

**BEFORE THE ENVIRONMENT COURT**

Decision No: [2011] NZEnvC **248**

**IN THE MATTER** of an appeal under Section [120] of the  
Resource Management Act 1991

**BETWEEN** Laidlaw College Inc  
(ENV-2011-AKL-000049)

New Zealand Retail Property Group  
(NZRPG)  
(ENV-2011-AKL-000051)

Magsons Hardware Ltd  
(ENV-2011-AKL-000052)

Canam Corporate Holdings Ltd & The  
Whitby Trust  
(ENV-2011-AKL-000053)

New Zealand Transport Agency  
(ENV-2011-AKL-000058)

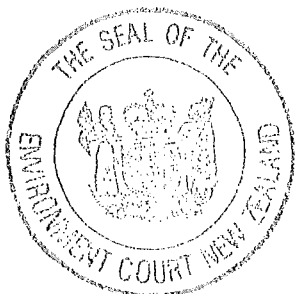
Appellants

**AND** Auckland Council (formerly Waitakere  
City Council)

Respondent

**AND** Magson's Hardware Ltd

Applicant



Hearing at: Auckland, 24-27 January and 1 February 2011

Court: Environment Judge M Harland  
Environment Commissioner K Edmonds  
Environment Commissioner H McConachy

Appearances: Mr Brownhill for Magsons Hardware Ltd  
Mr Braggins and Ms Obushenkova for New Zealand Retail  
Property Group  
Mr Lanning and Ms Hartley for New Zealand Transport Agency  
Mr Casey, QC and Ms Davidson for Auckland Council

Date of Decision: 1 September 2011

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### INTERIM DECISION OF THE ENVIRONMENT COURT

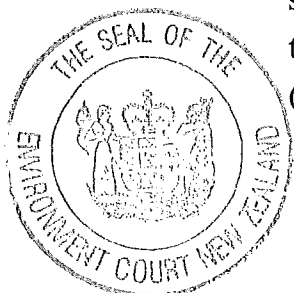
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- A. Final consideration of the appeals is deferred to allow Magsons to advance the details of the proposed traffic mitigation with Auckland Transport and NZTA for the reasons outlined in this decision.
- B. A judicial telephone conference is to be convened in one month's time to review progress.

### REASONS FOR DECISION

#### Introduction

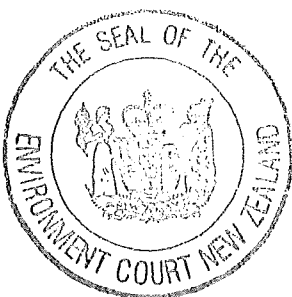
[1] Magsons Hardware Ltd ("**Magsons**") wants to build what may be the biggest store in New Zealand, a Mitre 10 Mega on the corner of Lincoln Road just off the motorway. As part of the development Magsons also proposes commercial office space on the rooftop of the Mitre 10 Mega store. The land is not zoned for a store of this scale and nature and is non-complying under the Waitakere City District Plan ("**the District Plan**").



[2] The Waitakere City Council ("**the Council**") granted consent to the proposal subject to conditions on 22 January 2010. Magsons appealed some of the conditions, and the New Zealand Transport Agency ("**NZTA**") and New Zealand Retail Property Group ("**NZRPG**") appealed the granting of consent, seeking that it be declined. Settlement was reached with three neighbouring landowners, Laidlaw College, Canam Corporate Holdings Limited and the Whitby Trust, who had also appealed the Council's decision, and the Court had consent memoranda in front of it to give effect to those settlements if it is minded to grant consent.

[3] Broadly speaking the main issues in contention related to the traffic effects arising from the proposal and whether or not the proposal was contrary to, or inconsistent with, the policies and objectives of the relevant planning instruments. The focus of the appeal by NZTA was (not surprisingly) on the traffic issue, with the NZRPG appeal concentrating on the planning issues. The NZRPG case included an argument that if consent was granted it would create an undesirable precedent affecting the integrity of the District Plan and lead to inappropriate use of industrial/commercial land. The approach taken by NZRPG invoked the response from Magsons that we should consider NZRPG's case against the backdrop of trade competition, given its commercial interest in providing large-format retail opportunities at its shopping centre/s. The Council took a neutral position on the appeals, but provided information particularly on the proposals for the road network in the vicinity of the site.

[4] The facts required to be considered under the legal criteria overlap, even though the analysis and evaluation of them is distinct and different tests apply. To avoid repetition of the facts, we intend to deal with them as topics under the headings of "traffic" and "planning", with the detailed issues and arguments specified and decided under each topic. Before doing so, an outline of certain background matters is required in order to give a context to them. The background matters include describing the site and its surrounding environment, summarising the details of the proposal and outlining the statutory and planning framework that applies. There is also a preliminary issue concerning the weight that should be given to NZRPG's case as Magsons contended it was a trade competitor.



## Background

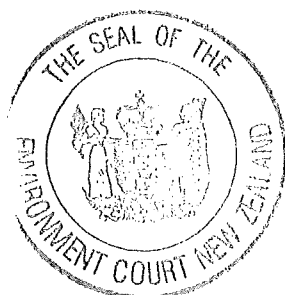
### *The site and its surrounding environment.*

[5] The site upon which the development is proposed comprises 5.3 hectares. Previously it was owned by Collards' Vineyard, with the land being used predominantly for the growing of grapes. The bulk of the land is now bare, but it is largely surrounded by industrial-type development. The site borders Central Park Drive to the north and Lincoln Road to the west. Lincoln Road is a regional arterial route which has recently been identified as an intensive corridor under the Auckland Regional Policy Statement – Plan Change 6 (“**ARPS Plan Change 6**”). Lincoln Road joins onto the north-western motorway not too far from the site and is the gateway to Henderson, an important suburban centre in west Auckland. The site is a very desirable one with its exposure to the high volumes of vehicle traffic travelling along Lincoln Road, and the motorway.

[6] The site has been subdivided into four lots, but this proposal only concerns Lots 2 and 4. Lot 2 is the proposed development site comprising 3.15 hectares, and Lot 4 is the anticipated principal access road through the site, the entrance to which is from Central Park Drive. This road could in the future link into a proposed road extending from Paramount Drive and Universal Drive should it be designated, but this is uncertain and we give it no weight in our consideration. Lots 1 and 2 will remain undeveloped and may be sold at a future date.

[7] The proposed Mitre 10 building is set back from Central Park Drive, with a Hirepool and the Mobil service station in front of it, and Lincoln Road behind Lot 1 that will have other development on it. There are still pockets of viticulture or horticultural land uses and undeveloped land close to the motorway,<sup>1</sup> but the area is now dominated by business uses with a mix of warehouse storage, small manufacturing companies, specialist activities and industrial type retail services, health services, educational services, office and light industrial use. Examples of the

<sup>1</sup> Mr Barbour gave a figure of 70-80,000 m<sup>2</sup> as a rough bulk and location analysis of other areas of land which may be available for development in the immediate environment. That included all the pieces of land to the north of Central Park Drive that abut the motorway including the site and an area north of Triangle Road between Triangle Road and the motorway with BCNZ's transmission tower (Transcript pages 417 - 420).



types of activities undertaken nearby include an automotive business (Partmaster), an electrical retail sales business (Cory Electrical), mechanics, building and hardware supply businesses (Carters, Heritage Tiles, Repco, Humes, Dulux), hire equipment businesses, office developments and vehicle sales yards. The buildings in the vicinity are typically of small to medium size, comprising either two levels or are high-studded one level warehouse-type buildings. The impression we gained on our site visit is that the area is clearly “in transition” with activities meeting the directions for this zone.

[8] Slightly south of the site and on the west and opposite side of Lincoln Road is the Lincoln North Shopping Centre. The existing Mitre 10 Mega which this proposal seeks to replace, is situated across Universal Drive some 650m north of the proposal and next to a supermarket.

### *The proposal*

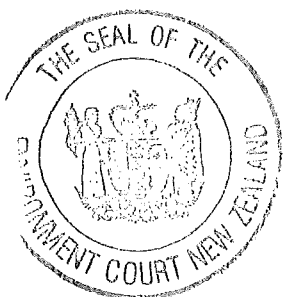
[9] Mr Kumar, a director and shareholder in Magsons outlined for us the background to the development of business. Over the last 20 or so years he and his family have worked hard to establish a very successful business with the Mitre 10 franchise, such that his family interests now include a number of Mitre 10 stores at Botany, Henderson and Westgate shopping centre.

[10] The proposal is for a large warehouse-type building, to accommodate mixed retail/office development, with a total floor area of 26,821m<sup>2</sup>, including office space on the ground floor and mezzanine levels and a further 8000m<sup>2</sup> of commercial office space on the rooftop.<sup>2</sup> The Mitre 10 Mega is intended to serve both trade and retail customers for which 686 car parks will be provided.

[11] The existing Mitre 10 Mega owned by Magsons just down the road is said to be too small for further development. In particular Magsons wishes to increase the trade component of its business, which is not able to occur at the current site given its layout. Magsons also wants more retail space for the display of larger items. Overall, Magsons believes there is sufficient market demand to justify almost doubling the floor area of its business. It emphasised that this would provide another choice for the

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<sup>2</sup> Opening Submissions of Counsel for Magsons Hardware, paragraph 1.2. While there was some difference in the areas referred to in evidence and submissions, the differences are not material.



market, and would provide potential economic benefits associated with the employment of about 200 general retail workers,<sup>3</sup> although this figure may include those currently employed at the existing Mitre 10 Mega which will be closed.

[12] The commercial office space was initially proposed to be completed after the development of the Mitre 10 Mega store, but Magsons have now agreed to complete the entire development, including offices, before the commencement of trading, should consent be granted. Such a condition could not extend to requiring the office space to be occupied before the commencement of trading, as that would depend on the state of the market and other factors beyond Magson's control.

[13] Leaving aside the scale of the proposal, the nature of it would not necessarily be out of character with the mixture of light industrial and business activities conducted nearby.

