

Decision No. A 7/2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 121 of the Act

BETWEEN KEYSTONE WATCH GROUP

(RMA 771/99)

Appellant

AND THE AUCKLAND CITY COUNCIL

Respondent

AND KEYSTONE RIDGE LIMITED

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)

Environment Commissioner J R Dart

Environment Commissioner R F Gapes

HEARING at AUCKLAND on 21 to 25 August 2000 inclusive, and 27 to 29 November inclusive.

APPEARANCES

R Brabant for Keystone Ridge Ltd.

W J Embling for Auckland City Council

L J B Paterson & N B Paterson for Keystone Watch Group

DECISION

Introduction

[1] This is an appeal by Keystone Watch Group ("the appellant") against Auckland City Council's ("the Council") decision to permit Keystone Ridge Ltd



("the applicant") to substantially demolish a former supermarket building at 3 Keystone Ave, Mt Roskill, and to replace it with three apartment blocks containing a total of 66 residential units. It is proposed that the complex consist of 15 two-bedroom units, 36 one-bedroom units and 15 studios, together with associated car-parking and a gymnasium.

[2] The front, 3 storey, block, which is to be sited parallel to Keystone Ave, will include the gymnasium and will be built above the existing semi-basement parking area. The two rear, 4 storey, blocks, will run parallel with the eastern and western boundaries, respectively, and will be built above the rear, ground level, parking area. There is provision for a total of 105 off-street parking spaces, including 7 visitor spaces. There is no separate provision for loading spaces. The sole vehicular access to and from the site will be via the existing driveway on the site's eastern boundary.

The Site and Environs

[3] The site is on the southern side of Keystone Ave, some 50 metres east of the avenue's intersection with Dominion Rd. The intersection marks the near, northern limit of the Dominion Rd/Mt Albert Rd suburban shopping centre. The site rises steeply from street level to an existing excavated terrace at the rear. An existing high, 5.4 metre, retaining wall extends the length of the southern boundary. It is topped by a 3-metre mesh and barbed wire fence, separating that part of the site from its rear neighbour, the Dominion Rd Primary School. The existing retaining wall on the site's eastern boundary rises from 2 metres at its street frontage to 5.4 metres at its rear. It is topped by a close-boarded, 1.8 metre high fence separating it from two single-storey houses at 5 and 5A Keystone Ave. Immediately over the site's western boundary is a driveway giving vehicular access to the rear of numerous commercial buildings fronting Dominion Rd.

[4] In the mid-1970s, substantial excavation of the site, which has an area of 2576m² and a frontage to Keystone Ave of 47.17m, was carried out prior to the construction of a single building, flush with the street boundary and 9.1m in height, for occupation as a supermarket. That use was abandoned some 3-4 years ago. The whole now presents as a derelict and rubbish-strewn site with the building covered with graffiti and posters and in a state of neglect and disrepair.



[5] With the exception of the properties at its intersection with Dominion Rd, Keystone Ave, which is some 340 metres long, is a typical suburban residential street of well-established houses with some minor, relatively recent, in-filling. At its eastern end, where it links with Akarana Ave, is Fearon Park, an extensive recreation reserve, accommodating the Roskill District Rugby Club's rooms, rugby fields, a softball field, and a children's playground. Akarana Ave, in turn, links with Mt Albert Rd. A traffic-calming installation opposite 5 Keystone Ave, generally, marks the break between the short-term, on-street, parking associated with the commercial development to the street's west and the residentially-related parking to its east. Its existing traffic volumes are estimated to be 2000-3000 vehicles per day.

[6] The site is zoned Business 2 in the Operative Auckland District Plan (Isthmus Section) ("the operative plan") as are the properties to its west. Apart from that, and the bank on the northern corner of its intersection with Dominion Rd, the whole of Keystone and Akarana Avenues are zoned Residential 6a. The school to the rear of the site is zoned Special Purpose 2.

Status of Proposal

[7] Under the operative plan residential units are provided for as a restricted controlled activity in the Business 2 zone. There is no control on the density of residential activity in the business zone.

[8] In addition, the proposal requires a number of resource consents under the operative plan, which are conveniently set out in the evidence of Mr McCarrison the planning consultant called by the Council. These are:

- Maximum Height
 - A discretionary activity as a development control modification¹ is required to allow the building fronting Keystone Avenue to exceed the 12.5 maximum height limit set out in rule 8.8.1.1 of the operative plan by 0.62 metres.

¹See Part 4.3.1.2B of the operative plan.



- Streetscape Improvement
 - A discretionary activity as a development control modification to allow the provision of landscaping and tiered planters well above the ground level, on portions of the existing building in lieu of the requirement under the streetscape improvement control 8.8.1.3 which provides that not less than 50% of that part of the site between the road boundary and a parallel line 3 metres therefrom is to be appropriately landscaped.

- Earthworks
 - A discretionary activity under Part 4A.2B to allow earthworks totalling 500m³ which exceeds the maximum 25m³ provided for as a permitted activity.

- Excavations
 - Controlled activity consents under rules 4A.2 and 8.7.1 to allow excavations within 20 metres of a site boundary where the slope below ground level at the boundary exceeds the one vertical to two horizontal line as follows:
 - the excavation on the eastern side exceeds the one in two plane by a depth of 0.8 metres tapering to 0.0 metres over a distance of 35 metres.
 - the excavation on the western side exceeds the one in two plane by a depth of 1.3 metres tapering to 0.0 metres over 15.5 metres.
 - the excavation on the southern boundary exceeds the plane by up to a depth of between 1.30 metres to 0.8 metres.

- Parking
 - A discretionary activity under rule 12.9.1.1 to allow provision of 105 car parking spaces in lieu of the required 132 under rule 12.8.1.1.



- A controlled activity under rule 12.9.1.1A to allow the provision of car-parking spaces for more than 100 vehicles as provided for under rule 12.9.1.1.A.
- Stacked Parking
 - A restricted discretionary activity under rule 12.9.1.1 to allow provision for 25 stacked car parking spaces in lieu of the requirement under rule 12.8.1.3 for the formation of the parking spaces to be in accordance with figures 12.2a and 12.2b of the plan.
- Access
 - A discretionary activity as a development control modification to allow vehicle access to the site at a gradient of one in six in lieu of the requirements under rule 12.8.2.1(c) for the grade of access to be not steeper than one in eight and where it terminates at the road boundary for the provision of a 6 metre wide platform not steeper than one in twenty.

[9] The site is also affected by Plan Change T003 (Change 3) which was notified on 15 November 1999, and which seeks to apply additional controls at the interface between residential and business zones. These controls include making any activity within 30 metres of a residential zone a restricted discretionary activity, and imposing a more restrictive “building in relation to boundary” rule, the breach of which is to be considered as a discretionary activity. The proposal is within the 30 metres prescribed by the former and breaches the latter by a depth of 150 mm along 6.75 metres of frontage. The proposal therefore requires resource consent in terms of Change 3, as follows:

- To allow an activity in a business zone within 30 metres of a residential zone under Plan Change 3 rule 8.7.1. This is to be considered as a restricted discretionary activity under rule 8.7.3.2.
- A discretionary activity to allow the building fronting Keystone Avenue to infringe the proposed building in relation to boundary rule 8.8.1.12 under Plan Change 3 by a depth of 150mm over a length of 6.75 metres.



Multiple Consents

[10] Clearly this is a case where multiple consents are sought in a single application. Both the applicant and the Council presented their case on the basis that overall the application is a discretionary activity and accordingly requires, as a whole, to be assessed as a discretionary activity. This is in accordance with the approach taken by Cooke J under the former legislation in *Locke v Avon Motor Lodge Limited* (1973) 3 NZPTRA 17. Cooke J had held that where a particular feature of a development proposal made it non-complying (in that case a non-complying side yard), so that a conditional use application was necessary, then the whole use of the property was non-complying. Cooke J stated that a “hybrid concept” would add an unnecessary complication to legislation which was already complicated and said:

On a conditional use application the fact that there is only minor non-compliance for the predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive.

[11] The Environment Court, in *Rudolph Steiner School v Auckland City Council* (1997) 3 ELRNZ 85, adopted *Locke* where it said that a discretionary activity in respect of which the Council has not restricted its discretion is wholly discretionary, and that in exercising the discretion to grant or refuse consent and to impose conditions a consent authority is to have regard to all the matters listed in section 104(1) relevant to the circumstances.

