in which the effects of true concern can be mitigated or to evaluate the proposal and the wider context discussed above.

7.12 It is submitted that the approach taken by Auckland Transport to the Proposal is unrealistic. It appears to assume that the demand for full-service supermarkets can be met by providing multiple smaller metro supermarkets. Mr Goddard's evidence is that that is not the case.

- (a) Full-service supermarkets carry a full range of items, many of which cannot be purchased at a smaller supermarket. Accordingly, the expectation is that members the public will continue to travel to undertake regular (e.g.: weekly or fortnightly) main order shops from full-service supermarkets. If those full-service supermarkets cannot be provided in new locations (such as the Site) those trips will be made to more distant locations, adding to congestion.
- (b) The Applicant's understanding is that there will be a need for approximately 70 new full-service supermarkets in the region (of all brands) over the next 30 years, notwithstanding the development of metro supermarkets serving smaller catchments.

***Todd Langwell's response to comments***

7.13 In addition to the more general, strategic considerations outlined above, the Applicant points to the comprehensive response to comments set out in Todd Langwell's statement. By way of summary:

- (a) The ITA analysis and use of modelling was agreed in pre-application meetings between the Applicant and AT, with full cognisance of the strategic importance of Dominion Road and the existing capacity issues. The need to promote public transport was acknowledged by all parties, and the ITA and

modelling considered four options to achieve this. Despite extensive engagement, the first indication from AT that alternative transport modes (e.g.: walking and cycling) should be modelled was included within their comments on the proposal provided to the EPA.

- (b) Notwithstanding the above, a number of measures to mitigate effects and enhance or promote alternative modes have been adopted in the Application, including: compliant cycle parking spaces; end of trip facilities; eBike and e-vehicle charging facilities; car share scheme; and pedestrian laneways and other connections through the site.
- (c) A Site Travel Management Plan is proposed and enshrined in the draft conditions of consent. Auckland Transport has not commented on the conditions of consent.
- (d) Mr Langwell acknowledges that, particularly given the volume of cyclists already using Dominion Road, provision for cycling is less than optimal. Upgrades to Dominion Road to better provide for cyclists are Auckland Transport's responsibility, and beyond the Applicant's control. However, the Applicant has sought to promote cycling through such measures as it can provide/control, including by providing cycle storage in accordance with the AUP, end of trip facilities and charging stations for e-Bikes.
- (e) Mr Langwell confirms that the Proposal does not reduce the width of the footpaths at Grange Road and Prospect Terrace, but rather increases the available width and increases the capacity and amenity of the footpaths on the site frontages.
- (f) Mr Langwell notes that effects on northbound buses from the Proposal could be mitigated by extending the operating times of the existing northbound bus lane on weekdays. This was modelled and reported on in the ITA and indicated a potential reduction (improvement) in travel time for northbound buses. This would however require removal of kerbside parking during evening peak period, which could affect businesses and other properties, requiring public consultation.

- (g) Mr Langwell responds to AT's criticisms of modelling of Scenario B, and confirms:
- (i) The model already simulates reduced vehicle speeds as a result of raised tables.
  - (ii) The model does not require consideration of effects of turning vehicles on otherwise free-flowing bus journeys.
  - (iii) The unreleased vehicles identified in the model are unlikely to create additional pressure by using side roads as "rat runs", given congestion during peak times, and the fact that such vehicles will be discretionary sole purpose trips to and from a point of origin that will have used an arterial road (most likely Dominion Road) to access the site. Mr Langwell also notes that the relevant vehicle trip would already exist, but would be accessing a different supermarket, creating congestion on a different part of the network.
- (h) Auckland Transport's pedestrian safety and amenity concerns regarding vehicle crossing widths are misplaced, for the reasons set out in 7.3 of the ITA in support of the Application. Notwithstanding that, the Applicant has offered an alternative proposal, as illustrated in Figure 2 of Mr Langwell's evidence. The provision of a 2.5m pedestrian refuge island breaks up the width of the combined service lane / residential parking access at Prospect Terrace, which further reduces risk of conflict between pedestrians and vehicles.
- (i) The reasoning for selecting "Scenario B" (dual lane approaches on both side roads) as the preferred mitigation measure was that it best aligned with minimising effects on public transport and reducing overall congestion on the side roads. Together with provision of raised tables and removal of angle parking, this creates much-improved safety and amenity for pedestrians in off-peak times when approach speeds and free flowing conditions occur. A range of alternative and enhanced options could be implemented in future if that were considered appropriate. The

Applicant welcomes further discussions with Auckland Transport in this respect.

