

Tabled 5/12

IN THE MATTER

of the Resource Management Act 1991
("RMA")

AND

IN THE MATTER

of Proposed Plan Changes 82A, 82B, 88,
88A-J, 109, 115, 143-154, 147 and 148 to
the Whangarei District Plan

**Legal submissions on behalf of Southpark Corporation Limited
[Submission 154; Further Submission X359]**

Introduction

1. These legal submissions and the evidence to be presented are in support of original and further submissions by Southpark Corporation Limited ("**Southpark**") on proposed Plan Changes 82A, 82B, 88, 88A-J, 109, 115, 143-154, 147 and 148 to the Whangarei District Plan, known as the Urban and Services Plan Changes ("**Plan Changes**").
2. Evidence will be presented on behalf of Southpark by:
 - a. Tim Heath, retail economist.
 - b. Nick Roberts, planner.

Both witnesses will present brief supplementary statements in response to evidence presented to the panel for Town Centre Properties Limited, the owner of the existing Ruakaka Shops.

3. Southpark's submissions arise, in large part, from concerns regarding the failure of the Plan Changes to address appropriately the extensive area of land at Marsden Point zoned Marsden Primary Centre ("**MPC**"). Southpark manages a significant portion of the MPC Zoned land on behalf of the landowner, the Marsden City Limited Partnership.
4. While the MPC Zone is an urban zone within Whangarei District and its relationship to other urban zones is critical to realising the Council's long-standing vision for Marsden Point / Ruakaka, the MPC Zone has been omitted from the Plan Changes. Accordingly, Southpark lodged original and further submissions on the Plan Changes seeking relief

that would more appropriately address the relationship between the MPC Zone and the other urban zones in Marsden Point / Ruakaka.

5. The submissions will address the following matters:
 - a. The basis for the Southpark submissions and the relief sought in them. This includes a discussion of the jurisdictional basis for the precinct provisions suggested by Mr Roberts as an alternative form of relief, the legitimacy of which has been questioned in opening legal submissions for Council.
 - b. The assertion by Brett Hood, planner for Town Centre Properties Limited, that Southpark is a trade competitor and that its submissions regarding the Ruakaka Shops should be disregarded.
 - c. General observations regarding the role and relevance of structure planning and growth strategies in areas, such as Whangarei District, that are experiencing or expecting population growth.

The Southpark Submissions

6. Southpark's primary submission seeks:
 - a. *That the Local Commercial zoning at the Ruakaka Shops be changed to a Neighbourhood Commercial Zone and the extent of the zoning be reduced* - Southpark says that this relief is necessary in order to ensure that there is an appropriate relationship between the MPC Zone and the existing Ruakaka Shops, so that the MPC Zone is not precluded from developing as envisaged by Council, as a consequence of inappropriately extensive development at the Ruakaka Shops.
 - b. *Amendment of Objective SD-03, which focuses on urban consolidation, to include reference to the MPC* - This relief is intended to incorporate the urban MPC Zoning into the policy framework being introduced through the Plan Changes.
 - c. *Relief regarding policy and rule provisions concerning and governing the Neighbourhood Commercial Zone and the Local Commercial Zone* - These changes are sought largely as a consequence of the primary alterations in item (a) above.

d. *Relief regarding relative minor aspects of the transport and earthworks provisions.*

7. Southpark's further submissions oppose relief sought by a number of parties, most notably with respect to proposed rezonings and other alterations to planning maps. Mr Roberts' evidence records his agreement with the recommendations in the Section 42A Report regarding the Southpark further submissions. Southpark accepts Mr Roberts' conclusions.
8. In his evidence in chief, Mr Roberts has suggested an alternative form of relief to the rezoning of the Ruakaka Shops land, namely the introduction of a precinct which would limit the range and extent of activities within the Local Commercial Zone and would, accordingly, avoid the need to change the zoning or make consequential changes to policy provisions. This matter is addressed in paragraphs 59 and 60 of the opening legal submissions on behalf of Council as to scope. In light of those submissions, Mr Roberts has suggested a refinement to the alternative relief proposed by him, so that the precinct will be retained but would limit only retail, food and beverage activities within the Ruakaka Shops to the level provided for within the Neighbourhood Commercial Zone. It is submitted that the revised relief is within scope:
 - a. The effect of the rezoning relief sought in the Southpark submission was to reduce the extent of land at the Ruakaka Shops set aside for future commercial development and to constrain the range of extent of activities that could be established on that land.
 - b. The effect of Mr Roberts' (revised) precinct would be similar. It would reduce the extent of land set aside for the Ruakaka Shops and the range of activities able to be carried out on that land to a similar extent to that expressed in the submission.
 - c. When determining the scope of relief sought under a submission, it is the extent to which substantive provisions are to be changed that primarily defines the envelope of relief available to the Council and Court. The manner in which those changes are realised is generally a matter of flexibility, provided the changes sought do not go beyond those initially proposed. Mr Roberts' revised provisions are deliberately drafted so as to have that effect. That is, they change the effect of the substantive provisions to an extent similar to the relief originally sought, but adopt a different mechanism to reach that outcome.