***Statutory and planning framework.***

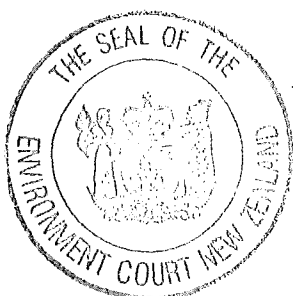
[14] The proposal requires consent as a non-complying activity in the Lincoln Working Environment zone of the District Plan because of the scale of the retail activity involved. The provisions of ARPS-Plan Change 6 as it relates to the Lincoln Road corridor are also relevant.

[15] As the proposal is a non-complying activity, we must consider whether it meets the threshold test outlined in s104D of the Resource Management Act 1991 ("the Act"), before considering the matters referred to in sections 104(1) and 104B of the Act. This requires us to consider whether or not the adverse effects of the activity on the environment will be minor, or the proposal is for an activity that will not be contrary to the objectives and policies of the District Plan. If either of these tests is met we must consider the proposal against the matters outlined in s104, the provisions of which are subject to Part 2 of the Act and its overall purpose of sustainable management.

[16] We signal that we have decided that the proposal can meet the threshold test outlined in s104D(1)(b) and the reasons for our conclusion are set out below, but firstly we need to address the issue of trade competition.

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<sup>3</sup> Mr Foy evidence-in-chief, paragraph 6.1



*What weight should we give to NZRPG's case and evidence?*

[17] NZRPG owns land in west Auckland concentrated around the Westgate town centre and owns the Westgate shopping centre.<sup>4</sup> Mr Barbour, a registered property valuer and a registered property consultant, who is part of the executive team within NZRPG<sup>5</sup> described NZRPG's position in relation to the appeal as follows:

NZRPG's submissions in relation to this hearing should in no way be construed as being anti-competitive towards Mr Kumar or Mitre 10, but are directed at what are significant inconsistencies in the application of the District Plan so as to have a significant impact on the pattern of land use development in the sub-region and NZRPG's confidence in the administration of the District Plan, *placing in jeopardy the aspirations of the Westgate Town Centre*<sup>6</sup> (as a result of the implications arising from this application being granted).

[18] Not far away from Westgate is the site upon which a new town centre is proposed which is referred to as Massey North. NZRPG referred to an appeal in relation to a plan change concerning part of the proposed town centre at Massey North which was recently determined by the Court.<sup>7</sup> The appeal dealt with the extent to which certain types of retail and development could be dealt with in one of the five precincts that form part of the proposed town centre. One of the issues the Court had to determine was how to apportion the total proposed retail space comprising 38,000m<sup>2</sup>. The Court apportioned 22,000m<sup>2</sup> for large-format retail in precinct C. NZRPG used this case as a comparison, submitting that it was an example of a properly integrated planned approach to the siting of large-format retail.

[19] Both the Westgate shopping centre and the proposed town centre at Massey North are down the motorway, but reasonably near as the crow flies to Lincoln Road.

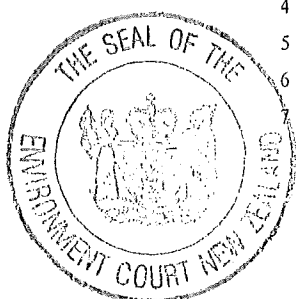
[20] Magsons questioned the motives behind NZRPG's appeal and its involvement in the case, acknowledging that the proposal was lodged before 1 October 2009 with recent amendments to the Act designed to deal with trade competitor appeals.

<sup>4</sup> Mr Barbour, evidence-in-chief, paragraph 4.5.

<sup>5</sup> Mr Barbour, evidence-in-chief, paragraph 1.6

<sup>6</sup> Mr Barbour, evidence-in-chief, paragraph 4.4

*The National Trading Company of New Zealand v Auckland Council* [2011] NZEnvC 13



[21] Section 104(3)(a) of the Act requires the Court to have no regard to trade competition. Magsons submitted that we should give little or no weight to the evidence of the NZRPG because of its position as a trade competitor.

[22] NZRPG countered by pointing out that it does not participate in retail trading and is not a direct competitor, nor does it have any tenants who are competitors. We were also advised late in the proceedings of Mr Kumar's interests in the Mitre 10 store at Westgate. Furthermore, Magsons own evidence was that there is room for a Mitre 10 Mega at both Westgate and Lincoln Road.

[23] Whilst the issue was raised by Magsons it was not vigorously pursued by it. We remain mindful of the need not to have regard to trade competition in making our decision.

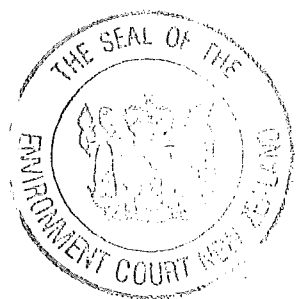
**Traffic effects.**

*The issues and the evidence*

[24] The Council in its decision found that the existing road network would be of sufficient capacity to accommodate the additional traffic movements without detriment to the road's function or safety, provided that the road improvements required by the conditions of consent were implemented. NZTA did not agree and appealed.

[25] Between the Council's decision and the hearing for this appeal the Auckland Council came into existence and with it a new regional framework. Auckland Transport is now the agency responsible for dealing with traffic matters within the Auckland region, not the Council.

[26] In this Court, both traffic witnesses (Mr Philip for Magsons and Ms Crafer for NZTA) agreed that before the proposal could be granted, additional mitigation measures over and above those contained in the Council's conditions of consent were required, so that the Central Park Drive/Lincoln Road intersection could accommodate the traffic generated by the development.





[27] Accordingly, Magsons proposed:

- (a) a new west-bound lane on Central Park Drive along with associated changes at the Central Park Drive/ Lincoln Road intersection; and
- (b) widening Central Park Drive to provide an additional east-bound traffic lane on the approach to the intersection with Lincoln Road and Triangle Road, which would provide significant benefit to the operation of the Triangle Road intersection.<sup>8</sup>

The proposed mitigation would require the consent of Auckland Transport which has not yet been obtained, nor discussed with it in any detail.

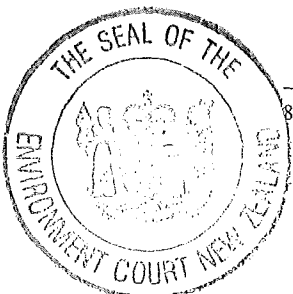
[28] Ms Crafer considered that if the above could be implemented, it would provide additional capacity which could potentially mitigate the traffic-related effects arising from the development in the weekday/evening peak period, but she did not agree that it would be adequate to cope with the Saturday peak. At the heart of the Saturday peak issue is a difference of opinion between the experts about how much traffic will be generated by the proposal and if delay is caused by it, how much delay is reasonable.

[29] There are therefore two overall issues for us to determine under this topic, whether or not the traffic effects during the Saturday peak are able to be mitigated to an acceptable level and overall whether the mitigation proposed has been sufficiently identified or can indeed be provided. The issue raised by NZTA relating to the consistency or otherwise of the proposal with the relevant planning documents will be dealt with by us when we consider planning matters.

[30] We intend to commence by first identifying the relevant roading network around the site and determining how far it should extend in relation to traffic effects arising from the proposal. We will then consider what traffic might be generated from an activity able to be undertaken from the site as of right, and decide whether we should take this into account as a lawful "bottom-line" when considering what is proposed by Magsons ("the permitted baseline" argument). We will next consider whether or not the mitigation proposed overall will be sufficient to mitigate adverse traffic effects arising from the proposal and then we will specifically deal with the Saturday peak issue— what it comprises and whether the effects from it are able to be

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<sup>8</sup> Mr Philip, evidence-in-chief, paragraph [6.3]



satisfactorily mitigated. Lastly we will determine whether the mitigation proposed is certain enough for us to rely on, given that Auckland Transport has not approved it.

*The road network around the site*

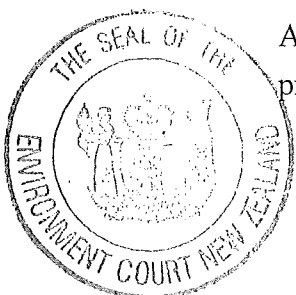
[31] The site is bounded by Lincoln Road, a regional arterial road, to the west and Central Park Drive, a district arterial road, to the north. Access to the site is to be from Central Park Drive. Lincoln Road is one of the main roads to Henderson, a town centre in west Auckland. Both it and Central Park Drive are part of a primary arterial route in the strategic freight network for the Auckland Region.

[32] The traffic-signal-controlled intersection of Lincoln Road, Central Park Drive and Triangle Road is close to the site. The Lincoln Road interchange, and access to and from the SH16 north-western motorway, is located to the north of the site. These two junctions are key elements within the surrounding road network and form an effective gateway for large volumes of traffic at various periods. Universal Drive and Paramount Drive, south of the site and with access to Lincoln Road are also important elements in the road network in the vicinity.

[33] Bus services operate along Lincoln Road, with northbound and southbound bus stops close to the site. The Council has recently installed improved cycle facilities/lanes on Central Park Drive and Triangle Road, including on the westbound approach to the intersection with Lincoln Road.

[34] The surrounding network performs poorly during peak periods, with the intersection of Lincoln Road, Central Park Drive and Triangle Road typically experiencing the worst performance measured by the length of the delay. Overall the performance of this intersection is worse during the Saturday midday peak than during the weekday evening peak.

[35] There are upgrades to both the motorway and local road network planned respectively by NZTA and Auckland Transport which the parties agreed should be taken into account. NZTA plans to upgrade the Lincoln Road interchange and widen the motorway. This work is to be completed by 2016 and will provide additional capacity in the network. Mr Edwards (the traffic expert for the Council) set out Auckland Transport's proposals in relation to the local road network, which include providing an additional lane in each direction along Lincoln Road from the motorway



interchange to south of Universal Drive, with the additional lanes allocated for bus and cycle traffic.<sup>9</sup>

[36] It is fair to say, however, that the possible changes on Lincoln Road are at a preliminary stage and no funding is allocated for them.

*What area should be considered in terms of adverse traffic effects?*

[37] Magsons sought to limit the area for assessment of adverse traffic effects to the road network immediately surrounding the appeal site. It submitted that an applicant for resource consent is not required to resolve infrastructure problems outside its boundary. In support of this proposition it referred us to *Landco Mt Wellington Limited v Auckland City*<sup>10</sup> (a large scale residential development on a major arterial road) and *Progressive Enterprises Limited v North Shore City Council*<sup>11</sup> (a supermarket on a major arterial road).