- 7.14 Mr Langwell responds to various comments received from EWL Inc and other local residents. As well as those issues already addressed in his response to Auckland Transport, Mr Langwell corrects EWL Inc's errors in relation to the ITA, modelling and details of the Application. He responds to issues raised in the Stantec peer review report attached to the EWL Inc comments, many of which are similar to issues raised by Auckland Transport, and notes that the documents referred to by Stantec appear to include some that were superseded and replaced by documents included in the final ITA.
- 7.15 In his concluding comments, Mr Langwell confirms the benefits from a strategic transport planning perspective of providing for supermarkets in locations proximate to the intensifying population provided for by the Unitary Plan. While local congestion effects are inevitable, overall that strategy reduces the length of trips to and from supermarkets, in a context whereby increasing congestion of the network is the inevitable consequence of intensification that will drive increased uptake of public transport and alternative transport modes and contribute to achieving an efficient compact urban form.

## 8. SPECIAL CHARACTER

- 8.1 John Brown's statement refers to his special character assessment, as well as the support set out in the comment received from **Heritage New Zealand – Pouhere Taonga**, which confirms that the proposal "*will not effect any changes to the on-site special character values that are currently present nor regarding the contribution the site makes to the wider Eden Valley Special Character Area*".
- 8.2 Effects in terms of the interface with the adjacent Isthmus A Residential Special Character Area are addressed through the setback of apartments at upper levels, and the most sensitive interfaces at the frontages to Prospect Terrace and Grange Road can be addressed with attention to articulation, scale and materiality. Mr Brown considers that conditions requiring Council approval of materials and finishes will ensure this occurs.

8.3 In response to the comments received from **EWL Inc**, John Brown points out a number of ways in which those comments do not correctly characterise an earlier publication by Boffa Miskell, Matthews & Matthews Architects, R.A Skidmore Urban Design and Salmond Reed Architects 2004 “Character & Heritage Study Eden Valley / Dominion Road”, and the report prepared by Jeff Brown attached to the EWL Inc comments. He notes that:

(a) The 2004 report did not recommend scheduling of the building on the Site and did not conclude that the building is a high quality character heritage building or “*landmark element*” as alleged in the EWL Inc comments.

(b) Mr Jeff Brown’s report is more nuanced than is portrayed in the EWL Inc comments. Mr Jeff Brown considers the proposal’s design is generally appropriate for the Site and the wider context, with the exception of the Grange Road and Prospect Terrace frontages. John Brown defers to Ms de Lambert in terms of the urban design effects of those frontages (see commentary above).

8.4 Mr Brown notes that the background to the identification of the building on the site as a character supporting building demonstrates that it was the Dominion Road frontage of the building which was considered to make the necessary contribution to character, notwithstanding its inconsistency in terms of architectural style, materiality, scale and massing with the late Victorian and Edwardian buildings for which the particular area is recognised. The frontage of the building is to be retained.

8.5 Mr Brown summarises the conclusions reached in his special character assessment, and confirms that his conclusions are unchanged as a result of any comments received.

## **9. STORMWATER DESIGN**

9.1 The methods proposed for addressing stormwater issues are addressed in material filed with the application and in response to requests for further information.