[12] Salmon J in *Aley v North Shore City Council* (1998) NZRMA 361 approved the Environment Court’s adoption of *Locke* in *Rudolph Steiner School* and commented at page 377:

*Just because a plan allows for the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. If the nature of a proposal requires a discretionary activity consent application to be made in overall exercise of discretion under sections 104 and 105 an application of the principles in *Locke* and *Rudolph Steiner* could mean that full advantage might not be able to be taken of the maximum provisions set by the rules.*

On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists. The “activity for which consent is sought” is in the present instance the building that is proposed not just those aspects of development which have had the effect of requiring a discretionary activity.



[13] The Court of Appeal in *Bayley* added to the penultimate sentence the words “or as it would exist if the land were used in a manner permitted as of right by the plan”.

[14] It was on this basis that the appellant submitted that as there is non-compliance, some of which require discretionary activity applications, it is necessary to look at the whole of what the applicant is proposing to do and take a “holistic approach”. It was submitted on behalf of the appellant that a failure to meet one or other of the development controls enables a greater intensity of development than is envisioned by the operative plan as a whole. Mr L.J.B Paterson (Paterson Snr) submitted:

It is not a case of ticking off items in isolation and saying they have only a minor effect after considering each of the controlled activities but the application as a whole must be considered.

He submitted the importance of having regard to the cumulative effect of the non-compliance.

[15] In his closing address Mr Brabant took issue with this approach and submitted that this is an appropriate case where the required consents can be dealt with separately. The effect of this is, he said, that the primary consent application for residential units is properly considered as a restricted controlled activity. This is contrary to his opening submission where he said:

Overall the proposal requires consent as a discretionary activity.

[16] Similarly, Ms Embling shifted her stance on behalf of the Council. The evidence adduced on behalf of the Council was on the basis that the development was to be assessed overall as a discretionary activity. Such a shift in stance is understandable from the point of view of the applicant and the Council as it has the effect of compartmentalising the activities for which different consents are required. This may, depending on the circumstances, limit the scope of the consent authorities, and this Court’s discretion.

[17] The issue of multiple consents was addressed in *Bayley v Manukau City Council* (1999) 1 NZLR 568 (CA) and in two recent decisions of Randerson J in the High Court: *King and others v Auckland City Council and anor* (unreported, High Court, Auckland CP519/99, 1 December 1999); and *Body Corporate 970101 v*



Auckland City Council and anor (2000) 6 ELRNZ 189. In *King's* case Randerson J referred to the observation of the Court of Appeal in *Bayley* at 579-580:

Such a course may be inappropriate where another form of consent is also being sought or is necessary. The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.

[18] Randerson J then went on to say that the approach as expressed in the comments by the Court of Appeal is consistent with the clear statutory intention of the Act to treat the sustainable management of natural and physical resources in a comprehensive manner. He then said:

I have no doubt in the present case that a compartmentalised approach would not have been appropriate. Indeed, both PDL as applicant and the Council's planning officer accepted that the applications were to be dealt with as a whole and should be treated overall as an application for consent to a discretionary activity.

...

Plainly, this was a case where the consents overlapped in the sense described in Bayley to such an extent that they could not realistically or properly be separated ... for the grant of the consents themselves.²

[19] In *Body Corporate 970101* Randerson J said:

Where there is an overlap between the two consents such that consideration of one may affect the outcome of the other, it will generally be appropriate to treat the application as a whole requiring the entire proposal to be assessed as a discretionary activity.³

[20] Randerson J's views were approved by the Court of Appeal in *Body Corporate 970101 v Auckland City Council and anor* (unreported, Court of Appeal, CA 64/00, 17 August 2000).

[21] We are satisfied that in the present case a compartmentalised approach is not appropriate for the following reasons:



² Page 18 and 19.
³ Ibid. page 192.

- First, the applicant and the Council presented their case on the basis that the development was to be assessed overall as a discretionary activity. The evidence did not therefore specifically address the question of overlap or the manner in which the large number of consents should be dealt with separately.
- Secondly, putting aside the height restrictions under the operative plan and Change 3 (matters which we consider not to be of major significance), discretionary consent is required for the 500m³ earthworks, the failure to comply with the street-scaping improvement control and the shortfall in car-parking and access. There is in our view an overlap in the sense described in *Bayley* between the earthworks consent and the streetscape improvement control with the development as a whole. They relate to the proposed construction of the buildings. They enable the designing of a structure that has a greater impact on the environment than would otherwise be the case because of the more intense use of the site. In addition, for reasons given later in this judgment we are not satisfied to the requisite degree that the parking shortfall and access will not have adverse effects beyond the site boundaries.
- Thirdly, there is a close relationship between the discretionary consents required and the other numerous consents required that not to look at it in the round would, to use the Court of Appeal's words in *Bayley*, "split it artificially into pieces".

Basis for Decision

[22] As we consider the proposal should be considered overall as a discretionary activity we are required to consider the matters set out in section 104(1) of the RMA. The following matters are relevant:

- Part II matters – section 104(1) – (subject to Part II);
- The actual and potential effects on the environment – section 104(1)(a);
- The Auckland Regional Policy Statement – section 104(1)(c);
- The relevant objectives, policies, rules and other provisions of the operative plan and Proposed Change 3 – section 104(1)(d);



[23] Following a consideration of the relevant matters set out in section 104(1) we are then required to exercise our discretion pursuant to section 105(1).

The Operative Plan

[24] Part II of the operative plan sets out the manner in which the Council is to carry out its functions under the RMA. It addresses the issues that face the city and sets the principal objectives and the strategy of the Council to achieve the “sustainable management” of the resources of the isthmus. The relevant issues include those set out in Part 2.2:

- *The need to accommodate ongoing change within the urban area while maintaining and enhancing the quality of the present environment.*
- *The need to encourage intensification of use within the Isthmus while recognising the pressure on existing infrastructure, transportation and utility services that such intensification brings.*
- *The need to manage the physical growth of the Isthmus in a way which recognises the value of the existing resource while providing the flexibility to meet a variety of community aspirations.*
- *The need to ensure that business growth does not compromise the protection and enhancement of the environment.*

[25] Part 2.3 sets out the principal objectives of the Council. Objective 2.3.3 headed “Community” includes such objectives as: the achievement of a healthy and safe living environment; allowing for the development of a range of residential neighbourhoods and environments; the protection and enhancement of residential amenities and allowing maximum flexibility for individual site development without adversely impacting on neighbouring activities.

[26] The residential strategy under Part 2.4 recognises that the existing housing density is low; that the regional aim is to discourage unconstrained urban expansion; and that the intensification of residential areas is permitted where appropriate. The operative plan recognises that people require different types of housing. The business zoned areas make provision for housing that can be provided without the usual development constraints imposed on residentially zoned properties such as minimum open space area and landscape area. The expected outcomes for the strategy are set out in Part 2.5 of the plan which in part says:

The community will enjoy flexibility and choice in locations for work, leisure and living, secure in the knowledge that certain levels of amenity will be attained.



Overall the strategy will benefit the wider community and will leave a suitable legacy for future generations.

[27] Part 6 of the plan, “Human Environment”, recognises the importance of managing the opportunity for the provision of housing and infrastructure to ensure that an acceptable quality of life is maintained. Part 6.2.3 headed “Housing” recognises the provision of housing to meet the change in requirements of the community while seeking to ensure that residential environmental standards are not compromised. It says in part:

- *Housing meets the fundamental human need of shelter. If it is to perform this role properly it must be economically accessible, physically suitable to the users and sited where it can maximise opportunities for employment and recreation. For example, the housing market must be responsive to socio-economic changes in the district in recent years, which have produced a range of household sizes from extended families to small one and two person households, by providing a suitable range of housing. Resource management policies must also be sufficiently flexible so that the housing market can respond quickly to future shifts in the pattern of demand.*
- *Wide opportunities for housing are provided in the plan. Residential densities are not arbitrarily defined but are related to the maintenance and enhancement of existing standards of amenity. The current amenity and environmental standards within the residential neighbourhoods of the Isthmus will not be compromised by those provisions which open up opportunity.*

[28] Part 6.2.8 headed “Infrastructure” says in part:

- *The urban area provides an environment in which people can live and work. It depends on its infrastructure of transport and network utility services for water supply, drainage, energy and telecommunication and radio communication systems. Without this infrastructure and these network utility services, an acceptable quality of life could not be maintained, and adverse environmental effects could occur.*

[29] Part 8 of the operative plan contains the objectives, policies and provisions relating to business activity. The plan recognises that business activity through its effects can seriously impact on the quality of the environment and measures must be adopted to remove, reduce or mitigate those effects⁴. Part 8.2, headed “Resource Management Issues”, recognises the need for transitional measures that promote and encourage sustainable alternative use of redundant industrial land. This is further emphasised in Objective 8.3.1 which seeks to foster the service employment and productive potential of business activity while at the same time ensuring the sustainable management of the natural and physical resources of the city. One of the policies under this objective is:



8.1.