[38] The extent of the area that needs to be considered as being potentially affected by adverse traffic effects is a matter which needs to be decided in the context of each particular case. Whilst we agree with the general principle that an applicant is not required to resolve existing infrastructure problems, neither should it add significantly to them. The question is always one of degree depending on the facts of each case. The focus must be on the effects which arise from a particular proposal in the context of the particular environment into which it is sought to be transposed. Clearly, the roading network immediately around a proposed site will need to be considered, but equally, depending on the nature of the roading network and the potential for flow-on effects, a wider consideration of the network may be appropriate depending on the case.

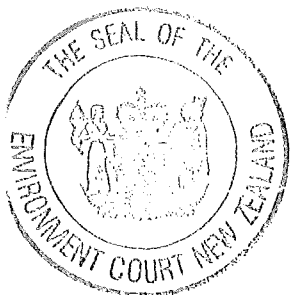
[39] Ms Crafer considered the immediately affected road network surrounding the site to include the northern part of Lincoln Road north of Universal Drive, including the Central Park/Lincoln/Triangle Road, Paramount/Lincoln and Universal/Lincoln intersections and the Lincoln Road motorway interchange. Magsons appeared to suggest that traffic effects beyond the Central Park/Lincoln/Triangle intersection

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<sup>9</sup> Mr Edwards, evidence-in-chief, paragraphs [10]-[14]

<sup>10</sup> A35/2007

<sup>11</sup> W75/2008



should not be considered; but we do not agree. Indeed, the traffic modelling and the traffic evidence provided by Magsons and NZTA took a wider approach.

[40] In our view, given the close and important relationship of the Central Park/Lincoln/Triangle intersection to all of these roads, the traffic effects arising from the proposal that should be considered encompass the northern part of Lincoln Road north of Universal Drive well beyond this intersection.

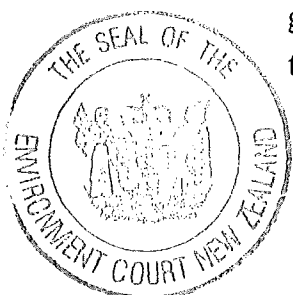
***What is, and should we discount, the permitted baseline?***

[41] The District Plan permits an office development to occur as of right on this site. Under s104(2) of the Act we may disregard any adverse traffic effects arising from a complying office development on this site, if we wish. Magsons made it clear it was not relying on the permitted baseline, because it considered any adverse effects arising from its development (including traffic effects) would be no more than minor.

[42] Mr Reaburn (the planner for NZRPG) and others considered that offices in this location would take a long time to be occupied, and that meant we should exercise our discretion to disregard the permitted baseline. Mr Osborne (the planner for NZTA) was of the opinion that the permitted baseline could not be applied to a Saturday, given that offices would not be operational at that time.

[43] In assessing the adverse traffic effects arising from this proposal, we have decided to take into account the fact that an office development could be built on this site as of right. Such an office development would generate additional traffic from Monday to Friday with potentially adverse effects. We accept that an office development may take time to be occupied, therefore any adverse traffic effects arising from it may be difficult to predict, but this does not mean that it should be completely disregarded; rather it is a question of the degree to which such adverse effects should be taken into account as part of the permitted baseline. In this case our view is that it would be unrealistic to look at this site, (which is a “greenfields” site surrounded by existing urban development), without contemplating the potential future urban use of it, even if that occurs in stages.

[44] We accept and have taken into account that an office development would generate adverse traffic effects from Monday to Friday, but equally we accept that these effects are likely to be incremental.



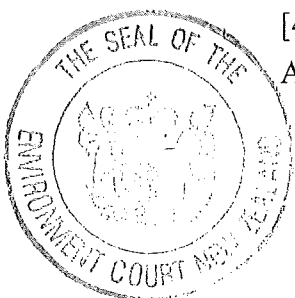
*Is Magsons proposed additional mitigation sufficient?*

[45] Mr Philip for Magsons did not provide any detailed design evidence for either the additional lane proposed on Central Park Drive or the design of the works that may be required to re-align the intersection. Neither had Mr Philip considered the future bus and cycle measures planned for Lincoln Road or the impacts on utility services within the road that might arise as a result of the proposed mitigation measures he had suggested. He failed to show how the additional lane (including cycle ways) could be accommodated within the existing road reserve. Mr Philip conceded that whilst these measures would assist to mitigate the traffic effects arising from the proposal, they might not be the most efficient or appropriate method/measure to be undertaken in relation to the wider traffic network, but he nonetheless thought they would be adequate.

[46] The additional mitigation proposed requires the approval of Auckland Transport. We asked the Council to explain the statutory role and functions of Auckland Transport under the new regime and we were told that the Local Government (Auckland Council) Act 2009 provides that, while ownership of local roads remains with the Council, Auckland Transport is responsible for managing the network. Certain functions and powers previously exercised by local councils are now assigned to Auckland Transport, including (with some minor exceptions) those under Part 21 of the Local Government Act 1974. It is therefore Auckland Transport who would be required to authorise any works proposed by Magsons within the road reserve. Prior to this hearing Auckland Transport has not been asked for, nor had it given any such approval.

[47] The Local Government (Auckland Council) Act 2009 is very careful to separate the functions of Auckland Transport from those of the Council. Whilst the Council may make rules about Auckland Transport's governing body and how it goes about making decisions it is prohibited from performing any function or exercising any power conferred on Auckland Transport. It would therefore be wrong to delegate decision-making on the certification of traffic conditions to the Auckland Council given that this role is to be fulfilled by Auckland Transport. Auckland Transport is not a party to these proceedings.

[48] The Council could therefore not provide any assurances about the views Auckland Transport might reach in deciding whether or not the proposed mitigation



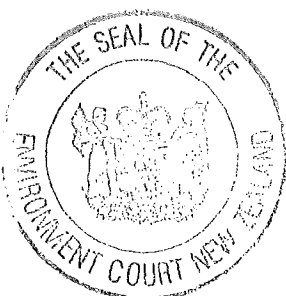
works will be authorised. Nonetheless during the hearing the Council requested Auckland Transport to provide preliminary comment about the proposed additional mitigation, and it provided a letter<sup>12</sup> from it which suggested that there was no impediment to the proposal being potentially approved. The letter, however, asked a number of important questions including how public transport, pedestrian and cyclists would be affected by the additional mitigation measures suggested by Magsons. In our view the letter did no more than indicate a tentative, and possibly relatively uninformed, view about Magsons' suggested additional mitigation measures. We find it a long way from indicating approval.

[49] Overall we conclude that there is a large degree of uncertainty about whether the proposed additional mitigation measures can be implemented, and if they are, whether they would be effective. In addition, there is the uncertainty about whether or not Auckland Transport would allow the proposed mitigation. Foreshadowing this possibility arising, Magsons suggested that the approval of Auckland Transport could be a condition precedent to the development occurring. It referred to *Westfield (New Zealand) Ltd v Hamilton City Council*<sup>13</sup> where such a mechanism was used to deal with certain traffic effects which involved Transit NZ, who was not a party to the proceedings.

[50] *Westfield* involved an appeal in relation to the Hamilton City Proposed Plan Change 39, which sought to re-zone 10.59 hectares of land at Te Rapa to commercial services to enable a large-format shopping complex, then referred to as a "super-centre" to be developed. The Council declined the application for the plan change and the appeal ensued. There were potentially adverse traffic effects, given that the proposed super-centre was to exit at several points onto State Highway 1. For a number of years before the decision, the Council and Transit NZ had undertaken studies that had been carried out in conjunction with the development of urban growth strategies and structure plans, to ensure coordination of land use and transport planning. There was a difference of opinion about the proposed traffic mitigation, but the proposal by the applicant's traffic expert had been accepted by the Council and Transit NZ. The Court imposed a condition (which later became a subject of appeal)

<sup>12</sup> Memorandum from Auckland Transport 28 January 2011 headed 297 Lincoln Road: Proposed widening of Central Park Drive (attached to respondent's submissions)

<sup>13</sup> *Westfield (New Zealand Limited) v Hamilton City Council*, [2004] NZRMA 554



that any retail activity could not commence until certain works had been completed by Transit NZ, who was a third party and not involved in the appeal.

[51] The High Court<sup>14</sup> on appeal agreed with the Environment Court that a condition precedent which defers the opportunity for an applicant to embark on the activity until a third party carries out some independent activity, is not invalid.<sup>15</sup>

[52] Whilst clearly, therefore, a condition precedent is a legally available mechanism,<sup>16</sup> the factual situation as outlined in *Westfield* is somewhat different from the position with which we are faced. Not only did that case concern plan change appeals, but a particular feature of it was that the traffic experts for the Council and Transit NZ had agreed with the proposed mitigation. This case is quite different, because there is no agreement that the mitigation proposed would be effective, because Auckland Transport has not been able to properly assess the extent of the proposed mitigation. In our view, the letter from Auckland Transport, to which we have already referred, is insufficient to create the kind of certainty we would need to satisfy us that a condition precedent was appropriate at this stage.

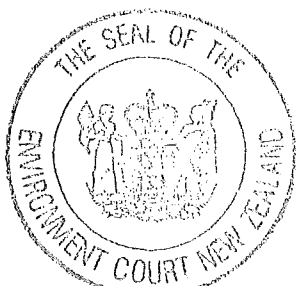
[53] We were concerned about whether Magsons had been prejudiced by the local government reorganisation in Auckland. We specifically asked Mr Casey, QC if he could address this point. For whatever reason (and none was advanced for Magsons) there was no approach by it to either the Waitakere City Council, or Auckland Transport as the road controlling authority, in relation to the additional mitigation it proposed. The Council submitted that Magsons was on notice about the possible shortcomings in the level of detail provided by it in relation to the proposed mitigation works, therefore any uncertainties arising lie at its feet. We find the approach taken by Magsons to be somewhat unusual, and with the benefit of hindsight, unwise, especially in relation to enquiries being made to the former Waitakere City Council. Whilst we are not satisfied that Magsons has been prejudiced by the local government reorganisation, we accept that there may have been confusion about who to approach between October and this hearing date. This is evident from the record, which shows

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<sup>14</sup> *Westfield and ors v Hamilton City Council* HC Ham, CIV 2003 485 000956, 17 March 2004, Fisher J

<sup>15</sup> Ibid at paragraph 56

<sup>16</sup> Ibid



that we required evidence to clarify the role of Auckland Transport. This evidence was provided by Mr Edwards.<sup>17</sup>

*The Saturday peak*

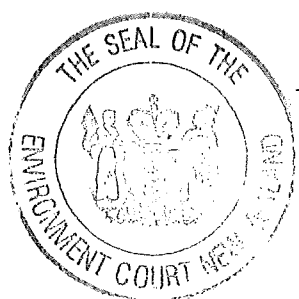
[54] The Saturday peak does not affect the motorway traffic, which Ms Crafer told us runs fairly freely on a Saturday. The main traffic effects on a Saturday are experienced on the local road network, with the flow along Lincoln Road being the main concern but only between 12 noon and 1pm (referred to in the evidence and now by us as “*the Saturday peak*.”)