- 9.2 Issues relating to stormwater methodology have been raised by officers from Auckland Transport and Auckland Council. Duncan Thomson's statement addresses those matters, which in large part appear to relate to the extent to which Auckland Transport and Auckland Council are prepared to work with landowners (and in particular the Applicant) to address stormwater issues across common boundaries.
- 9.3 The upzoning of urban areas of Auckland in the AUP has enabled increases in site coverage and hence stormwater discharges. As a consequence, the management of increased stormwater flows is an inevitable consequence of the strategic approach taken by Council to accommodating growth. The Applicant's expectation is that, in that context, the Council and its related entities would be endeavouring to work cooperatively and constructively with landowners to manage stormwater in the most efficient and effective way. Methodologies that have been adopted in the past may well become increasingly difficult to apply as the city becomes developed more densely.
- 9.4 Impermeable surface coverage on the Site is already close to 100%, so stormwater flows from it should not increase other than as a consequence of increased rainfall in the future. Neither will those elements of the application that are of greatest concern to submitters (e.g.: the additional height and the provision of a supermarket) contribute to increased stormwater flows from the Site.
- 9.5 The Applicant and its consultants recognise, however, that the management of overland stormwater flows onto, through and beyond the Site need to be addressed in a comprehensive way given that the Site receives overland stormwater flows from the properties to the east and the development is expected to be in place for the long-term.
- 9.6 The material filed with the panel describes the mechanisms that are proposed, including:
- (a) For overland stormwater flows entering the Site from upstream a central culvert conveying the flows below the ground to discharge via constructed bubble-up pits, with the addition of a peak flow attenuation system; and

(b) In respect of rainwater falling on the Site, a drainage system incorporating surface water roof collection with detention and discharge via ground soakage.

9.7 Mr Thomson's advice is that, notwithstanding the issues raised by the Council and Auckland Transport officers, the stormwater management proposals are appropriate for the Site and existing conditions and provide a robust and resilient solution to the existing flood impacts currently experienced on the Site.

9.8 From the Applicant's perspective it is important and desirable that the Council and Auckland Transport work constructively with it to manage stormwater across the common boundary. Auckland Transport is the downstream receiver of those stormwater flows. It has an ability and, we would submit, an obligation to work with upstream landowners so that land can be developed in a manner that reflects the AUP expectations regarding intensification.

## 10. PLANNING PROVISIONS

10.1 The planning instruments that are relevant to the Panel's determination of the Application are discussed in paragraph 3.2 above. The relevant documents are addressed in the AEE and the statement of evidence of Mr Matthew Norwell. However, the Applicant makes the following brief comments in relation to:

(a) The National Policy Statement for Urban Development 2020.

(b) The RPS provisions of the AUP.

### ***National Policy Statement for Urban Development 2020***

10.2 The National Policy Statement for Urban Development 2020 ("**NPS-UD 2020**") took effect on 20 August 2020.

10.3 The NPD-UD 2020 provides strong national guidance in relation to requirements on Councils to provide for urban development, and in particular the development of housing to meet the diverse and changing needs of communities. Specific and directive requirements are made of councils particularly Tier 1 Urban Authorities (such as Auckland Council), in relation to Tier 1 Urban Environments (such as Auckland).

10.4 The Environment Court recently considered the applicability of the NPS-UD in relation to a private plan change proposal in *Eden-Epsom Residential Protection Society Incorporated v Auckland Council* [2021] NZEnvC 082. The questions before the Court were:

*(a) Does the NPS-UD apply yet? It is operative, but does it drive PPC21; are we required to move ahead of decision-making by the Council on implementation of directive and urgent policies?*

*(b) If it does drive PPC21 how and in what ways would it drive it?*

10.5 The Court briefly analysed provisions of the NPS-UD, before concluding that:

(a) Its decision on the private plan change application would be a “*planning decision*” for the purposes of the NPS-UD; and

(b) The Court was not required to and would not be giving effect in its decision to Objectives and Policies in the NPS-UD that are not requiring “*planning decisions*”.

10.6 The Court’s conclusion is inconsistent with MfE guidance in relation to the applicability of the NPS-UD, however that guidance is not binding law in itself. The decision is the only direct consideration of the applicability of the NPS-UD 2020 to date by the Environment Court, and on its face would also apply to any decision in relation to the Application, given that the definition of “*planning decision*” in clause 1.4 of the NPS-UD includes “...*a decision on ... a resource consent ...*”.