- *By offering incentives for the comprehensive redevelopment of large, vacant, under-utilised or derelict industrial sites within the Isthmus.*

This reflects one of the resource management issues in Part 8.2 of the plan, which says:

- *The need for transitional measures which promote and encourage suitable alternative use of redundant industrial land.*

[30] The use of a “zoning technique” is to allow the district plan to create bundles of activities considered generally appropriate in each zone or area, in recognising the constraints of the environment and that some activities may not be appropriate in every location. As previously mentioned the western end of Keystone Avenue and Dominion Road has been zoned Business 2 to reflect this area’s suitability to accommodate the range of activities offered under this zoning. One of the objectives of the business zone is to provide for retailing office and commercial service activity at a medium intensity suburban level⁵. One of the policies emanating from this objective is:

- *By permitting a wide range of business and non-business activities within these centres.*

[31] A further objective is to ensure that any adverse environment or amenity impact of business activity on adjacent residential or open space is prevented or reduced to an acceptable level⁶. The policies emanating from this objective are:

- *By adopting controls which limit the intensity and scale of development to a level appropriate to the zone’s proximity to residential zoned properties and open space areas.*
- *By requiring acceptable noise levels at the interface between residential zones and business zones.*
- *By adopting controls which seek to protect residential zones’ privacy and amenity.*
- *By adopting parking and traffic measures which seek to avoid congestion and parking problems.*

[32] As previously mentioned the subject site interfaces with two environments in addition to Business 2, being Residential 6a and Special Purpose 2. The Residential 6a zone is the most common classification of land on the Isthmus. Within it,



⁵ 6.2.1(a).

⁶ 6.2.1(e).

medium intensity activity such as multi-unit residential development is encouraged. This zone recognises the need for further development while retaining and sustaining a reasonable level of amenity.

[33] The Dominion Road Primary School to the rear of the site and contiguous with the southern boundary is zoned Special Purpose 2 (Education). The school is visually separated from the site due to the difference in ground level and the mature pohutukawa trees and security fence along the southern boundary.

[34] Transport is a major issue for the city and Part 12 of the operative plan is devoted to transportation. It emphasises the need to protect corridors for the provision of regular and efficient public transport services and the plan recognises the need to control activities that may adversely impact on the efficient functioning of the existing traffic network with considerable emphasis on off-site parking for proposed developments.

[35] As previously mentioned residential units are a restricted controlled activity. Rules 8.7.2.1 and 8.7.2.2(3) set out assessment criteria relating to controlled activities of which the following are relevant:

- Site layout with special emphasis on parking and vehicle circulation areas to ensure that the effects of the proposal are internalised and do not impact on the adjacent roadway or adjacent sites;
- Car-parking to be located remotely from residential zoned boundaries or where this is impracticable adequate screening is to be provided to reduce adverse aural or visual impacts on residentially zoned land;
- Internal circulation of the parking areas is to be designed to ensure safe and efficient vehicle circulation;
- Conditions may be imposed to ensure no minor adverse effects on the environment occur as a result of the proposal;
- Where the subject site adjoins other business zoned sites adequate measures to the satisfaction of the Council should be incorporated into the design and/or location to ensure indoor acoustic privacy.



[36] The matters contained in Part 2 of the operative plan establish an approach that is consistent with Part II of the Act and in particular the sustainable management of natural and physical resources. Emphasis is given to securing certain levels of amenity for the community and protecting these for future generations. The provision of housing to meet the change in requirements of the community is recognised in Part 6 of the operative plan while seeking to ensure that residential environmental standards are not compromised. We were told by Mr McCarrison that:

It is recognised that apartment complexes within appropriate located business zoned areas in the last five years have enabled provision of a style and character of residential living that is not able to be provided on residentially zoned land.⁷

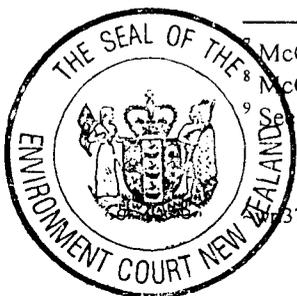
[37] The market demand for such residential units is reflected in the popularity of this form of housing. We were also told by Mr McCarrison that:

A clear focus and message of the objectives, policies and general strategy of Part II of the district plan and those specific Residential 6a and Business 2 zones is the expectation to provide the opportunity for additional housing; to maintain and improve the amenity of the residential areas and business centres over time.⁸

[38] Mr Green, the consultant planner for the applicant, had this to say:

The plan identifies the investment and infrastructure and existing shopping centres as being significant in the context of the Business Activity 2 zone. In my opinion the introduction into the Business Activity 2 zone of an increased catchment of family units and individuals likely to make use of the nearby shopping centre will do much to revitalise the retail outlets currently in existence and may cause them to improve and diversify the goods and services that they provide to the community. In my opinion this is a sustainable use of an existing resource consistent with the provisions of the district plan.

[39] We were told that the existing centres, such as the Mt Roskill end of Dominion Road, where commercial activity has traditionally been retail-centred, are going through dramatic change due to the alteration in the organisation of retailing such as shopping malls, large stores and technology. Thus, the district plan aims to increase the opportunity for a wider range of activities to establish in these areas where it is appropriate⁹. Residential units, which were a non-complying activity under previous plans, now have restricted controlled activity status in the Business 2 zones of the operative plan.



⁷ McCarrison, paragraph 5.12.
⁸ McCarrison, paragraph 5.25.
⁹ in particular Part 8.2 & 8.3 of the Operative Plan.

[40] We are of the view that the proposal is generally in accord with those relevant parts of the operative plan which aim: to encourage intensification of residential use in parts of the Isthmus; to encourage alternative use of redundant land in appropriate located business zoned land; and to encourage residential development in close proximity to main traffic routes. However, there is a constant thread throughout the objectives and policies of the operative plan which emphasise such matters as: the maintenance and enhancement of the present environment¹⁰; the protection and enhancement of residential amenities¹¹; the achievement of a healthy and safe living environment¹²; allowing site development without adversely impacting on neighbouring activities¹³; and assessing that business activity does not adversely impact on adjacent residentially zoned properties.¹⁴.

[41] Of concern is the effect of the proposal on the amenity of the adjacent residentially zoned land. It is the effect on the amenity of the adjacent residentially zoned land that is at the heart of this appeal. The appellant maintains that the proposal has been designed beyond the potential of the site. The effect of this, the appellant says, is that the bulk, height and density of the proposal has an overpowering effect on the residential amenities of the Residential 6a zone located to the east and north of the site. Further, the effects on visual and oral privacy to the north and east are considerable, as is the effect on parking and traffic congestion in Keystone Avenue. The numerous conditions that the consent was made subject to will it says not sufficiently mitigate or avoid these adverse effects. The non-compliance of the development controls are in each case not of relevant significance on their own says the appellant but their combined effect reflects an over development of the site. One of the appellant's witnesses, Mr G W Pederson, a resident at 20A Keystone Avenue, Mt Roskill said:

... I support the development of apartments in principle. However, it is my view that the developer is attempting to over develop this site.

[42] It is therefore necessary for us to consider what adverse effects will flow from allowing the proposal and, if they are, the extent to which those effects will affect the adjacent residential environment. We deal with this later under the heading "Potential Effects".

¹⁰ 2.2.

¹¹ 2.2.3.

¹² 2.2.3.

¹³ 2.2.

¹⁴ 8.6.2.1(e).



Proposed Plan Change 3

[43] Plan Change 3 was publicly notified on 15 November 1999. It replaced proposed Variation 164 that had been publicly notified on 23 June 1997 and was withdrawn to allow the district plan to become operative. Both the plan change and withdrawn variation reflected Council's concern to protect the amenity of residentially zoned properties from the potential adverse effects of activities within the business zones. Both the plan change and withdrawn variation require that all permitted and controlled business activities on sites within 30 metres of a residentially zoned property be considered as at least a restricted discretionary activity. The change sets out some ten criteria against which any proposal is to be assessed. These relate to such matters as:

- [a] the effect on infrastructure, particularly wastewater and stormwater drainage systems;
- [b] compliance with development controls, particularly zonal height, floor area ratio and required parking and noise controls;
- [c] the intensity level of the adjacent residential zone for permitted or controlled activities is to be used as a guide but such an intensity assessment does not need to be undertaken for activities which satisfy off-street parking requirements and infrastructure considerations;
- [d] the bulk colour and design of buildings;
- [e] traffic and parking considerations and the location and design of vehicular access and car-parking;
- [f] the cumulative effects of activities, particularly traffic and noise and the proximity to public transport.