Trade competition issues

9. In his evidence Brett Hood, the planner for Town Centre Properties Limited, asserts that the Southpark submission and evidence “*is clearly motivated by trade competition*”. It is submitted that the evidence on behalf of Southpark establishes that the Plan Changes, in the absence of the relief sought by Southpark, will generate significant adverse effects that go beyond effects generated by trade competition and accordingly are relevant and necessary to your enquiry under the Resource Management Act 1991 (“**RMA**”).

Prohibition on considering trade competition in section 74(3) RMA

10. Pursuant to section 74(3) RMA, regard cannot be had to “*trade competition or the effects of trade competition*” when developing district plan provisions.
11. Prior to 1 October 2009, that section simply precluded consideration of “*trade competition*”, with the words, “*or the effects of trade competition*” being added by section 58 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31). A similar change was made to section 104(3) RMA, which is the corresponding provision with respect to resource consent applications. For reasons discussed below, it is submitted that the addition of those words made no substantive difference to the interpretation and application of the sections. Put simply, the sections were applied prior to the 2009 amendment as if they included reference to “*effects of trade competition*”, so the amendment essentially reflected existing interpretation.
12. The case law, both before and after the 2009 amendment, is clear that regard can be had to effects on the amenity of the public caused by any *significant* reductions in the viability and vitality of commercial centres that arise as a consequence of such trade competition – what can be termed, “*distributional*” or “*consequential*” effects.
13. The point at which such effects become relevant and worthy of consideration has been the subject of discussion in a large number of cases. It is not proposed to review that material in detail. Instead the submissions will focus on the chain of High Court, Court of Appeal and Supreme Court decisions on a judicial review by Northcote Mainstreet Incorporated and Westfield (NZ) Limited of North Shore City Council’s decision to process, on a non-notified basis, an application for resource consent by Discount Brands Limited with respect to the Fox Outlet Centre in Northcote. Those decisions concerned the corresponding provision of the RMA regarding resource consent

applications (section 104 (3)) but provided more general clarification of the RMA provisions governing consideration of trade competition.

Discount Brands Decisions

14. In *Northcote Mainstreet Incorporated v Discount Brands Limited*¹, the **High Court** traversed the principles as they relate to the consideration of trade and consequential effects under the RMA. The test, as described by the High Court on that occasion was as follows (emphasis added):

"The RMA's concern with the broader effects of proposals on the community is consistent with the widely stated purpose of the RMA in s5 with its reference to enabling "...people and communities to provide for their social, economic, and cultural wellbeing...". But, the Environment Court has made it clear that adverse social or economic effects must be significant before they could properly be regarded as going beyond the effects ordinarily associated with trade competition on trade competitors: see the discussion in Imrie Family Trust v Whangarei District Council (1994) NZRMA 453 at 462-463 ...

The key point of distinction between the adverse effects of trade competition on trade competitors and adverse effects which may properly be considered under the RMA, is that trade competition effects focus specifically on the impacts on individual trade competitors. In contrast, where a proposal is likely to have more general effects on the wider community, then the RMA permits consideration of those effects.

In regard to shopping centres, I would not, with respect, subscribe to the view that the adverse effects of some other competing retail development must be such as to be ruinous before they could be considered. But they must, at the least, seriously threaten the viability of the centre as a whole with on-going consequential effects for the community served by that centre.

15. Randerson J's decision was appealed to the **Court of Appeal**. In *Discount Brands Limited v Northcote Mainstreet Incorporated*² [2005] NZRMA 57; 10 ELRNZ 204, the Court of Appeal described the test as follows (emphasis added):

"... As a general proposition, the adverse trade effects of a proposed retail development must be such as to seriously threaten the viability of existing retail centres, with ongoing consequential effects for the community served by those centres, before they can properly ground an objection to the grant of a resource consent. The consequential effects might take the form of an effect on public amenities or roading. Those might, for instance, be rendered redundant, or diminished in their community benefit, because the viability of an existing retail centre might be undermined."