[55] Whilst both Mr Philip and Ms Crafer agreed that there was a Saturday peak, the level to which it would be increased by the development was disputed. Both undertook modelling to estimate the likely traffic that would be generated by the proposal and its effects on the local traffic network. Both reached different conclusions about what level of delay would result from the increased traffic generated by the development and what the significance of these effects were likely to be in terms of the statutory tests, with Ms Crafer maintaining that the effect would be more than minor and unable to be mitigated by what was proposed, and Mr Philip maintaining the opposite.

[56] We will begin by considering the trip generation rate that should apply, followed by the effects that flow from the rate we accept. We will next consider the significance of these effects and lastly whether or not they can be mitigated.

*What is the “trip generation rate” for shoppers at the Mitre 10 Mega is likely to be?*

[57] The modelling used to inform the traffic witnesses on the likely adverse effects arising from the proposal had a “*trip generation rate*” as a key input. Both Mr Philip and Ms Crafer agreed upon a base year of 2016, which allowed for and assumed that the Lincoln Road motorway intersection and lane extensions had been completed. There was no dispute that the modelling undertaken was robust, rather the issue was what trip generation rate should have been used.




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<sup>17</sup> Mr Edwards, evidence-in-chief dated 26 January 2011



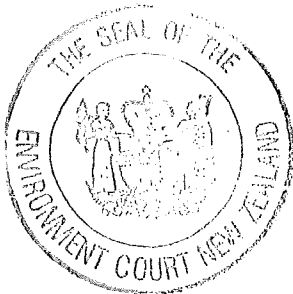
[58] Mr Philip (for Magsons) initially suggested that 6.43 trips per 100m<sup>2</sup> gross floor area<sup>18</sup> (expressed as 6.43/100m<sup>2</sup> GFA) would be generated by the proposal, but amended the trip generation rate to a figure of 4.60,<sup>19</sup> stating that the higher figure “*is so extreme that it is unrealistic*” and submitting that the lower figure would still be conservative. His reasons were:

- (a) The proposal is to expand an existing store for which the actual known traffic generation rate is 4.60 and it is common practice to use actual rates rather than generic rates if these are known;
- (b) The trip generation rate was applied to the total covered floor area of the development which includes about 2,200m<sup>2</sup> GFA of inwards goods area which, at the higher trip generation rate of 6.43 would result in an additional 140 movements per hour during a Saturday peak period for the inwards goods area. He believed this to be an extreme over-estimate of likely deliveries during this time;
- (c) The proposed percentage increase in floor space modelled is approximately 103%, but expansion of existing stores does not result in traffic directly proportional to the increase in floor space;
- (d) Applying the 40% increase in turnover estimated by the applicant’s business analysis would result in an increase of about 240 additional trips to and from the new site compared to an increase of about 1,120 trips if the higher trip rate of 6.43 is applied to the total GFA of the new store;
- (e) A significant proportion of the increase in turnover is expected to come from trade customers, with 80% having their orders delivered, typically during a weekday, with delivery trucks often carrying multiple orders at a time.

[59] Magsons case was that the proposed store would have the potential to draw more customers than the existing store as it would be more visible and offer a better shopping experience. Mr Smith (the architect for Magsons) said the proposed store would “*exhibit... prominence as a significant new commercial building for Waitakere*

<sup>18</sup> Mr Philip, evidence-in-chief, paragraph [4.5]

<sup>19</sup> Mr Philip, rebuttal, paragraphs [2.26-2.27]



*City*".<sup>20</sup> Mr Kumar gave evidence that the new store would have a less intensive layout, with more display and circulation space and increased product lines. He anticipated an increase in turnover of up to 40 percent, although the increased floor space is approximately 100%.

[60] Mr Warren, a planner experienced in large scale retail developments, also gave evidence for Magsons, and considered the increased turnover to be more in the order of 30 percent. Mr Warren agreed with Mr Philip that it was appropriate to use the existing store generation rate of 4.60 rather than 6.43 trips per 100m<sup>2</sup> GFA. In his view, the traffic generation rate of 6.43 would only be achieved if the turnover of the new store represented an increase of 184% (or nearly three times) of the turnover achieved by the existing Mitre 10 Megastore. This he considered to be a fanciful basis for assessing traffic generation rates.<sup>21</sup>

[61] We are dealing with a predicted increase in turnover with high levels of uncertainty on what might happen in practice. If the store is highly successful, the turnover may exceed the estimates provided to us. The new enterprise is also, to some extent, uncharted waters for turnover given its size and potential attractiveness to customers.

[62] Mr Philip also provided comparative trip generation rate data from large hardware superstores both in New Zealand and Australia. This data was presented in a table<sup>22</sup> which we now reproduce:

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<sup>20</sup> Mr Smith, evidence-in-chief, paragraph 16

<sup>21</sup> Mr Warren, evidence-in-chief, paragraphs [110]-[114]

<sup>22</sup> Mr Philip, evidence-in-chief, Table 3, page 9

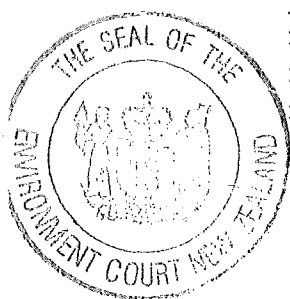


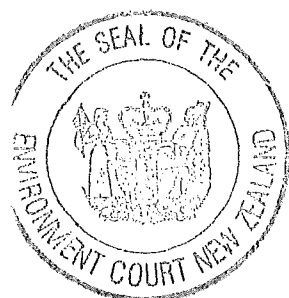
Table 3 – Peak Hour Trip Generation Rates for Hardware Superstores (trips/100m<sup>2</sup> GFA)

Store/Location	GFA (m <sup>2</sup> )	Peak Hour Rate		Data Source
		Weekday	Saturday	
Mitre 10 Mega Glenfield	8,091		4.80	ITA – Albany Block (TPC)
Bunnings Constellation	9,100		6.49	ITA – Bunnings Wairau (TDG)
Generic Mitre 10 Mega	9,400		4.78	ITA – Mitre 10 Lunn Ave (Beca)
Bunnings Parramatta	9,800	2.30	6.69	RTA database (2009)
Bunnings South Nowra	9,948	1.99	4.22	RTA database (2009)
Mitre 10 Mega Botany	11,335	1.70		ITA Albany Block (TPC)
Bunnings Botany	11,900	2.44	5.20	ITA – Bunnings Wairau (TDG)
Bunnings Minchinbury	11,915	2.84	6.33	RTA database (2009)
Bunnings Hamilton	12,400	2.43	4.98	ITA – Bunnings Wairau (TDG)
Mitre 10 Mega Henderson	13,119	2.20	4.60	ITA for Albany Block (TPC)
Bunnings Bankstown	14,111	2.05	5.98	RTA database (2009)
Average generation rate		2.24	5.41	
85%ile generation rate		2.44	6.43	

[63] Ms Crafer reviewed the data provided by Mr Philip. She observed that trip rates do not correlate to store size, and highlighted that the data is based on single counts, which might be undertaken on a rainy day or a dry day, and different seasons, affecting how busy the home improvement business would be. Her opinion was that a trip generation rate of 6.43 was appropriate given the location of the store next to the motorway interchange, and the additional transport access benefits that afforded.

[64] We do not agree that it is appropriate to simply apply the trip generation rate of the existing store to this proposal, given the proposed store's location, the convenient access it would have from the motorway, and the likelihood that the range of products it stocks will attract a greater customer base from a wider proportionate catchment, resulting in a higher turnover. Indeed Mr Philip acknowledged that his assessment did not take into account Mr Kumar's evidence about the potential for the proposed new store to draw more customers because it would be more visible and a better shopping experience than that experienced at the existing store.

[65] Even with its limitations, a figure of at least 5.4 (the average generation rate Mr Philip provided for the 10 hardware superstores outlined in the above table) is more credible than the 4.60 for Saturday, notwithstanding the likelihood that trade sales are



likely to result in a reduced traffic generation rate and be more likely to occur during weekdays. It seems to us that the Saturday peak trip generation rate of 6.49 obtained from the Bunnings Constellation hardware superstore (which is close to a motorway interchange) is instructive. We therefore consider both the traffic generation rates of 6.43 and 5.4 when looking at the likely adverse effects and their significance.

*What are the likely adverse effects and their significance?*

[66] Magsons invited us to apply a contextual approach to the assessment of traffic effects as was adopted by the Court in *Progressive Enterprises Ltd v North Shore City Council*,<sup>23</sup> and submitted that it was inappropriate to decline consent simply because the proposal would be adding to existing traffic conditions at Saturday midday peak, as customers will still buy their hardware supplies somewhere else using their cars. Magsons submitted that the adverse effects would be small in magnitude, limited in duration, and minor when considered in the context of the traffic situation on the surrounding road network.