The explanation given for the criteria is:

Some activities and buildings have the potential to adversely affect surrounding residential areas due to building dominance, shadowing reduces access to sunlight, and loss of privacy. Other impacts can include streetscape, visual design, heritage values, noise, traffic and parking, intensity of development and cumulative effects. The Council may impose conditions to ensure that the effect on neighbouring residential zoned properties is addressed and in some circumstances where the effects cannot be mitigated or avoided the activity may be refused consent.



[44] The plan change provides specific rules and criteria for controlling development at the interface of residential and business zones. Hitherto the plan addressed this issue in only a general way.¹⁵

[45] The plan change has reached the stage where the Council's officers are assessing and preparing reports on the submissions. It has yet to be subjected to independent decision-making and testing through the various processes required by the Resource Management Act. In considering the weight that we give to it we take into account the following principles which arise from the various cases:

- The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process¹⁶.
- The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:
 - (i) The extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;
 - (ii) Circumstances of injustice;
 - (iii) The extent to which a new measure, or the absence of one might implement a coherent pattern of objectives and policies in a plan¹⁷.
- In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan¹⁸.

[46] In considering the weight to be given to proposed Change 3 we have regard to the stage it has reached through the objection and appeal process. We note that it does reflect the general provisions of the operative plan relating to the clear intent of the plan to protect the amenity of residentially zoned properties from the potential

¹⁵ See Objective 8.6.2.1(e) and policies emanating therefrom.

¹⁶ See *Hanton v Auckland City Council* A010/94 3 NZPTD 240 adopted in *Burton v Auckland City Council* 1994 12 NZRMA 544.

¹⁷ See *Burton v Auckland City Council* (supra).

¹⁸ See *Lee v Auckland City Council* W014/94 4 NZPTD 178, 1995 NZRMA 241.



adverse effects of activities in the business zones. This requires us to carefully consider the potential effects of the proposal on the adjacent Residential 6a zones, which we will consider in some detail later in this judgment.

Auckland Regional Policy Statement

[47] Chapter 2 of the ARPS is headed “Regional Overview and Strategic Direction” and makes specific reference to “*higher density, infill housing*”. It acknowledges under section 2.6.3 that Auckland’s low-density urban areas have been wasteful of land ... “*and this has led to inefficient travel patterns and use of energy*”. Urban intensification is supported “*so that better utilisation is encouraged of the substantial reservoir of under-utilised land within the urban area. Much of this land is in areas where the existing utility systems and transport network have capacity to service more intensive or infilled development. Intensification can enable more efficient use of physical resources including infrastructure and also shift the emphasis of development of metropolitan Auckland toward an urban form which is more efficient in transport and energy terms*”.

[48] There is further comment in section 2.6.3 that infill and intensification needs to be carefully planned “*to avoid, remedy or mitigate adverse effects which can stem from loss of trees and bush, overloading of utility systems (especially drainage and stormwater), traffic congestion and reduction of space around buildings*”.

[49] The sentiments of the ARPS are to some extent mirrored in the document adopted by the respondent in June 2000 and called “Growing Our City – Through Liveable Communities 2050”. This document sets out a strategy for managing the growth of Auckland City into the new millennium. Using a number of criteria, it proposes to encourage redevelopment in specific locations so as to safeguard identified environmental and amenity features and at the same time ensuring land use development will be integrated with transport planning and infrastructure improvements. Keystone Avenue and the Dominion Road area is identified as being within one of seven strategic growth management areas spread throughout the city. A strategic growth management area is considered to be a place where the existing development pattern and infrastructure is conducive to supporting denser, mixed use, pedestrian friendly environments and where there is easy access to public transport. This area is forecast to be able to accommodate 3311 additional households by 2050 and this in turn reflects the Council’s intent of working towards achieving a higher intensity of housing to meet expected population growth.



[50] We agree with Mr McCarrison when he says that in his opinion ... “*the proposed development meets many of the policies of the regional policy statement with regard to the intensified use of the land adjacent to a major arterial road and where the infrastructure can accommodate such development*”. This view was underlined by the evidence we heard, and which was not challenged, that Dominion Road is a strategic arterial road providing the opportunity for an efficient private vehicle and public transport system. It is the effects of the proposed activity on the adjacent residential zoned areas that are therefore the important issue in this case. We now turn to the potential effects of the proposal.

Baseline

[51] Before discussing the potential adverse effects of the proposal it is necessary to address the submissions of counsel for the applicant and the respondent with respect to what is now become known as the “baseline” against which adverse effects are to be compared. We were referred to *Bayley* at 576 where the Court of Appeal said:

The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right.

[52] We have already referred to the Court of Appeal’s qualification of Salmon J’s words in *Aley*. We have also considered the numerous decisions of the High Court¹⁹ and the Environment Court²⁰ on this issue. The comments in *Bayley* were made in relation to section 94 of the Act. In this case we are dealing with the exercise of discretion under section 105 and the consideration of effects pursuant to section 104(1)(a). Salmon J considered the comments had relevance to the exercise of discretion under section 105 and the consideration of effects pursuant to section 104(1)(a) in *Smith Chilcott Ltd*, which was cited with approval by Chambers J in *Arrigato*.

[53] We consider the proper approach is as stated by the High Court in *Barrett* where the Court stated by reference to the Court of Appeal decision in *Bayley*:

¹⁹ Including *McAlpine v North Shore City Council*, M1583/98, Auckland Registry; *Low & ors v Dunedin City Council*, CP51/98, Dunedin Registry; *King & ors v Auckland City Council*, CP 519/99, Auckland Registry; *Barrett v Wellington City Council*, CP 31/00, Wellington Registry; and *Smith Chilcott Ltd v Auckland City Council & Anor*, AP 74-SW/00, Auckland Registry; *Auckland Regional Council v Arrigato Investments Limited & Others*, AP 138/99, Auckland Registry.

²⁰ *Arrigato Investments Ltd v Rodney District Council*, A115/99; *Martinez & Anor v Auckland City Council*, A32/00; *Contact Energy Limited v Waikato Regional Council & Anor*, A04/00.



But I accept that when the Court of Appeal is referring to what could be done on the site as of right it had in mind credible developments, not purely hypothetical possibilities which are out of touch with the reality of the situation. A test based on theory rather than reality would place an intolerable burden on consent authorities.

[54] We are also mindful of the comments of the High Court in *King*, where Randerson J noted that the “as of right” approach assumes that the applicant would proceed with the development to the extent permitted as of right, and that there are no other advantages to be gained from the non-complying aspects of the proposal such as increased density or more intensive use of the site which would not be available if the relevant controls are observed. He further commented at page 15:

All of this suggests that some care will be needed by consent authorities in applying the “as of right” principle in Bayley at least until some further guidance is available from the Court of Appeal as to its application in particular cases.

[55] Although Mr Brabant did not make specific submissions on the point, the expert evidence of the applicant was adduced on the basis that when assessing a discretionary activity, the Court should not consider environmental effects from a building that complies with the development controls.. We are not persuaded that *Bayley* overruled the principle stemming from *Locke* and reiterated by Salmon J in *Aley* (already quoted), that where a proposal requires a discretionary activity consent, then the overall exercise of discretion under sections 104 and 105 could mean that full advantage might not be able to be taken of the maximum provisions set by the rules. With respect we consider the position was correctly and pragmatically stated by the Environment Court in *Wouldes and ors v North Shore City Council & anor*, unreported, A58/98 where Judge Bollard and his Commissioner colleagues said:

In granting consent at first instance, the Council apparently felt that the proposal's overall compliance with the development control guidelines was of major import. Given the detailed nature of the plan, we can appreciate this viewpoint. If a plan is drawn with a degree of elaboration that this one is, a would-be applicant may generally be expected to have comparative confidence in formulating a proposal such as the present. Yet, such a plan cannot be expected to operate as a cast iron guarantee to success, having regard to the full range of matters relevant under section 104(1) in affording due primacy to Part II of the Act. Compliance for such guideline criteria is site coverage, maximum height, height in relation to boundary, yard provision, building length, and so forth, will doubtless assist in the quest of formulating a proposal that will be all the more likely to minimise adverse effects on the environment in accordance with the plan's intent. Even so, we repeat that in discretionary activity cases the plan cannot be expected to operate as an infallible blueprint or mechanism to a given end. Cases may still be expected to occur from time to time where, despite careful attention to the guideline provisions, resultant effects on adjacent owners are nonetheless found to be unsatisfactory in the final analysis.