16. The Court of Appeal's decision as it related to the adequacy of information provided with the application was then overturned in the **Supreme Court**³ in the *Discount Brands* decision. In relation to the appropriate test to be adopted with regard to the

¹ *Northcote Mainstreet Incorporated v Discount Brands Limited* (High Court, CIV-2003-404-5292, Auckland Registry, 5 February 2004; (2004) 10 ELRNZ 146, Randerson J) at paras [57] to [63]

² *Discount Brands Limited v Northcote Mainstreet Incorporated* [2005] NZRMA 57; 10 ELRNZ 204 at para [10]

³ *Westfield (NZ) Limited v North Shore City Council* [2005] NZRMA 337

potential adverse effects of the proposal, the **Supreme Court** (per Blanchard J) stated (emphasis added):

“An important matter which the Council’s Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres – on the natural or physical qualities and characteristics of those areas that contributed to people’s appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.

(para 119)

The Court of Appeal considered that only ‘major’ effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s94(2)(a). But in equating major effects with those which were ‘ruinous’ the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be ‘significant’ before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.”

(para 120)

Subsequent Case Law

17. Those decisions have been followed since, notably in the High Court and Court of Appeal decisions in *General Distributors Limited v Waipā District Council*⁴. In addition, the Environment Court has on a number of occasions approved district plan provisions that address such distributional or consequential effects (see, for example, *Advance Properties Limited and others v Taupo District Council*⁵).

⁴ High Court CIV 2008-404-004857 and Court of Appeal CA 160/2009 [2009] NZCZ 213

⁵ *Advance Properties Limited and others v Taupo District Council* [2014] NZEnvC 126

18. The matter has not been addressed further by the Supreme Court and none of the subsequent cases appear to have questioned the continued relevance of that case law.

Relevance of Case Law in this case

19. It is submitted that the *Discount Brands* line of cases is relevant to the Plan Changes:
- a. The wording of section 104(3) RMA, which was relevant to the *Discount Brands* cases, has at all stages been consistent with the wording in section 74(3), which applies to the Plan Changes.
 - b. The *Discount Brands* decisions explicitly and exclusively addressed the *effects* of trade competition rather than trade competition itself, despite the fact that the relevant section 104(3) only referred to “*trade competition*” at the time when those decisions were made. Thus, the *Discount Brands* decisions addressed the very point that has been raised by the current wording of sections 74(3) and 104(3) RMA, being, as Randerson J put it in the High Court, the “*point of distinction between the adverse effects of trade competition on trade competitors and adverse effects which may properly be considered under the RMA*”.
20. It is submitted that the *Discount Brands* decisions:
- a. Draw a clear distinction between the effects of trade competition on competitors and the wider social and economic effects on the viability of and amenity provided by centres that may be generated (at least in part) as a consequence of such trade competition.
 - b. Reinforce a common element in Environment Court decisions whereby an assessment of potential consequential social and economic effects follows and is informed by retail economics evidence incorporating an assessment of trade competition effects.
 - c. Indicate that social and economic effects warranting consideration under the RMA can arise where a proposal, as a consequence of trade competition and the redistribution of trade, will affect: the range of activities provided at a centre; the level of service and functionality provided by the centre; the amenity, character and social function provided by a centre; and, ultimately, the viability and vitality of the centre.

- d. Provide that where trade competition produces social and economic effects that are *significant*, they go beyond the effects ordinarily associated with trade competition and should be considered.
- e. Establish that where such effects may arise, they need to be evaluated and taken into account in terms of an enquiry under RMA as to the most appropriate provisions to give effect to Part 2 and higher order planning provisions.

Implications

- 21. Mr Roberts' evidence discusses the Council's strategic planning initiatives with respect to Marsden Point / Ruakaka and refers in particular to the Council's Structure Plan, its Growth Strategy and its Implementation Strategy, which:
 - a. Anticipate significant growth in Marsden Point / Ruakaka in future decades.
 - b. Identify the need for a primary mixed-use centre which is to be located on the land now subject to the MPC Zone.
 - c. Provide for the Ruakaka Shops to be retained but as a lower order centre which would support and be complementary to the primary centre on the MPC Zone.
- 22. The only expert evidence before you regarding the potential for relevant distributional or consequential effects to arise in terms of RMA is the statement by Mr Heath. He concludes that the current extensive area of land zoned Local Commercial has the potential to delay significantly if not prevent development of the planned primary centre on the MPC Zoned land. As a consequence, the provisions give rise to a risk that the centres hierarchy anticipated by Council for Marsden Point / Ruakaka will either be delayed or prevented from occurring unless steps are taken at this stage to implement appropriate constraints on the development of the Ruakaka Shops land.
- 23. The fact that the MPC Zoned land is currently largely undeveloped does not mean that you should ignore the adverse planning consequences for the Council's chosen strategy. To the contrary, that exemplifies and exacerbates the issue because:
 - a. Given the rate of population growth in Marsden Point / Ruakaka it is unlikely that the initial phase of development of the primary centre will be of sufficient scale to "*leapfrog*" the Ruakaka Shops to an extent that it will immediately serve its planned function.