[67] While the “Saturday noon to one” is the peak period identified, both witnesses accepted that in reality the peak would last longer. Ms Crafer referred to four or five hours as a possibility, but we had no definitive evidence supporting this opinion.<sup>24</sup>

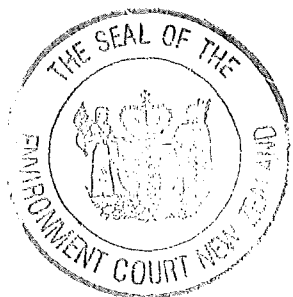
[68] The modelling of the trip generation rate of 6.43 predicted a minute and a half to three minutes extra journey time for people during the peak period on a Saturday, as opposed to a predicted minute to a minute and a half extra journey time if a trip generation rate of 4.6 was adopted. The 5.4 trip generation rate would result in a figure somewhere between the two ends of the range.

[69] Mr Philip considered that the adverse effects for Saturday would be less than minor at any of the above trip generation rates with the addition of the lane on Central Park Drive. He considered the predicted increase in delay at the intersection of Lincoln Road and Universal Drive to be relatively high and, combined with the level of service change, to have a more than minor effect during the Saturday peak (at the 6.43 trip generation rate). Mr Philip also considered that with an extra lane on Central

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<sup>23</sup> W075/2008

<sup>24</sup> Transcript page 362



Park Drive (if allowed), the delay would reduce at the Lincoln/Central Park/Triangle intersection.

[70] Ms Crafer considered the delays would be more than minor at the 6.43 trip generation rate, the average (5.4) and even the lower rate (4.6). Ms Crafer considered that the adverse effects from the additional travel time of a minute and a half over a four minute journey to be quite a way past “*more than minor*”, given the regional arterial road status and function of Lincoln Road. When pressed, she said “*quite a way past more than minor*,”<sup>25</sup> but did not go so far as to state the adverse effects to be significant. We take minor as meaning “*lesser or comparatively smaller in size or importance*”<sup>26</sup>.

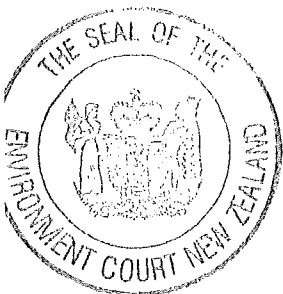
[71] Ms Crafer referred to the cycle-time of the signalised intersections at Universal Drive and Lincoln Road/Central Park Drive/Triangle Road. Her evidence was that, if the cycle-time was around 120 seconds and the green light for the northbound movement was about 50 seconds, this would mean the non-green (amber/red) time is about 70 seconds. Because of this, there could be an extra 90 second delay, which would mean that a motorist might get through the first intersection on the first green light, but would be held up at the second intersection for more than a whole cycle, and vice versa. This, she said could be repeated at the next intersection, which would result in even longer queues. Ms Crafer considered that motorists would not expect this sort of delay, given that the road is a strategic route typified by little significant delay.

[72] Mr Philip invited us to look at traffic delays in context. He highlighted that every trip contains variable elements, and significant delays can occur even on well-managed routes. He reminded us that on any network the time a trip takes can be affected by traffic signalling. Mr Philip considered the Saturday delay times would be within people’s normal expectations. In his opinion, looking at traffic delays across the week and not just focussing on the Saturday peak, there would be less than minor adverse traffic effects.

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<sup>25</sup> Transcript page 362

<sup>26</sup> *Bethwaite and Christchurch Property Trustees v Christchurch City Council*, C85/93, 10 November 1993.



[73] Magsons submitted that the timing of trips to hardware stores tends to be more discretionary as customers can choose the time of the day and route they use, would act rationally, learn from their experience and adjust their behaviour to avoid congested traffic conditions. Mr Philip's opinion was that customers could and would choose to visit such a store at different times if congestion on Saturday peak times was known. Mr Philip reminded us that trade customers would use the road network less in the weekend, as deliveries occur during the week.

[74] Whilst accepting that shopping or recreational trips might be discretionary, Ms Crafer's opinion was that the evidence does not suggest that people are trying to avoid the current Saturday peak. Ms Crafer said that people's expectations of Saturday travel would be for a more consistent travel time, but again we do not know the basis for this assumption. Ms Crafer drew our attention to the sports fields and facilities in the area, with the netball and tennis facility on Te Pai Place and the Trusts Stadium offering soccer, cricket and other sports. She said because these sorts of activities generally have very fixed times, reliability of travel time is important.

[75] We conclude that there could be more than minor adverse traffic effects from the proposal on a Saturday at peak periods, which could worsen the existing traffic situation, particularly given we are not clear on the feasibility and effectiveness of the proposed mitigation measures. While we accept that some people may adjust the timing of their visits to the Mitre 10 Mega so as not to contribute to the traffic delays during peak hours on Saturday, the more important point is that the delays should not be unreasonable. The delays on a Saturday may not be unreasonable, but this depends on the overall traffic mitigation proposed being feasible and effective.

### ***Overall conclusion in relation to traffic effects***

#### ***Section 104D evaluation***

[76] The adverse traffic effects on traffic, pedestrians and cyclists are more than minor for Saturday, and also for the weekday peak periods, because of the uncertainty over whether the additional mitigation proposed would be feasible or effective, or even be allowed by Auckland Transport. A condition precedent would not provide the necessary assurance for the operation of a key intersection in the local and regional road network. It would be difficult to frame such a condition precedent, and there are questions about the ability to delegate a decision that should be made in the



first instance to a third party, Auckland Transport. This means that the proposal would not pass the first part of the test under s104D. As we have signalled, however, we find the proposal to meet the s104D test as it is not contrary to the objectives and policies of the District Plan, so we therefore need to evaluate traffic effects under s104(1)(a).

*Section 104(1)(a) evaluation*

[77] Our preliminary overall assessment of traffic effects under s104(1)(a) is that the traffic delays on Saturday may not be unreasonable in the circumstances if satisfactory mitigation measures (included in the proposed consent conditions) can be put in place. In making that preliminary assessment we take into consideration:

- Trade traffic occurring outside Saturday
- Traffic effects over the whole week, not just the Saturday
- The traffic context, with the high volumes on Lincoln Road
- The concern is not the performance of the motorway interchange and motorway.

[78] However, we cannot make a final assessment without more certainty about the feasibility and effectiveness of, and particularly Auckland Transport's position on, the potential mitigation of adverse traffic effects on traffic, pedestrians and cyclists for both the weekday peak periods and for Saturday. How we have decided to deal with this is outlined at the end of this decision.

**Planning issues**

[79] We now turn to consider the overall topic relating of planning. We were helped in our consideration of planning issues by the evidence of Mr McPherson and Mr Warren for Magsons, Mr Osborne for NZTA and Mr Reaburn for NZRPG.

[80] Before analysing the actual relevant objectives and policies to determine whether or not the proposal is contrary to them, we need to deal with Magsons contention that the proposal is not contrary to the objectives and policies of the District Plan, because the Working Environment zone provides for retail as a non-complying activity.



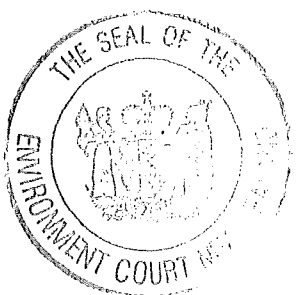
***Interpretation of retail as a non-complying activity in the Working Environment zone.***

[81] The land is zoned Working Environment, and provides for a certain scale of retail activities as permitted (largely convenience stores) and discretionary (within a particular floor area and radius), with other retail activities as non-complying. Magsons advanced an argument that because there is a specific non-complying rule based on size, that rule must mean that anything considered under it is provided for in the Plan and is therefore not contrary to the objectives and policies for the purposes of s104D(1)(b).

[82] In the sense of an activity needing to be "*described*" in a District Plan under s87A, being "*provided for in the Plan*" is a pre-requisite for all activity statuses (permitted through to non-complying and even prohibited). All land use restrictions must be clearly stated in a District Plan because of the presumption in s9 RMA that any land use activity that does not contravene a District Plan can be undertaken as of right. That is as far as "*provided for in the Plan*" can be taken. A non-complying catch-all or default rule, which the Plan also has for activities in other 'zones', is as much "*provided for*" as a specific non-complying rule. In the Working Environment zone the Council has simply identified an upper threshold above which it wishes to have maximum control, and has sensibly not tried to list all situations in which an activity may not meet its expectations in the lower activity lists.

[83] Mr Reaburn helpfully described the reasons for the approach the Council had taken to including non-complying activities in its first District Plan prepared under the RMA, as he had been involved in writing it. Under the structure of the Plan, where there is an upper limit on a particular activity, the non-complying activity rule is included so people know where they need to go under the RMA when their activity exceeds a threshold in a lower consent category.

[84] We find that the evidence of Mr Reaburn establishes the reason why the District Plan is structured as it is, and this interpretation does not support the argument advanced by Magsons. We reject Magsons argument on this point.





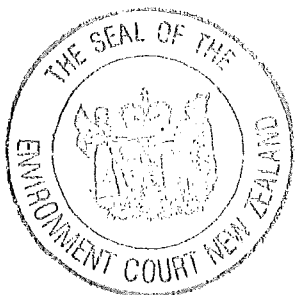
*Is the proposal contrary to the objectives and policies of the District Plan?(s104D(1)(b))*

[85] Policies 1.2, 1.3 and 4.1 encourage the establishment of retail activities in a way which will minimise vehicle trip lengths and numbers and support major town centres as key transport destination points.

[86] Policy 11.17 sets out the range of outcomes expected of retail activities:

Retail activities should be managed to enable people and communities to provide for their social and economic wellbeing in a way that sustains and enhances the quality of commercial and community facilities and services, amenity values and general vibrancy of the City's town centres, having particular regard to the following:

- supporting urban consolidation and mixed use development in locations which are accessible by private and public transport modes, and discouraging development which could be better located in respect of accessibility;
- promoting the pedestrian oriented amenity values of town centres including pedestrian precincts, pathways and parks, landscaping, street furniture and shop display frontages;
- encouraging, where appropriate, the integration of new retail activity with existing retail and other community resources and activities in the same area, and in particular in town centres including site and building design integration and pedestrian and road;
- establishing and enhancing the quality and design of buildings;
- recognising the importance that arises from the role of town centres as community nodes in the City;
- recognising that the development of inappropriate retail activity can create adverse effects on the function served by, and the amenity values of, town centres;
- ensuring that the development of new retail activity does not result in adverse social and economic effects by causing a significant decline in amenity in town centres of the positive contribution made by town centres to the social and economic wellbeing of people and communities in the city;
- enabling potentially incompatible retail activities, including those which will compromise pedestrian-oriented amenity values or residential amenities, to establish in locations where adverse effects can be remedied or mitigated;
- enabling competition between retailers and types of retailing.