[56] The *Locke* principle enables a consent authority and, thus the Court, to exercise its overall discretion taking into account all the matters set out in section 104(1) and Part II of the Act. To negate the *Locke* principle may well, in certain circumstances, result in the plan rules having primacy over Part II matters. The rules are arbitrary prescriptions which may not in particular circumstances give the protection to the environment which reflects the clear purpose of the Act as enunciated in Part II. In such cases, when the Court is exercising its discretion under section 105, the Part II matters must prevail.

[57] Conversely, in some circumstances, the rules may be unduly restrictive and to apply them would be contrary to the enabling provisions of section 5 and the principles of sustainable development as set out in Part II. Again Part II should prevail.²¹

Potential Effects

[58] It was the potential adverse effects of the proposal on the adjacent Residential 6a zones immediately to the east and across Keystone Avenue to the north of the site that was the major concern of the appellant. The appellant was represented by Mr L J B Paterson supported by his son Mr N B Paterson. Mr Paterson Snr is an architect and Mr N B Paterson is a registered engineer. They presented detailed submissions and evidence to the Court. The essence of their case is succinctly encapsulated in the following paragraph of their submissions:

*It is for this Environment Court to decide whether the applicant has designed, scaled and landscaped his development to be sympathetic to the surrounding residential sites or whether he just designed the biggest blocks and the greatest number of apartments he could.*²²

[59] They asserted that the size and scale of the proposal will result in a number of adverse effects and the following were addressed at some length in the evidence of all parties:

- The building – its dominance, its visual effects and its effects of overshadowing adjacent properties;



²¹ See for example such cases as: *Minister of Conservation & Ors v Kapiti Coast District Council*, A1024/94; *Price v Auckland City Council*, W180/96, 2 ELRNZ 443; and *Russell Protection Society Inc v Far North District Council*, A125/98.
²² Appellant's submissions, page 8.

- The effect on the aural and visual privacy of the adjacent dwellings;
- Traffic, including parking, and effects on pedestrian and road usage;
- The effect on infrastructure, particularly sewerage and stormwater;
- The effect of lighting on neighbouring properties;
- Noise.

We deal with each in turn.

The Building

[60] In this respect we heard evidence from Associate Professor C A Bird who lectures in Architecture and Urban Design at the University of Auckland School of Architecture. He gave architectural and urban design evidence on behalf of the applicant. Mr S J Cocker, a landscape architect, also gave evidence for the applicant in this respect. For the appellant we heard evidence from both Mr Paterson Snr and Mr N B Paterson and a number of residents. Of particular concern to the appellant were the bulk and the dominance of the building, its visual effects occasioned by its size and inadequate landscaping, and its shadowing effect on those properties to the east. Associated Professor Bird addressed these issues. As to dominance he said:

In this context "dominance" might best be described as a quality or characteristic of a building which is perceived by a viewer of that building. Architectural characteristics which may or may not give rise to a perception of dominance include "bulk", "colour", and "design", ...

[61] He said that as the proposed development generally complies with the development controls its bulk was contemplated by the plan. He then explained in some detail how the colour and design of the building effectively reduces what would otherwise be an "over-dominant building" to one which is "architecturally and urbanistically appropriate to its site and surroundings".

[62] Mr Cocker discussed the proposed landscaping of the building which he said "will assist in ameliorating the potential impact of the building".

[63] Mr Paterson Snr, himself an architect, pointed out that Keystone Avenue consists mainly of single storey residential buildings. He also pointed out the location of the site in relation to the different types of zone and the topography of the



site and its surrounds. The site is located on a slope extending south towards the top of Keystone Ridge and is thus higher than the residential land to the north. All these factors, he said, added to the dominance of the buildings. He opined that the mitigation attempts, including architectural design measures such as the modulation of the building façades and landscaping, are “woefully inadequate” to ensure that the generated effects of the application are no more than minor.

[64] In assessing the evidence we are mindful that visual perceptions of buildings and such matters as building dominance can be influenced by the subjective disposition of the beholder. We have concluded that the visual effect of the building will be quite significant and the form of the building will be dominant in the streetscape, thus adversely affecting the amenity of this residential neighbourhood.

[65] With regard to overshadowing, Associate Professor Bird acknowledged that in the late afternoon, when the sun is at a low angle, there will be some overshadowing of the properties to the east of the site. Mr Paterson Snr referred to shading diagrams drawn up by the applicant’s architect, Mr Brown, and attested that there would be significant shadowing created in the afternoon for most of the year starting from about 4.00pm in most afternoons from the 21 March to 21 September. We agree that the shadowing effect is significant.

Privacy

[66] The issue of privacy was addressed by a number of witnesses, in particular, Mr Brown, Mr McCarrison, Mr Paterson Snr, Mr S D Watson and Mr A J Wootton for the appellant.

[67] We find that the surrounding properties will be considerably impacted by lack of privacy. This will be exacerbated by a number of factors including the following:

- The height of the buildings above the predominantly single-storey dwellings;
- The design of the proposal which includes decks facing outwards from the north and east sides of the site;
- The intensity of the development. The density of the proposal is approximately 39m² per unit as compared to the Residential 6a density of 375m² per unit.



[68] Recognising the effect on privacy the applicant has taken measures to mitigate any such effects. The impact to the north is not as bad as to the east. The properties to the north are already overlooked by the public space of the road although not nearly to the extent of the proposed apartments. Further, the dwellings tend to have their private space orientated to take advantage of the views, sun and privacy to the north. In addition, tree and shrub planting and fencing provide some privacy to the front yard areas and rooms of each dwelling that face the street. Additional street planting is also proposed. The properties to the east will be most affected. They will be overlooked from a higher building and the evidence indicated that this is likely to be from 17 units on the eastern side. Recognising this possibility the applicant has taken measures to mitigate any effects including:

- Ensuring a separation distance of approximately 11.5 metres between the eastern boundary and the proposed new residential block running parallel with the eastern boundary;
- By making provision for balconies, 1 metre wide by approximately 7 metres in length, to all units between the glazed areas of the proposed building and the surrounding environs to provide a “buffer zone”. The balustrades of the balconies are to be either frosted glass or solid to provide a visual screen. As Mr Brown pointed out the balconies are designed for use more as outlook courts, rather than the significant external space that the traditional suburban deck implies. According to Mr Brown the balconies will allow a graduated shift from interior to exterior that helps blur the boundary and enable the exterior to invade the interior space rather than vice versa;
- It is proposed to plant a 100mm strip at the top of the retaining wall adjacent to the eastern boundary with trees and other vegetation, including pittosporums growing to 5 metres in height. These, it was asserted, will provide some additional privacy and visual amenity in the medium to long term. Quite apart from the questionable practicality of such a proposal, such planting would, of course, have to be with the consent of the owner and occupier of the affected property.

[69] On the evidence, assisted by our site visit, we find that the proposal will result in an increased loss of privacy primarily to the east and, to a lesser extent to the north of the site. We conclude that the increased loss of privacy will be



significant. The mitigating measures proposed will not sufficiently ameliorate the loss of privacy particularly to the east.

Traffic

[70] For the applicant, we had the benefit of expert evidence from Ms B Coomer-Smit who has had 13 years experience as a specialist traffic and transportation engineer. She described for us relevant surrounding street details, including that Keystone Avenue is a traditional 20 metre wide suburban street with footpaths, berms and kerb-side parking on both sides, as well as one moving traffic lane in each direction. She also told us that the 'traffic-calming' structure just east of the site, already referred to, was installed to discourage motorists from using Keystone Ave and Akarana Rd to bypass the signalised intersection of Dominion Rd with Mt Albert Rd. She also drew to our attention the fact that Dominion Rd is a well-served public transport route and that the nearest bus stops are only some 2 to 3 minutes walking distance from the site. Based upon peak period traffic counts carried out under her direction in September 1998 and August 2000, she estimated that Keystone Avenue carries around 2000 vehicles per day.