10.7 Accordingly, if the Panel is to apply the NPS-UD 2020 in its decision on the Application, it should refer to (emphasis added):

(a) **Objective 2:** *Planning decisions improve housing affordability by supporting competitive land and development markets.*

(b) **Objective 5:** *Planning decisions relating to urban environments, and [Future Development Strategies] take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

(c) **Objective 7:** *Local authorities have robust and frequently updated information about their urban environments and use it to inform planning decisions.*

- (d) **Policy 1:** *Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum: (a) have or enable a variety of homes that: (i) meet the needs, in terms of type, price, and location, of different households; and (ii) enable Maori to express their cultural traditions and norms; and (b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and (c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and (e) support reductions in greenhouse gas emissions; and (f) are resilient to the likely current and future effects of climate change.*
- (e) **Policy 6:** *When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters: (a) the planned urban built form anticipated by those RMA planning documents that have given effect to this National Policy Statement (b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes: (i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and (ii) are not, of themselves, an adverse effect (c) the benefits of urban development that are consistent with well-functioning urban environments (as described in Policy 1) (d) any relevant contribution that will be made to meeting the requirements of this National Policy Statement to provide or realise development capacity (e) the likely current and future effects of climate change.*

10.8 The Applicant says that the Proposal is, in particular, consistent with Policies 1 and 6, which relate to planning decisions under the NPS-UD.

10.9 If granted the Proposal will:

- (a) Contribute to the existing housing stock in Mt Eden with dwelling typologies that are atypical of historical development in the area but are in high demand;
- (b) Provide alternative, more affordable dwelling options relative to the typologies traditionally available in the area;
- (c) Be accessible to the various identified elements of the urban environment, including by public transport along Dominion Road;
- (d) Be consistent with the planned urban built form of the city under the AUP (which, while operative prior to the promulgation of the NPS-UD, to a significant extent is consistent with and implements it);
- (e) Enable the realisation of development capacity provided for under the AUP; and
- (f) Contribute to and enable the realisation of benefits associated with well-functioning urban form.

***AUP – RPS provisions***

10.10 **Part B2** of the AUP addresses urban growth and form. It focuses on the accommodation of growth; anticipates significant change to the form of the city; and provides guidance as to the Council's priorities both in terms of the AUP provisions and the form of growth that it anticipates occurring as a consequence.

10.11 **Part B2E.1 – Issues** focuses on a singular matter, being the way in which growth is to be provided for. The goals to be met include: enhancement of the quality of life for individuals and communities; supporting integrated planning of land use, infrastructure and development; optimising the efficient use of the existing urban area; encouraging the efficient use of existing social facilities; enabling provision and use of infrastructure in a way that is efficient, effective and timely; and maintenance and enhancement of the quality of the environment (both natural and built). The Applicant says the Proposal will clearly address these goals by enabling the development of an

efficient, attractive residential community, well integrated with existing land use and infrastructure.

10.12 **Part B2.2 – Urban Growth and Form** sets out a range of generally applicable provisions:

(a) **Part B2.2.1 – Urban Growth and Form Objectives** includes:

- (i) Objective 1, being “*a quality compact urban form*” that enables specified outcomes.
- (ii) Objective 2, being the accommodation of urban growth primarily within the 2016 urban area.
- (iii) Objective 5 being the integration of land development with provision of appropriate infrastructure.

Comment: The Applicant says that the Proposal will promote a quality compact urban form by providing for higher density development within the existing urban area, located on an arterial transport corridor that is intended to become a Frequent Transport Network.

(b) **Part B2.2.2 – Urban Growth and Form Policies** includes the following policies which fall under the heading, “*Quality compact urban form*”:

- (i) Policy 4, which reads, “*Promote urban growth and intensification within the urban area 2016...*”
- (ii) Policy 5, which reads, “*enable higher residential intensification a) in and around centres; b) along identified corridors; and c) close to public transport, social facilities including open space and employment opportunities.*”

Comment: The Plan Change is wholly consistent with these policies. With reference to Policy 4, the Proposal represents significant residential intensification within the urban area, and indeed on the Auckland Isthmus immediately adjoining the Frequent Transport Network and on the edge of an identified centre. With reference to Policy 5, the Site is centrally located on

the public transport network, and easily accessible to and from social facilities and employment opportunities. Enabling development would give effect to the growth strategy adopted in the Unitary Plan and in particular the “*quality compact form*” sought.