[87] There is no question that the shopping experience that would be provided by the Mitre 10 Mega would enable people and communities to provide for their social and economic wellbeing. The other matters which follow in Policy 11.17 address the wider social and economic wellbeing considerations and we will consider each of them in turn.

*Would the proposal support urban consolidation and mixed use development in locations which are accessible by private and public transport modes, and discourage development which could be better located in respect of accessibility?*

[88] The proposal is vehicle rather than pedestrian-oriented, but there is access to public transport services nearby. The proposed site is accessible by private transport, even if there are questions about the ability of the road network in its vicinity to efficiently accommodate the traffic likely to be generated by the proposal. Generally we accept that the proposal would support urban consolidation and mixed use development.

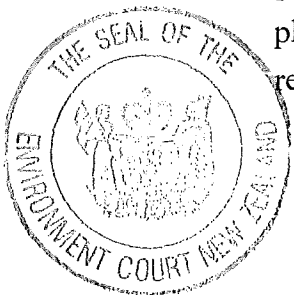
*Would the proposal promote the pedestrian-oriented amenity values of town centres including pedestrian precincts, pathways and parks, landscaping, street furniture and shop display frontages?*

[89] The proposal has none of these features and does not support any town centre. This is not surprising given, however, that everyone accepts that a proposal of this nature and size would not be an appropriate "fit" in a town centre.

*Would the proposal encourage, where appropriate, the integration of new retail activity with existing retail and other community resources and activities in the same area, and in particular in town centres including site and building design integration and pedestrian and road linkages?*

[90] A positive effect arising from the proposal is that a link road is to be provided from Central Park Drive that will assist in accessing the subject site and adjoining sites.

[91] Mr Reaburn's opinion was that the proposal is situated in an area with no planning or strategy relating to a large retail presence, that it is unrelated to existing retail activities and other community resources and activities in the same area, and it



is not integrated with any town centre. He acknowledged however, that stores of the proposed type cannot be expected, for instance, to create a significant active street frontage through display windows and pedestrian entrances as is typically expected for stores in town centres. Nonetheless Mr Reaburn considered it appropriate and necessary that an attempt be made to achieve this as much as is possible. In his opinion there had been no attempt to create a connection or link with the suburban shopping centre at Lincoln North, although we note that this is not a town centre.

[92] Mr Warren's opinion was that it would be impractical to consider any direct connection with the Lincoln North shopping centre which is on the opposite side of Lincoln Road and about 330m further south. His opinion was that given that the main existing retail facilities in the vicinity are themselves major destinations operating in a vehicle oriented environment," *near at hand connection by road is a suitable means of integration.*"<sup>27</sup>

[93] We agree with Mr Warren that it would be impractical, and therefore inappropriate, to consider any direct connection between this proposal and the Lincoln North Shopping Centre, given that Lincoln Road divides them, and the kinds of retail experience delivered by both are different.

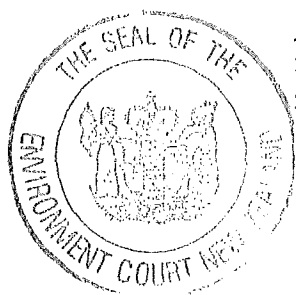
*Would the proposal establish and enhance the quality and design of buildings?*

[94] The proposed very large building presents no active frontage to either Lincoln Road or Central Park Drive, but there are requiring that to occur. The wall facing and very close to the proposed new street off Central Park Drive is 85 metres long, 12m high and punctuated only by two large loading entry doors. The wall facing Lincoln Road would be a blank wall over 130 metres long and up to 12 metres high. However, there is Lot 1, which is yet to be developed, between the building and Lincoln Road.

[95] We are mindful that, given the scale of the building, there could well be adverse amenity effects. This was discussed by Mr Reaburn<sup>28</sup> when he considered Policies 11.17(c) and 11.33 of the District Plan. Whilst we accept there are no specific design controls in the District Plan, there are still tensions evident in the

<sup>27</sup> Mr Warren, evidence-in-chief, Annexure B p6.

<sup>28</sup> Mr Reaburn, evidence-in-chief, paragraph [4.18]



policies between economics and design, that is encouraging design elements as in the policy above then providing, as a permitted activity, building up to the boundary line.

[96] *Rule 4 – Landscape Treatment in the Lincoln Working Environment*, whilst not applicable, is a useful guide in considering design elements and amenity effects. It lists a number of assessment matters including landscape treatment of car parking and manoeuvring areas, breaking up large/continuous building frontages, and a preference for trees over other sized plants.

[97] We were supplied with a landscape plan which provides a design outline for each landscaped area which, in total, would meet the area requirements for the plan. We were also provided with a comprehensive planting list. A new (and highly uncertain) planting condition L1 was offered in replacement to a previous version. We prefer the previous version that planting be undertaken in accordance with the planting plan supplied and based upon the provided plant lists.<sup>29</sup> The proposal will result in a loss of in situ trees and vegetation; as a result there should also be a link to the plans and plant list stated in any conditions, with an additional note that the planting of trees species is to be preferred.

[98] Amenity has been an issue, as an agreement by neighbours who have withdrawn their appeals illustrates. This agreement requires the building to be no more than 12 metres in height and set back at least 5 metres on the southern boundary, with a planting programme which provides for trees, shrubs and ground covers.

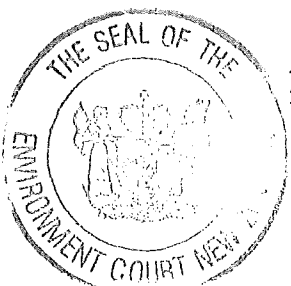
[99] We agree that the 5 metre planted set back would help break up the visual dominance of the south wall, but only if the trees, are a significant component of the planting.

*Does the proposal recognise the importance that arises from the role of town centres as community nodes in the City?*

*Does the proposal recognise that the development of inappropriate retail activity can create adverse effects on the function served by, and the amenity values of, town centres?*

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<sup>29</sup> Exhibit 2 Plant Schedule with Grades



*Does the proposal ensure that the development of new retail activity does not result in adverse social and economic effects by causing a significant decline in amenity in town centres of the positive contribution made by town centres to the social and economic wellbeing of people and communities in the city?*

[100] The proposal does nothing to recognise or support the role of town centres, but that does not make it contrary to these outcomes. We accept the evidence of Mr Foy, a retail analyst who gave evidence for Magsons, that while there would be minor trade impacts on individual retail outlets, the proposal would not create noticeable impacts on the vitality, vibrancy and amenity of the nearby town centres.

*Would the proposal enable potentially incompatible retail activities, including those which will compromise pedestrian-orientated amenity values or residential amenities, to establish in locations where adverse effects can be remedied or mitigated?*

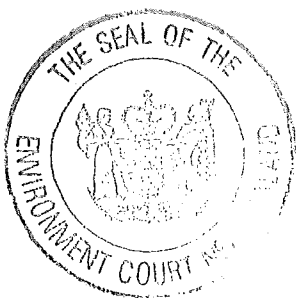
[101] Policy 11.17(a) provides some background which assists us to consider what may be incompatible retail activities:

Retail activities within the Working Environment should be restricted to support the amenity values, community focal point and transport hub roles of town centres. Yard-orientated retail activities that may cause adverse effects on the amenity of town centres may be located within the Working Environment, along with shops selling goods manufactured on-site, automotive parts and food and convenience shops.

[102] The size of the proposed development, the goods it sells, and its vehicle-oriented nature make its location in a town centre location difficult. The combined retail and trade nature of a Mitre 10 Mega mean it may not be a good fit with other retail activities either in, or adjacent to, a town centre. Mr Warren's opinion was that certain kinds of large-format retail such as the one proposed could also adversely affect the amenity of town centres, by potentially disrupting its pedestrian-oriented environment and creating localised traffic effects. Mr Warren's opinion, which we accept, is that the proposal is not contrary to this policy because by being located out of a town centre, it avoids potential adverse effects on the amenities and functions of such centres.<sup>30</sup>

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<sup>30</sup> Mr Warren, evidence-in-chief, annexure B, pp 8-9



*A sequential approach to the location of retail activity is adopted which favours locations in town centres (particularly major town centres) where retailing is generally a permitted activity. There is only limited provision for permitted retail activity outside town centres. However proposals for retail activity in working environments at the edge of town centres and on major roads, are subject to a resource consent or plan change procedures which require it to be shown that a town centre location would not better serve the Plan's objectives and policies.*

[103] Magsons submitted the proposal accords with a sequential approach to the location of retail activity because Lincoln Road is identified as an intensive corridor in Schedule 1 of the ARPS, and to give effect to the ARPS a change to the District Plan would need to occur. We return to this point later. However, we note that the ARPS contains a list of matters we need to consider when assessing the appropriateness of the site for the proposed retail development and we also consider these shortly.

[104] A very large retail building, with a trade component has a character more akin to large-format retail that would not fit well with the Plan's objectives and policies for town centres. But the Plan has not ignored provision for such activities. One such location is Massey North, with its dedicated large-format precincts at the edge of the town centre provided for in the District Plan. But the fact that provision has been made elsewhere in the Plan for this kind of retail activity, does not of itself make this an unsuitable site for a similar type of activity.

[105] In our view, this policy foreshadows limited permitted retail activity outside town centres. It foreshadows that working environments at the edge of town centres and on major roads may be suitable for retail activity, but does no more than signal that this will be subject to resource consent or plan change procedures. This proposal complies with this policy to the extent that it is subject to a resource consent process. Accordingly we do not find the proposal to be contrary to, or indeed inconsistent with, this policy.

*Overall conclusion under s104D*

[106] We conclude that the proposal is not contrary to, or indeed inconsistent with, the overall thrust of the objectives and policies. We are particularly influenced by the Plan's recognition that proposals for retail activity in working environments at the



edge of town centres and on major roads deserve consideration. Accordingly, the proposal passes the second part of the gateway or threshold test.