[71] Turning now to the issue of the traffic that is expected to be generated by the development. Ms Coomer-Smit told us that to assist her in her calculations, she had adopted the trip generation rates for medium density housing contained in the New South Wales Roads and Traffic Authority's "Guide to Traffic Generating Developments". She asserted that it was extensively used in New Zealand. Based upon that study, she arrived at a morning and evening peak trip rate of 0.45 per unit and concluded that:

The additional traffic to be generated during the peak hours can be equated to one vehicle turning into or from the development every 2 minutes. In terms of the effects of the additionally generated traffic on existing Keystone Avenue flows, the proposed development will add no more than 21 vehicle movements per hour, to any single section of Keystone Avenue. In fact these flows could even be less if one considers that the development is well serviced by public transport and that some of the trips generated by the development could well be public transport trips. ... consequently, ... these small volumes of added traffic flows will be imperceptible to the casual observer, and will have no discernible impact to (sic) the performance of the intersection at Dominion Rd.²³



[72] It was her overall conclusion that the development would have no more than minor adverse effects on the function, capacity or safety of the local traffic environment.

[73] Similarly, she told us of the traffic accidents that have been recorded over the past 5 years, of which there was only one reported in each of the past 3 years, and concluded that *the addition of a comparatively small number of traffic movements due to the proposed development will not compromise this road safety history in any way.*²⁴

[74] Turning to on-site considerations and dealing first with parking, as already noted, the development provides for only 105 parking spaces compared with the 2 per unit, or 132 spaces, required by the district plan. 28 of the spaces will be at basement level and the remaining 77, of which 25, or 24%, will be stacked, together with 7 visitor spaces, will be at ground level. Responding to the shortfall of 27 spaces, or, 20%, Ms Coomer-Smit reasoned that, based upon an analysis of 1996 census data equating the number of bedrooms against car ownership, *and conservatively assuming that all units have at least one car*, the actual expected parking demand would total 75 spaces distributed as follows:

Of the 51 one-bedroom or studio units, 46 will have one space and the remaining 5, two spaces; and

Of the 15 two-bedroom units, 11 would have one space and the remaining 4, two spaces.

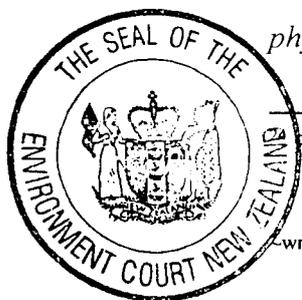
[75] Regarding the proposed stacked parking, it was her opinion that it was appropriate for this residential development and would result in an efficient use of the site. In that context, she also drew our attention to clause 12.9.1.2(d) of the district plan, which states, in part, that:

Stacked parking may be allowed for one of the two required parking spaces for any residential development where each residential unit has two parking spaces physically associated with it.

[76] It is not clear from the evidence which are intended to be the units that will be assigned two parking spaces. In our opinion, none of the stacked spaces would be *physically associated* with them, being separated by a minimum of one storey and a

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maximum of four storeys. In other words, we find that “physically associated” is not synonymous with “assigned” or “allocated”. Therefore, in that regard, the proposed parking does not comply with the district plan’s discretionary clause quoted above.

[77] Ms Coomer-Smit did not, however, draw our attention to the criterion stated in the previous paragraph, namely, that

Stacked parking will generally only be allowed in special circumstances in order to alleviate adverse effects, where no feasible alternative exists.

[78] It was not made clear to us what would constitute *adverse effects* in this context other than the obvious overflow to off-site, kerb-side, parking, and, given the proposed intensity of the development, there certainly appear to be no feasible on-site alternatives.

[79] Returning to the 105 spaces that are proposed, she allotted them as follows:

- (i) *Each of the 15 two-bedroomed units will have two spaces. Of these two spaces per unit, one space will be a stacked parking space.*
- (ii) *Ten of the single bedroomed units will have two spaces with one of the spaces being a stacked space.*
- (iii) *The remaining 41 units will be allocated a single carpark each.*
- (iv) *Seven spaces will be allocated as visitor parking spaces.*
- (v) *The remaining seven spaces can either be allocated to a single bedroom unit or can be used as visitor parking spaces.*²⁵

[80] And concluded that, *Given the nature of the activity as proposed, and the levels of traffic activities at the site, ... the parking arrangements as intended will provide a suitable and appropriate solution to the vehicle demands that will be generated.*

[81] We note, here, that only the seven visitor spaces would have unimpeded overhead clearance. The remaining 70 spaces at ground level and the serving aisles for all but 11 of them would have a maximum vertical height of approximately 2 metres, insufficient, in our view, to constitute *a suitable and appropriate solution* to the parking allocation problem.



[82] Notwithstanding the district plan's requirement, no dedicated loading space is proposed. Ms Coomer-Smit responded to that omission by suggesting that there is generally little need for such in residential developments *since most loading is minor in nature and can be readily accommodated from a visitor parking space* and, therefore, given that *there will almost always be a practical excess of parking on the site ... (it would be) both unnecessary and wasteful ... for a separate loading space to be provided.*²⁶

[83] Quite apart from the weekly collection of the contents of 66 wheelie bins, truck-generated movements would include, from time to time, furniture vans, goods delivery, servicing and emergency vehicles, and the like, to meet the needs of the occupants of the 66 apartments. We find it difficult to reconcile that prospect with such a conclusion.

[84] The district plan requires that *no loading space shall be less than 3.5m in width, or such greater width as is required for adequate manoeuvring and that no loading space shall be less than 3.8m in height.*²⁷ Assuming a weekly 'wheelie bin' rubbish collection, Ms Coomer-Smit noted that a 90 percentile truck would need to park adjacent to the visitor parking spaces to load from the 66 waiting bins assembled there. Having completed that lengthy task, it was her evidence that, in order to leave the building, the truck would then have to perform an awkward 4-point manoeuvre, the successful execution of which would also necessitate the driver having to turn the truck's wheels whilst stationary ie. the available aisle space would be insufficient to meet the minimum 90 percentile truck geometry required by the district plan. Elsewhere, we were told that the rubbish would be collected by private arrangement involving the use of smaller vehicles, but of what dimensions, we know not. Regardless of the size of the collecting vehicle, that part of the site could be obstructed for a considerable time on one day each week. We record here, the appellants' apprehension that the on-site collection process would prove to be so unsatisfactory that the kerb-side siting of at least some bins on collection days would be an inevitable result.

[85] We note in passing, that there are six "rubbish rooms" all located on the ground floor, intended to serve 66 units. There is no provision for the storage of rubbish on any of the three residential floors and access to and fro is by way of stairwells only; there is no provision for elevators. We cannot avoid the conclusion

²⁶ Par. 49
12.8.1.3 (e) & (f)



that, overall, the proposed servicing of the 66 apartments is not to such a standard as to persuade us that there will not be off-site effects which will be more than minor. Nor are we able to reconcile it with Clause 12.8.1.3 dealing with the *Size and Access to Parking and Loading Space* provisions which stipulates, at 12.8.1.3 (iv), that *Each loading space shall be adjacent to an adequate area for goods handling and shall be convenient to any service area or service lift*. Nor with the requirement that *Such required parking areas must be kept clear and available at all times, free ... of impediment ...*

[86] Access to and from the site, which will be security gate-controlled, is intended to be via the existing ramped driveway, which is 5.5 metres wide at its narrowest point and has a grade of 1:6. The district plan requires a minimum grade of 1:4 for residential zones and 1:8 for all other zones. In addition, clause 12.8.2.1 of the district plan requires that ramps terminating on a grade steeper than 1:20 shall be provided with a platform not steeper than 1:20 adjacent to the road boundary, such platform being not less than 4 metres long in the case of residential zones, and not less than 6 metres for all other zones. This requirement is of particular relevance for visitors who will need to leave their vehicles on that 1:6 slope in order to activate the entrance gate. Nevertheless, it was Ms Coomer-Smit's evidence that, even although the site is in a Business 2 zone, the residential character of the development is such that residentially zoned standards would be more appropriate. Again, we are not satisfied that, in view of the magnitude of the development, accommodating, as it will, at least 150 people, so simple a conclusion may be drawn. In any case, with regard to the minimum platform requirement, even the residential standard is not met.

[87] Whilst on the subject of truck-generated on-site movement, we record, in passing, that the first floor plans presented to us show that there is insufficient aisle space for a 90 percentile truck to gain access to two of the three blocks.

[88] Finally, we refer to 'headlight wash' caused after dark as headlight beams from vehicles leaving the site sweep across houses on the opposite of Keystone Avenue. Ms Coomer-Smit acknowledged that they would, and she observed that street planting on that side of the road, in time, would go some way towards alleviating the problem.