- b. In the interim, it will become increasingly difficult to establish a comprehensive mixed-use centre on the MPC Zoned land if the Ruakaka Shops are allowed to continue to expand:
- i. Southpark understands that, as a consequence of the rate of population increase at Marsden Point / Ruakaka, the MPC Zoned land is likely to be developed incrementally rather than through a single comprehensive development capable of serving the anticipated long-term catchment.
 - ii. The Ruakaka Shops will increase in size as additional activities establish there so any development on the MPC Zoned land will need to compete with an increasingly strong centre, which over time could increase to a size and function greater than the anticipated lower order status.
 - iii. The Ruakaka Shops will be able to continue to accommodate incoming demand without being required to meet the complex and demanding planning obligations that apply to the MPC Zone. Mr Hood's evidence implies that Southpark is endeavouring to obtain a competitive advantage over the Ruakaka Shops but in fact the current relatively lenient Local Commercial Zone provisions provide a competitive advantage to the Ruakaka Shops in comparison with the more stringent and demanding MPC Zone.
- c. The consequence will be that the high-quality amenity and service outcomes sought by Council on the MPC Zoned land will not be realised in a timely fashion. Nor will those amenity and service outcomes be realised on the Ruakaka Shops land, because:
- i. It is not appropriately located in terms of the Council's long-term strategy; and
 - ii. It is not subject to rules that would give rise to the form of development or level of amenity sought by Council for its primary centre.

General Observations

24. By adopting a staggered methodology for its District Plan review, the Council has inevitably created challenges for this committee and itself where (as in this case)

issues arise that affect land both inside and outside the area subject to the Plan Changes.

25. The Plan Changes should have included the MPC Zone:
- a. The Council's Growth Strategy and Structure Plan take an holistic approach to the future and anticipated Marsden Point / Ruakaka settlement. The existing urban areas are only a small part of that centre and it is critical that the area be planned and developed as a whole and not in an atomised way.
 - b. By including only part of Marsden Point / Ruakaka in the Plan Changes, Council has artificially focused on the existing area and ignored the future urban areas. Planning is concerned with the future and, in this case, that future involves extensive urbanisation and the development of a planning and infrastructural framework that will serve the larger Marsden Point / Ruakaka area.
 - c. In this case, the key long-term planning issue will be the relationship between the existing and future urban areas. In particular, the District Plan needs to address appropriately the potential for current and future development in the existing area to impact adversely on the future urban form of the wider area. That issue is at the core of the Southpark submissions.
 - d. To date, the MPC Zone and the Local Commercial Zone at Marsden Point / Ruakaka have never been addressed simultaneously in District Plan processes, although they were considered holistically through the Growth Strategy and Structure Plan processes. The current zoning pattern, with its excessive area of land at Ruakaka Shops zoned Local Commercial Zone, has the potential to compromise severely the long-term development of the MPC Zone and hence the implementation of the Growth Strategy and Structure Plan. Had the Plan Changes included the MPC Zoned land, the need to integrate the existing and future parts of Marsden Point / Ruakaka would have been explicitly before you, and you would have had an ability to amend both sets of provisions accordingly. Instead, you are limited to changing the provisions subject to the Plan Changes and, in that context, it is essential that you have regard to the unchallenged operative MPC Zone District Plan provisions relating to the identified primary centre.
26. Effective resource management and urban planning necessarily involve taking a long-term view. Development occurs slowly and needs to be undertaken in a way and at a

rate that is consistent with the long-term vision for an area and not compromise it. This, too, is an issue which is at the core of the Southpark submissions. While the Local Commercial Zone appears currently to be the commercial core of Ruakaka, the Council's long-term strategy involves it having a relatively minor role with the MPC Zone being the location within which future urbanisation and intensification in the broader Marsden Point / Ruakaka area is to be focused. Southpark asks you to recognise and respond appropriately to the risk posed to that long-term strategy by the zonings proposed in the Plan Changes.

Dated this 5th day of December 2019

A handwritten signature in blue ink, consisting of a large, stylized initial 'D' followed by a long, horizontal, wavy line.

Douglas Andrew Allan – Counsel for Southpark Corporation Limited