*Section 104(1)(b) evaluation*

[107] Section 104(1)(b) requires us to have regard to certain statutory planning instruments and in this case they are the ARPS and the District Plan. Under this part of our evaluation we can consider other provisions in the District Plan not just the objectives and policies.

[108] We approach this part of the evaluation by analysing how the provisions of both the ARPS and the District Plan “fit” with the proposal.

*The ARPS*

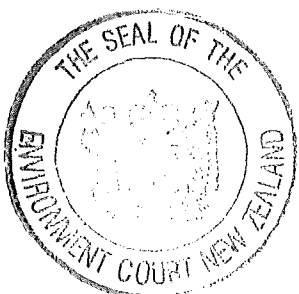
[109] The ARPS is the highest level planning document relevant to the consideration of this proposal. There have been key changes to the ARPS since the Council hearing, as a consequence of the Local Government (Auckland) Amendment Act 2004 (“LGAAA”). In particular, Lincoln Road is now listed as a high intensity corridor which provides a basis for the establishment of high traffic generating activities as well as retail activities including large-format retail. The identified corridor includes the site.

[110] The ARPS (and the District Plan) identify commercial activity in general and retail activity specifically as high traffic generating activities, and activities that have the potential to affect sustainability, efficiency, air and water quality, a compact sustainable urban form, a competitive and efficient economy, a quality environment and amenity values.

[111] The ARPS also recognises a hierarchy of retail locations. Policy 1 of the strategic policies relating to urban structure<sup>31</sup> refers to urban intensification being encouraged in the high density centres and intensive corridors identified in Schedule 1 or in the District Plan. As we have already outlined, Lincoln Road is identified as an intensive corridor in Schedule 1 to the ARPS.

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<sup>31</sup>Part 2.6.5



[112] Policy 4 outlines that development of high density centres and intensive corridors should primarily support or serve compact mixed-use environments. The combination of retail and office in the proposal would therefore contribute towards achieving this policy by providing a mixed-use environment.

[113] Policy 6 elaborates on the development expected in high density centres and intensive corridors, referring to compact mixed-use environments where this is compatible with the movement function of the corridor.

[114] Policies 7 to 11 set out a five level hierarchy of provisions for the location of commercial activities (including retail). The first four levels of provisions concern the location within high density centres and intensive corridors:

- (a) Commercial activities are to be encouraged in high density centres (policy 7);
- (b) The outwards expansion of the commercial core of high density centres where suitable is to be encouraged (policy 8);
- (c) Commercial activities are, where appropriate, to be enabled in business and mixed use zones along intensive corridors (policy 9);
- (d) New high density centres are to be enabled to be developed in locations which meet listed criteria (policy 10).
- (e) Commercial activities are, where appropriate, to be enabled in business and mixed use zones in locations other than high density centres and intensive corridors (policy 11).

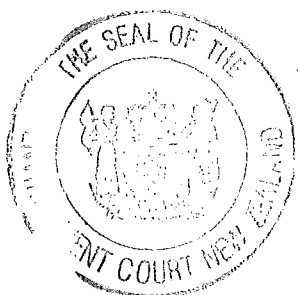
[115] Each successive layer in the hierarchy is subject to a list of matters to be assessed.<sup>32</sup>

[116] Under Policy 9, commercial activities (including retail) are '*where appropriate, to be enabled*' in intensive corridors, having regard to the following matters:

- (a) any effects on high density centre function and their role;

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<sup>32</sup> Mr Warren, evidence-in-chief, paragraphs 26-27





- (b) social and economic enablement and accessibility;
- (c) the efficient use and provision of infrastructure;
- (d) the impacts on transport efficiency, including but not limited to effective public transport throughout the region;
- (e) the effects on the road network;
- (f) the impacts of the development on the efficient use of any scarce industrial land resource;
- (g) the effects on residential activity and planning for residential intensification along intensive corridors; and
- (h) reverse sensitivity effects.

[117] Mr Warren addressed each of the matters outlined in Policy 9.<sup>33</sup> His opinion was that the proposed development is consistent with all of them, and he commented that Mr Reaburn did not comment or address the matters outlined in Policy 9.

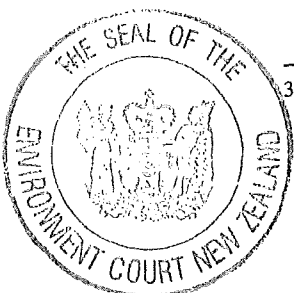
[118] We accept the evidence of Mr Foy that the proposal would not detract from Massey North, New Lynn and Henderson being the high density centres in the vicinity. There would be an element of social and economic benefit, including the possibility of an enhanced and accessible shopping experience for customers of the Mitre 10 Mega store. There would be efficient use of infrastructure (other than roading which is as yet unknown) and no reverse sensitivity effects.

[119] In addition, the Working Environment zone is only in part an industrial land resource, as the District Plan provides for a wide range of business activities in the zone and the land would be efficiently used for a business purpose as well. Public transport is of relatively low importance for the activity. The accessibility and impacts on transport efficiency and the road network may not be such as to make the site inappropriate.

[120] For the reasons expressed above, we find that the proposal would not be inconsistent with the ARPS.

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<sup>33</sup> Mr Warren, evidence-in-chief, paragraph 29, Annexure A, page 4



*What influence should the high intensity corridor in the ARPS have on the District Plan?*

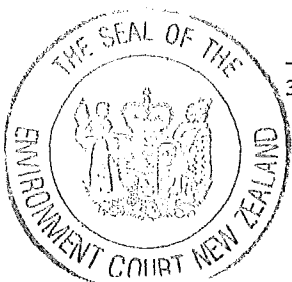
[121] Magsons put considerable store on the inclusion of Lincoln Road as a *high intensity corridor*, reminding us that a district plan has to *give effect to* a regional policy statement. Section 73(4) requires a local authority to amend a district plan to give effect to regional policy statement if the statement contains a provision to which the plan does not give effect within the time specified in the statement (not the case here) or as soon as reasonably practicable.

[122] NZRPG's position is that the Council is now, or will soon be, obliged to reassess the District Plan provisions for Lincoln Road Working Environment to determine whether they give effect to the ARPS, and if not the Plan will need to be amended as soon as possible. NZRPG therefore submitted we should not place too much weight on references to development of corridors in the ARPS, but rather we should exercise caution before allowing the ARPS policies to effectively "trump" the District Plan provisions before such re-assessment. On a district wide basis, NZRPG submitted that the District Plan is up-to-date in terms of identifying and providing for large-format retail, because it does so at Massey North and New Lynn.

[123] Mr Reaburn's opinion was that because Lincoln Road had been established as a *high intensity corridor* and this was a "high level decision", a plan change was needed to carry this through into the District Plan, so that the implications of development such as this could be looked at strategically across the area of the former Waitakere City. He described this as a "top down" approach rather than a "bottom up" approach, the latter being the approach taken here where a specific proposal is being considered in relation to a specific site which may or may not end up being appropriate in terms of planning for the entire area. He identified the risk of not following a "top down" approach as follows: "... the risk you run in that your infrastructure responses are determined by what I have referred to as an *ad hoc* proposal rather than a properly planned approach."<sup>34</sup> Mr Reaburn pointed out that there are only two high intensity corridors identified in the ARPS (Hobsonville Road is the other one), but there could be others within the former Waitakere City Council area. He described what he would see as the approach that should now be followed to convert such high level

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<sup>34</sup> Transcript p 463, lines 2-4



strategy/policy decisions into suitable District Plan provisions, and the way to do this he thought was by a plan change.

[124] Whilst the approach taken by Mr Reaburn might be the optimal theoretical approach, the commercial world should not necessarily be obliged to wait for the wheels of local government to action something which a higher level strategic document has signalled as being appropriate. Therefore in this case, we conclude that while the identification of Lincoln Road as a high intensity corridor is at an early stage in the process, the ARPS policy on intensive corridors is relevant to our consideration of this proposal and would also be relevant to any changes to the District Plan to give effect to the ARPS. It could also be some time before the process to review the District Plan described by Mr Reaburn gets underway. When considering this site in its context we do not think the applicant should have to wait for this kind of strategic assessment for which there is no clear timeframe, when the ARPS has given a clear policy direction to which the District Plan is obliged to give effect.

*Are there other locations for such a development?*

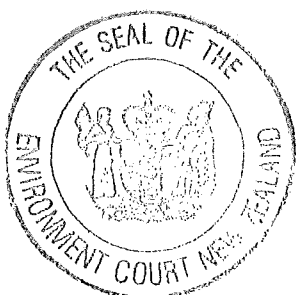
[125] Magsons put a great deal of reliance on the unique aspects of this location. It submitted that it was significant that a large block of land was available to it to develop close to its existing Mitre 10 store and therefore within the existing store's customer catchment. Magsons contended that the periphery of a town centre was not an appropriate location for its proposed development and we agree.

[126] NZRPG challenged the need for the development in this location, relying on the availability of land at Massey North town centre and also referring to Mr Kumar's evidence that he had not fully investigated alternatives, or obtained expert advice, before settling on this site.

[127] Mr Warren gave evidence that using a cut-out scale of the site and laying it over town centre blocks in Henderson and New Lynn, he had ascertained that it would be extremely difficult if not impossible to find a site of the necessary size.<sup>35</sup> He told the Court that both town centres are essentially built-up, with not a lot of available space for a proposal of this nature. He was also concerned that, should such a proposal proceed in a town centre, adverse traffic effects could arise as well as a risk

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<sup>35</sup> NOE page 289



that the pedestrian amenity of the centre could be degraded. His evidence was that such a proposal would need to be situated at an independent peripheral location. Finally, his evidence was that a combination of trade building supplies, hardware and home improvement activities (as is the case here) would more usually be located in an industrial area rather than in a town centre.