[89] Mr S D D Hewett, also a consultant traffic engineer with 13 years experience, appeared on behalf of the city council. His evidence, although not as detailed, closely mirrored that of Ms Coomer-Smit's, although he calculates that, not 75, but 95 on-site spaces would be necessary. He had a survey made in January 1999 of traffic movements at the Dominion Rd/Keystone Ave intersection and he also concluded that the development would have no more than a minor effect on the surrounding road network. With regard to on-site pedestrian safety, a matter not covered by Ms Coomer-Smit, Mr Hewett drew our attention to a condition attached to the council's consent. It requires that a separate pedestrian access-way from Keystone Ave, of at least a metre in width, shall be agreed upon prior to the beginning of any construction work. As a consequence, it is likely that the effective vehicular entrance width will be reduced to a maximum of 4.5 metres and therefore insufficient for 2-way movement. Also as a consequence, occasional queuing of vehicles seeking to enter the site is likely. He, in turn, was silent on the requirement for a (near) level platform at the driveway's entrance to the site.

[90] Mr Hewett also acknowledged that two of the ground floor parking bays (the stacked bay, numbered 36 on Plan (SK2) 03, did not meet the minimum district plan requirements. Nevertheless, he asserted that *The technical deficiency for space 36 would not however prevent vehicles manoeuvring into this on site parking space.*²⁸

[91] Mr NB Paterson, who is a professional consulting engineer, although without any particular traffic engineering expertise, gave evidence on traffic and other engineering matters on behalf of the appellants. He challenged claims regarding the parking provisions, noting, inter alia, that the existence of the six structural columns at basement level is such that 12 of the 28 parking bays fail to meet even the 90 percentile design standard's overall minimum width of 3 metres. It was also his evidence that 18 of the 77 spaces at ground level would be similarly adversely affected and that the 4-point manoeuvre of the rubbish truck, earlier referred to, would not be possible because of there being insufficient clearance between columns and the first of the visitor spaces. In that context, we note that movement to and from the four bays, numbered 53 to 54, would not be possible whilst the rubbish truck was loading. He further observed that the failure to provide for any 99-percentile cars on site, was an unrealistic reflection of likely ownership patterns.



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[92] Mr Paterson went on to challenge, at length, the evidence of the two traffic engineers regarding the traffic that would be generated by the development and its impact upon Keystone Avenue and its intersections with Dominion and Mt Albert Roads. He pointed out that the intersection counts at Dominion Rd by Mr Hewitt's firm were taken in January and therefore were not typical, but appeared to overlook Ms Coomer-Smit's work in that regard. He did not produce the results of alternative studies in support of his assertions, being largely content to conclude that since the development would more than double the number of residential units in Keystone Avenue from the existing 46 to 112, the number of cars, and therefore the total traffic, would increase proportionately. He felt that would inevitably result in a more than minor adverse effect on the environment.

[93] Mr W Fletcher of No. 2 Keystone Avenue, expressed concern about the existing excessive demands on kerbside parking. Likewise, Mr R. Thomas of #5 Keystone Ave, immediately east of the site, expressed concern regarding the impact of the development on the street's amenities, stating that ... *it is near impossible to get street parking most days of the week our garage entry is often blocked by cars parking over it.* (sic) He, and other residents, also drew attention to what they claimed to be the existing hazards and delays involving right-hand turning movements into Dominion Rd and their apprehensions regarding the more than doubling of traffic movements that the development would generate. However, their evidence, in each case, although sincerely held, did not extend beyond generalisations.

[94] Having listened carefully to all the evidence related to off-site and on-site traffic matters associated with the proposal, and having measured that evidence against the relevant provisions of the district plan and our site inspection, and weighted them accordingly, we find that it will result in adverse off-site effects that will be more than minor. In particular, we find that the shortfall and defects in manoeuvring and parking geometry provisions are such that there are likely to be adverse repercussions on the present use and enjoyment of Keystone Avenue's environment arising from the failure, looked at holistically, of the site's capacity to accommodate the traffic needs that would be generated by 66 apartments in the form envisaged. Specifically, there is a substantial under-design in meeting the minimum geometry necessary to accommodate cars and trucks; there is substantial under-design in the weekly assembly and collection of household rubbish; and, given the security gate control proposal, the steep driveway grade and the absence of a pausing platform, in our opinion, there is a potentially hazardous situation for non-occupier-



owned vehicles entering and leaving the site. Looked at together, those defects are such as to point to such an over-development of the site that, solely on traffic grounds, the off-site adverse impact on what, at present, is typical traditional suburban street of modest houses, will be more than minor.

The Effect on Infrastructure – Sewage and Stormwater

[95] The system in this Keystone Avenue area at the head of the Meola catchment is a so-called “combined system”, in which both stormwater and sewage effluents flow in the same pipes until meeting the Auckland Regional Council trunk sewer. It has been so since the early development of the city pipe networks, some of which date from the early 20th century. The systems were sized initially for sewerage flows only. Unfortunately, stormwater infiltration has added to the effects of development of the city. As a result, the system overflows under peak rainstorms, producing raw sewage flows from the public system on to private properties or watercourses.

[96] The evidence established that this pipe network has a history of flooding at Louvain Avenue intersection, implying that the network is working at full capacity under storm conditions. The Appellant evidenced considerable concern about the infra-structural difficulties pertaining to disposal of the effluent and drew attention to these inadequacies of the city’s local disposal system, which may not be rectified for many years.

[97] Mr Peter Bishop, owner of properties at the intersection of Dominion Road and Louvain Avenue, spoke of some overflows from the road cesspits on to his low-lying properties. Such sewage and stormwater had then to be pumped from these sites. He felt that further development should not be allowed until the council drainage system was fixed – which he understood might not be for twenty years.

[98] For the applicant, such overflows and overall “combined system” shortcomings had been acknowledged and extensively addressed in preparation of the design of systems on site. In particular, Mr S A Crawford, consulting engineer of Tonkin and Taylor Ltd evidenced a favourable review of design work performed for the applicant by Mr B D Clode, the consulting engineer engaged to perform the design for the development. Mr Crawford attached to his evidence Mr Clode’s design report describing the proposed system. He stated that that the design had been subject to separate reviews by the engineering consulting firms, Beca Carter Hollings and Ferner Ltd, and his own employer, Tonkin & Taylor Ltd. The system



was variously described to us as having a detention tank in the sub-floor basement to collect run-off from the site. It would have an orifice sized in accord with Council guidelines to restrict the rate of the gravity outflow in to the “combined system”.

[99] The proposed sewerage system had been designed to take cognisance of experience that shows that sewerage system flows tend to reduce to approximately 5% of total capacity at 12 midnight. That provides a basis for mitigation of the potential problem of this development. Thus, sewerage from the development is to be collected through the peak periods of flow (6–24 hour period), and stored in a tank capable of holding a 48 hour dose of foul sewage for eventual release via a pump system in the early morning hours. The pumps are programmed to switch on at midnight and pump the tank empty in approximately 1–2 hours, discharging to the existing 225 diameter combined sewer via a 150 diameter pipe. Should the pumps be activated at the same time as a rainstorm (pipe full) the float switch in the manhole will automatically shut the system down until, at one of its hourly checks, the electronic control indicates a suitable pumping time. When water levels have returned to the predetermined depths the pumps would automatically reactivate and the tank then pumped dry.

[100] Mr N B Patterson gave evidence of his technical reservations about the proposed pumped design details for sewage and his calculations suggesting need for a larger (72 hour capacity) stormwater tank. In that context, the rainfall tables for Auckland were discussed in evidence by him and by others. A view was put to us, that the rainfall event of the combined duration and intensity he suggested had such an extremely low probability as to be “of biblical proportions”.

[101] However, Mr Crawford’s evidence stated in conclusion that the proposed Clode design²⁹:

*... is consistent with normally acceptable engineering practice, meets Council design requirements and is generally conservative.
If the above design approaches are adopted, then I consider there will be an improvement on the existing situation....*

[102] We find that the evidence satisfies us that the proposed provisions for the two separate systems on site will dispose of both stormwater and sewage flowing from this site without adverse affect.

²⁹Crawford evidence 4.1 and 4.11.



Lighting

4.6.1 Resource Management Objectives and Policies

Objective

To ensure that artificial lighting does not have a significant adverse effect on the environment and on the amenity values of the surrounding area.

Policies

- By controlling the intensity, location and direction of artificial lighting so as to avoid light spill and glare on to other sites.
- By controlling where appropriate the use of artificial lighting where it will extend the operation of outdoor activities into night-time hours.