10.13 **Part B2.3 – A Quality Built Environment** includes the following objectives and policies:

- (a) Objective 1, being, “*A quality built environment where subdivision, use and development do all of the following: a) respond to the intrinsic qualities and physical characteristics of the site and area, including its setting; b) reinforce the hierarchy of centres and corridors; c) contribute to a diverse mix of choice and opportunity for people and communities; d) maximise resource and infrastructure efficiency; e) are capable of adapting to changing needs; and f) respond and adapt to the effects of climate change*”.
- (b) Objective 3 reads, “*The health and safety of people and communities are promoted.*”
- (c) Policy 3, which reads, “*Enable a range of built forms to support choice and meet the needs of Auckland’s diverse population.*”

Comment: Those provisions reinforce the focus in Part B2.2 on the need to accommodate growth and to alter the form of the city. The Proposal supports and is consistent with all of items (a) to (e) in Objective 1. It supports item (f) which relates to climate change. It is in that context that the Applicant asks you to consider the potential effects of the Proposal including in terms of the transport network and the density and form of development in the surrounding areas.

10.14 **Part B2.4 – Residential Growth** includes a series of objectives and policies that promote residential intensification, mixed-use development, a variety of housing options. Key objectives include:

- (a) Objective 1, reading, “*Residential intensification supports a quality compact urban form.*”

- (b) Objective 3, reading, “*Land within and adjacent to centres and corridors or in close proximity to public transport and social facilities (including open space) or employment opportunities is the primary focus for residential intensification.*”
- (c) Objective 4, reading, “*An increase in housing capacity and the range of housing choice which meets the varied needs and lifestyles of Auckland’s diverse and growing population.*”

Comment: The Proposal is consistent with and gives effect to all of these objectives, along with the corresponding Policies.

## **11. PURPOSES OF THE RMA AND FTA**

- 11.1 As noted above in relation to the Legal Framework, the Panel’s decision making in relation to the Proposal is similar to that of an RMA-decision maker, but with the additional emphasis on the separately defined purpose of the FTA.
- 11.2 The FTA requires that the Panel expressly refer to Part 2 RMA, which includes the purpose of the RMA (section 5). As noted by the expert panel in *Ryman*, the Court of Appeal’s decision in *RJ Davidson Family Trust v Marlborough District Council* ([2018] 3 NZLR 283) remains relevant under FTA regarding the applicability of Part 2 RMA in the context of a planning instrument (here the AUP) that has been competently prepared, and where a “*Part 2 assessment*” will not add to the Panel’s assessment under the AUP itself.
- 11.3 The Panel must also explicitly address the purpose of the FTA in its decision. *Davidson* does not address consideration of the quite separate and bespoke purpose set out in section 4 of that Act, which reads:

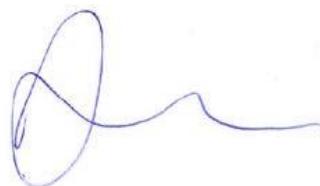
*The purpose of this Act is to urgently promote employment to support New Zealand’s recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.*

- 11.4 For the reasons set out in this memorandum, the application, and the supporting documents and evidence provided by the Applicant, we submit that:

- (a) The Proposal is readily able to contribute towards and support the country's recovery from COVID-19 in terms of its economic and social impacts; and
- (b) Granting consent will support certainty of ongoing investment in New Zealand while promoting sustainable management of natural and physical resources.

11.5 For completeness, we note that the Applicant's assessment of the Proposal against the purpose of the FTA is consistent with and not contrary to an assessment against the relevant planning provisions or the achievement of the sustainable management purpose of the RMA. We submit that the Panel can have comfort that in granting consent it is not placing the purpose of the FTA above or ahead of the purpose of the RMA.

**DATED** this 23<sup>rd</sup> day of June 2021



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**Douglas Allan / Daniel Sadlier**

Counsel for Silk Road Management Limited,  
Pudong Housing Development Company  
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