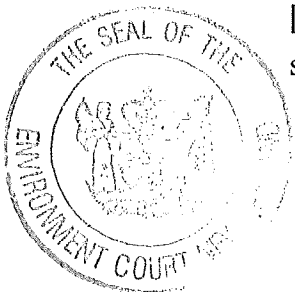
[128] In Mr Reaburn's view, the proposal was similar to a number of individual large-format retail stores which could be located on periphery of town centres or within areas specifically providing for large-format retail such as the Massey North town centre. He said that the new Massey town centre provides for extensive areas of large-format retail adjoining and complementing the core town centre and extending the existing Westgate Shopping Centre. The new motorway links and improvements mean that the proposed sub-regional Massey North town centre will be more accessible. Mr Reaburn also said that the design requirements (introduced through Plan Change 18) for sub-regional town centres will result in a higher quality environment for the community.

[129] While several witnesses made reference to Massey North town centre as an alternative location, we had no evidence on where such a development could be located, and its activity status. Even if there is space for such a large-scale development, the proposal would take up a large area of land at Massey North town centre, which would not be available for more conventional large-format retail development.

[130] We do not accept Mr Reaburn's view that this proposal is in effect akin to a number of individual large-format retail activities given its scale and the large area it would require. As for locating it at the proposed Massey North town centre, there would be insufficient land available for it and there is already a Mitre 10 nearby in which Mr Kumar has an interest. We accept the point made by Mr Warren that there is nothing in the planning documents that requires large-format retail developments to be located in and alongside town centres. To the contrary, the planning documents allow for the consideration of the merits of a location along the Lincoln Road corridor.

*Overall conclusion under s104 (1)(b)*

[131] We have had regard to both the ARPS and the District Plan provisions. We are satisfied that overall the proposal is not inconsistent with them, although this



conclusion depends on the traffic mitigation proposed being effective and able to be implemented and landscaping to provide for amenity effects.

***Other matters (s104(1)(c))***

*What do other documents say about the proposal?*

[132] We now consider other matters that are relevant under section 104(1)(c). Mr Reaburn drew to our attention the *Economic Wellbeing Strategy for Waitakere* adopted by the Policy and Strategy Committee June 2009. We take no more from this than it is a recent confirmation of the continued thinking/approach on the need to provide for retail development. It does, of course, predate the new Auckland Council.

[133] Another document referred to in the course of the hearing and provided to us at our request was the '*Industrial and commercial building design guidelines for developers*' March 2009, with case studies of Massey North and Hobsonville Corridor Industrial and Employment Areas. The Council said that the guidelines are a Council best practice guide to urban design which does not form part of the District Plan or any other document against which an application is required to be assessed. We find it to be of no relevance to the proposal as it refers to commercial buildings in sub-regional centres, such as Massey or Hobsonville. There are no guidelines for the Lincoln Working Environment area.

*Would, and what if, the proposal encouraged other similar developments?*

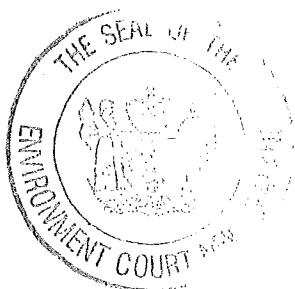
[134] NZRPG's position was that this proposal could open the door to a large retail development likely to attract similar retail developments. NZRPG submitted that the proposal is of an ad hoc nature and would have implications beyond the site and compromise the integrity of the Lincoln Working Environment.

[135] Cases such as *Dye v Auckland RC*<sup>36</sup> make it clear that while there is no precedent in the strict sense in this area of the law, there is an expectation that like cases will be treated alike and that the Council will consistently administer the provisions of the Plan. And cases such as *Rodney DC v Gould*<sup>37</sup> also make it clear

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<sup>36</sup> [2001] NZRMA 513

<sup>37</sup> [2006] NZRMA 217



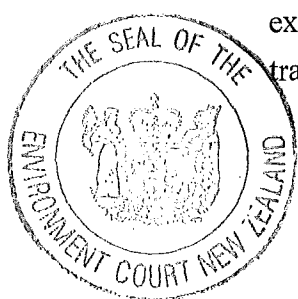
that it is not necessary for a proposal being considered for a *non-complying* activity to be unique before Plan integrity ceases to be a potentially important factor. Nevertheless as that judgment goes on to say, a decision-maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

[136] Magson's position was that there were several factors taking the proposal outside the generality of cases: its scale, the relocation of an existing business in an established catchment and the employment generation. Magsons submitted that those circumstances and the characteristics of the proposal would not call into question the integrity of the District Plan for regular activities and sites.

[137] Mr Foy considered that the Mitre 10 Mega might attract other hardware and home improvement activities, but not other types or retail such as comparison retail. In his opinion, the Mitre 10 Mega, by moving north, is coming to the party by joining an existing significant aggregation of trade-based businesses in the area.

[138] Mr Reaburn referred to the paucity of land in the Auckland region available for industrial purposes as well-documented, and reflected in a number of provisions in the ARPS and the District Plan. Mr Barbour gave evidence that the value of the surrounding land would increase on the back of an expectation of further large-format retail developments in the area, and this would make the land too expensive for industrial uses. Mr Warren considered that industrial development was better placed on the periphery of the city. That is not a factor that weighs heavily with us given the wide range of activities catered for in the zone and the potential for office development.

[139] There is still substantial undeveloped land surrounding the site and Mr Reaburn considered that similar arguments to those presented by Magsons could be presented for the retail development of that land. He said that from a planning perspective there are no factors which could distinguish this proposal from other typical large-format retail development, and this site from other working environment sites in the adjacent area. He said that the large-format retail development should be looked at as a number of individual large-format developments, and their being under one roof is not a sufficient distinguishing feature. Neither is the proximity of the proposal to the existing Mitre 10 Mega, which has already relocated three times. He considered the trade element of the enterprise to be secondary to the retail emphasis and therefore not



similar to the existing aggregation of trade-based businesses in the area. He concluded that the outcome of the threat to Plan integrity could be a substantial shopping complex which undermines the vibrancy and vitality of the town centres and their peripheries.

[140] We find that the above overstates the potential consequences of establishing a large home improvement store in this location, even though the store is to have a greater retail than trade emphasis given the type of development that already exists in the vicinity of the site. We see the proposal as a reasonable use of a large greenfields site close to public transport and accessible by trade and private vehicles, if the adverse traffic effects can be satisfactorily resolved. Moreover, the subdivision of the site to accommodate the development and the new road link is already approved.

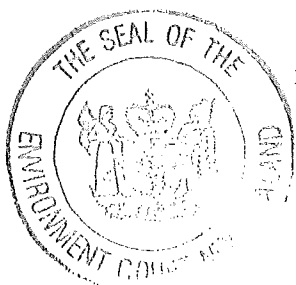
[141] We conclude that the proposal would neither cut across the District Plan policy framework nor the directions contained in the ARPS, in such a way as to compromise the proper consideration of future proposals in the general area in the future.

#### **Is the proposal sustainable management?**

[142] The applicant contended that development of the proposal would better enable residents of the catchment to provide for their social and economic wellbeing and does not offend the principles in Part 2. We acknowledge the positive effects of an alternative shopping experience for customers, the choice and convenience of a one-stop shop, the associated employment, and the contribution to the local economy with its flow-on effects.

[143] However, there needs to be effective mitigation of the traffic effects in order for the proposal to be an efficient use and development of the existing roading resource (7(b)) and not have major negative consequences for the finite characteristics of the road network (s7(g)), recognising the importance of Lincoln Road as an intensive corridor. There is also the question of the maintenance and enhancement of amenity values (s7(c)) which requires amendment to the conditions to protect neighbours and the streetscape, as proposed in consent memoranda before us. The traffic effects are also important in terms of the planning documents.

[144] We find that the proposed social and economic benefits of a Mitre 10 Mega may outweigh any adverse effects and enable sustainable management of natural and



physical resources, provided that satisfactory mitigation relating to adverse traffic effects (including on pedestrians and cyclists) for weekday and Saturday peaks is effective and certain.

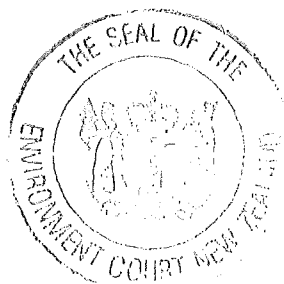
### **Section 290A**

[145] Section 290A RMA requires us, in making our decision, to have regard to (but not to follow) the first instance decision. NZRPG submitted that little weight should be placed on the Council's decision given the Council did not call any evidence in support of that decision. We do not agree with this approach. The Council's neutral position should count neither for nor against the weight to be placed on the first instance decision. However the proposal we have had to consider was considerably different from that which was before the Council. Therefore, whilst we have had regard to it, we do not give it significant weight.

### **Result**

[146] We have carefully considered whether or not we should decline consent at this point given that we are not satisfied that the traffic mitigation proposed and outlined in paragraph [27] will be effective and certain. We are not satisfied that a condition precedent approach is appropriate, given the total lack of discussion with Auckland Transport or its predecessor. We are left, however, with the conundrum that the mitigation might solve the problem, and evidence from one traffic expert (Mr Philip) that it would, and the indication from Auckland Transport that, subject to certain matters being investigated, it could see no impediment to approval being given. Bearing in mind that the Council decision approved consent (albeit accepting the proposal was presented to it on a different basis), and bearing in mind that if the proposed mitigation is effective and feasible it would be a waste of everyone's resources to re-litigate this matter, we have decided to issue this interim decision but postpone reaching a final decision at this time. This will allow Magsons the opportunity to advance the details of the proposed traffic mitigation with Auckland Transport and with NZTA.

[147] We are aware in so deciding that Magsons have been granted a significant indulgence, one which would normally not be so extended, however we cannot completely rule out that the timing of the local government reorganisation in





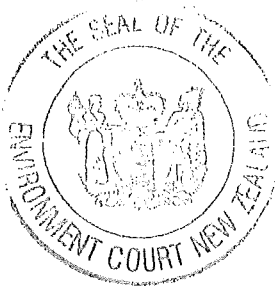
Auckland and the timing of the hearing have meant that some confusion may have existed about who needed to consider what.

[148] We have also referred to certain landscape matters which need to be addressed.

[149] The future course of these proceedings will be closely managed. There will be a judicial telephone conference convened in one month's time to review progress.

**SIGNED** at AUCKLAND this <sup>1<sup>st</sup></sup> day of ~~September~~ 2011

*For the Court:*



M Harland

Judge M Harland  
Environment Judge