[103] The operative plan seeks to ensure that artificial lighting does not adversely affect adjoining properties through light spill or glare. The main form of control is via Part 13 of the Auckland City Consolidated By-law, with which the applicant will need to comply. In the present instance all parking areas are located below or screened from neighbouring residential properties. As such the effect of any security lighting in these areas will be limited background wash. As was pointed out by Mr Brown, light levels will be controlled to ensure that residents of the development do not suffer any nuisance as a result of background light levels. As the residential neighbours are at a greater distance from the source of the light it follows that they are unlikely to suffer any ill effects.

Noise

[104] The operative plan sets the noise requirements for the Business 2 zone and rule 8.8.1.4 sets the noise control limits at the residential zone interface as follows:

Monday – Saturday	7am – 10pm	
Sundays and Public Holidays	9am – 6pm -	L ₁₀ - 50 dBA
At all other times		L ₁₀ - 40 dBA and L _{max} - 75 dBA of the background (L ₉₅) plus 30 dBA whichever is the lower

[105] During construction of the proposed apartments rule 4A.1.(d) of the operative plan prescribes restrictions generally in accordance with NZS 6803P: 1984 “The



Measurement and Assessment of Noise Constructions, Maintenance and Demolition Work".

[106] At all times the noise requirements as is set out in the operative plan will need to be complied with.

[107] In our view the evidence clearly establishes that the main period of time when generation of noise may well be of concern is during the construction period. This is particularly so during the excavation of the basement which will include the removal of some rock. This was emphasised by Mr N I Hegley, the acoustic consultant, who gave evidence on behalf of the applicant. Mr Hegley told the Court that until the construction equipment has been selected it is difficult to predict actual noise for residents. He pointed out that in order to ensure compliance with the noise levels the noisier activities will have to be restricted to between the hours of 7.30am and 6pm Monday to Saturday. In the event of any rock removal from the site it will be necessary to construct specific screening to screen the noise to the neighbours and select appropriate rock removal equipment. In order to ensure compliance with the requirements of the district plan during construction, Mr Hegley recommended and the applicant agreed to a condition of consent whereby the applicant is required to provide a construction noise management plan prepared by a registered acoustical engineer. That is to be approved by the Team Leader, Compliance Monitoring, Auckland City Environments. We are satisfied that such a condition will sufficiently mitigate noise during construction.

[108] We agree with Mr Hegley when he said that once the building had been completed there would be very few noise sources. The two potential sources of noise would be from traffic movements on site and activities in the proposed gymnasium that is to be located in the north-eastern corner of the first floor. We accept Mr Hegley's evidence to the effect that noise from the proposed gymnasium would be significantly less than the noise experienced from public gymnasiums as there would not be any organised group activities such as aerobics with loud amplified music. The use of this gymnasium would be casual and for the tenants use only. To ensure that this was the case the applicant agreed to an amendment to condition 3 of the consent conditions as imposed by the respondent which requires the consent holder to submit to the Council for approval a copy of the Body Corporate Rules for Keystone Bridge Apartments by including rules for:

Restricting the use of the gymnasium to tenants of the apartments only;



- Preventing the use of amplified music within the gymnasium.

[109] Mr Hegley considered the traffic noise from cars on the road and for the use of vehicles on the site. He concluded that the design provides sufficient mitigation to ensure that the vehicles on the site would not be a problem to the residential properties and that any increase in traffic noise, which he estimated at 1 dBA, would not be noticeable. We accept Mr Hegley's evidence, which was not contested.

Assessment of Adverse Effects Against Baseline

[110] We have concluded that a number of potential adverse effects will be felt off-site from the proposal. Mr Brabant pointed out that reference to the activity rule for the Business 2 zone in the operative plan shows that a range of commercial/industrial activities is available on the site as permitted activities. He submitted that those activities could be lawfully established in substantial bulky commercial/industrial buildings resulting in more effects on the amenities of the adjoining residential environment than the consented development.

[111] In considering credible commercial/industrial activities we are mindful of the evidence of Mr McCarrison where he said:

The existing centres, such as the Mt Roskill end of Dominion Road, where commercial activity has traditionally been retail centred, are going through dramatic change due to the alteration in the organisation of retail, e.g. shopping malls, large stores, and technology. The district plan aims to increase the opportunity for a wider range of activities to establish in these areas where it is appropriate. An example of this is residential units, which were a non-complying activity under previous plans but now have controlled activity status in the Business 2 zone of the district plan.³⁰

[112] We also note the words of Mr Green:

The intersection with Keystone Avenue and Dominion Road exists almost opposite Jasper Avenue and to the south and to the north are to be found strip shopping as there is further strip shopping on the opposite side of Dominion Road between Mt Albert Road and Jasper Avenue. This commercial enclave constituting the Mt Roskill shopping district. The commercial development in the area appears to date back from the mid to late 1960s, early 1970s with little obvious refurbishment or redevelopment in evidence.³¹

[113] We are required to consider credible developments that could be done as of right not hypothetical possibilities. There is no evidence before us that would enable



³⁰ McCarrison, paragraph 5.17.

³¹ Green, paragraph 4.6.

us to conclude that the construction of a commercial/industrial building of similar bulk and size is credible.

[114] Furthermore, we note that, with regard to the effect on privacy, a commercial use would operate primarily during standard business hours whereas the proposed residential units with the continual presence of occupation increases the loss of privacy both in the perception and in reality.

Positive Effects

[115] We also recognise that the proposal has a number of positive effects including:

- The introduction of apartment living into the Mt Roskill area. This is an area which stands to benefit in the long term from the resulting influx of residents. Their presence could assist in retaining the commercial viability of the shopping centre. That in turn would have a flow-on and beneficial impact on all parties likely to use those services.
- A derelict supermarket that is commonly agreed to be an eye sore at this time will be replaced by a modern building.
- The location of the site is close to a significant public transport corridor and this provides the opportunity for the use of public transport to and from the site to the principal employment centres of the central business district.

Part II Matters

[116] Part II of the Act promotes the sustainable management of natural and physical resources. Accordingly, both the residential and business zoned land in this part of Auckland are a physical resource that require management for existing and future generations.

[117] It is common ground that there are no section 6 matters of national importance. The following section 7 matters are relevant:

the efficient use and development of natural and physical resources (section 7(b)).



- the maintenance and enhancement of amenity values (section 7(c)).
- the maintenance and enhancement of the quality of the environment (section 7(f)).

We consider that the proposal is in accord with section 7(b) in that it will provide an opportunity for the broader community to improve the viability of the Mt Roskill commercial environment. The proposal will also remove an unsightly and derelict structure. Notwithstanding this, we consider that the overall effect on the adjacent residential amenity will be contrary to section 7(c) and section 7 (f).

Exercise of Discretion

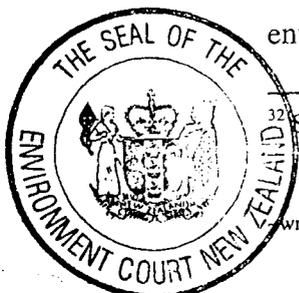
[118] In the overall exercise of our discretion we have regard to the provisions of the operative plan. We balance those provisions of the plan that the proposal appears to be generally in accord with, against the policies and objectives specifically directed at preventing, or at least reducing to an acceptable level, any adverse impact on residential amenities adjacent to business zones³².

[119] We have regard to Change No. 3 bearing in mind the stage it has reached during the resource management process. Change No. 3 is of course designed in the instant case to mitigate effects between the Business 2 and Residential 6a interface boundaries.

[120] We have considered the various adverse effects likely to arise from this proposal and have concluded that the effects are such that they will be more than minor and in our view the conditions of consent that are proposed will not sufficiently mitigate such effects.

[121] There is some merit in the criticism by the appellant that the applicant's proposal is an over development of the site, the consequences of which are a number of adverse effects on the adjacent Residential 6a zoned land. The number of minor transgressions of those controls displayed by the proposal underlines this criticism. We have looked carefully at the evidence relating to the potential effects likely to emanate from the proposal both during construction and following its completion. We are of the view that those effects will have an adverse effect on the existing environment contrary to section 5(2)(c) and sections 7(c) and 7(f) of the Act.

³² See Part 8.6.2.1(e) of the operative plan.



Accordingly, for the reasons given in this decision, we exercise our discretion to refuse consent and allow the appeal.

Determination

[122] We accordingly allow the appeal and the Council decision is set aside.

Costs

[123] Costs are reserved. We do however indicate that our tentative view is that costs should lie where they fall.

DATED at AUCKLAND this 11th day of January 2001.



Gordon Whiting

Gordon Whiting
Environment Judge

