

BEFORE THE ENVIRONMENT COURT

I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2020] NZEnvC 024

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s 120 of the Act

BETWEEN PANUKU DEVELOPMENT AUCKLAND
LIMITED
(ENV-2018-AKL-000176)
Appellant

AND AUCKLAND COUNCIL
Respondent

AND R Peters and R Bannan
R Dexter and A Modrow
N Smith
P Lange
L Whiley
s 274 parties

Court: Environment Judge M Harland
Commissioner K Edmonds
Commissioner D Bunting

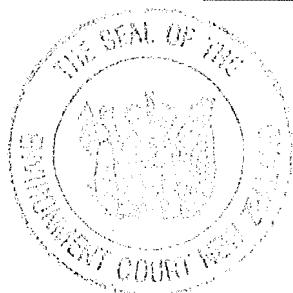
Hearing: 20-23, 26-27 August and 24-25 September 2019

Counsel: D J Minhinnick and S H Pilkington for the Appellant
D Hartley, A Buchanan and B Ford for the Respondent
Mr R Peters, Mr R Bannan, Mr R Dexter, Ms A Modrow, Mrs N Smith, Mr
P Lange and Mr L Whiley – s 274 parties – for themselves

Date of Decision: 6 March 2020

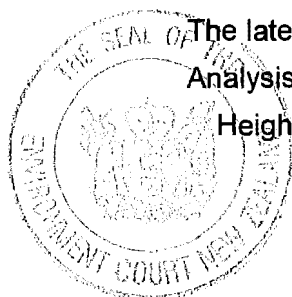
Date of Issue: - 9 MAR 2020

INTERIM RESERVED DECISION OF THE ENVIRONMENT COURT

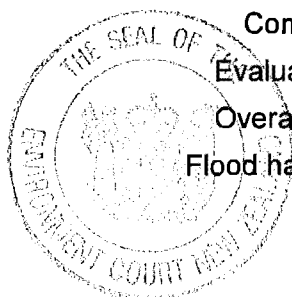


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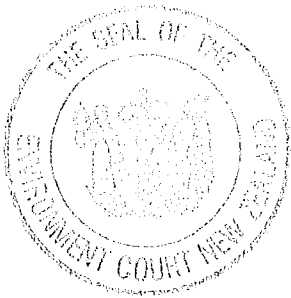
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A: The parties are to address the matters referred to in this decision summarized in paragraphs [397] to [399] to see if agreement can be reached about them. If the parties are unable to agree, they are to provide memoranda to the Court **no later than Friday 24 April 2020** setting out their respective positions, following which we will consider whether a final decision can issue on the papers or whether the hearing should be reconvened to deal with the remaining issues.

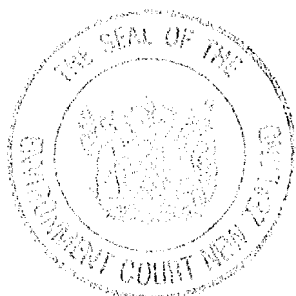
REASONS

Introduction

[1] This is an appeal by Panuku Development Auckland Limited (**Panuku**) against a decision of Independent Hearing Commissioners (**the Commissioners**) appointed by Auckland Council refusing its application for resource consents to construct a new multi-level mixed-use development on eight adjoining sites at 198-202, 214-222 Dominion Road and 113-117 Valley Road, Mount Eden, Auckland (**the site**). The development at this stage comprised four separate buildings containing 102 residential units, nine retail units and 116 carparks. The proposal required all the existing buildings on the site, including two character supporting buildings, to be demolished.

[2] The application was refused because the Commissioners concluded that the development was not compatible with the amenity and character of the surrounding residential area, neither was the scale, bulk and intensity of it in keeping with the planning outcomes identified in the Auckland Unitary Plan (**the AUP**), particularly in relation to special character values and height.

[3] Since the appeal was filed, Panuku has redesigned the development. At the outset of the hearing, Panuku's evidence proposed a development still comprising four separate buildings with the original nine retail units, but with fewer residential units and carparks and with further design elements and amendments to the construction details and proposed conditions of consent to reduce its potential impact on the neighbourhood. By the end of the hearing additional amendments to the design, the configuration of carparks, construction details and the proposed conditions were presented to the Court by Panuku.



[4] The appeal was initially opposed by Auckland Council (**the Council**), but by the time the hearing commenced its position had changed. It supports the revised proposal. That proposal includes the conditions for any consent.¹

[5] The seven s 274 parties who participated in the hearing² are all residents and/or owners of properties who live and/or own properties near to the proposed development. They oppose the proposal even though there have been changes to it and they ask the Court to dismiss the appeal. The key issues for them relate to the effects the proposal will have on their amenity, health and wellbeing (including during construction), the loss of the Universal Building and the special character values ascribed to it, and the proposal's non-compliance with various provisions in the AUP.

[6] We commence this decision with some matters of background to provide context to the proposal. We then provide an overview of the proposal and the legal and planning framework that applies to it before dealing with each of the issues in contention between the parties.

Background

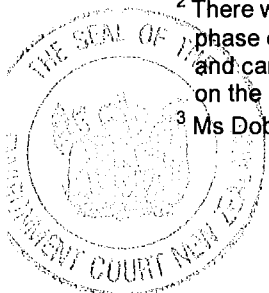
[7] Panuku is a Council Controlled Organisation of Auckland Council tasked with managing and developing the Council's non-service property portfolio and providing strategic advice on the Council's remaining property portfolios. It is responsible for approximately \$1.5 billion of Council-owned land³ and it is the owner of the properties at 198-202 and 214-222 Dominion Road and 113-117 Valley Road.

[8] The properties at 214-222 Dominion Road and 113-117 Valley Road were initially purchased by Auckland City Council in 2003 and 2006 for a proposed roading project which was designated under the then operative District Plan. The project was for a dedicated bus

¹ There were three versions of the proposed conditions provided during the hearing: The set of conditions that were proposed at the start of the hearing were attached to Mr Pope's evidence dated 7 June 2019. These are referred to as "Version 1". An updated set of conditions dated 23 August 2019 was provided to the Court by Mr Lala when he gave evidence. These are referred to as "Version 2" of the conditions. Mr Lala advised that Version 2 had been prepared in response to various issues raised during the hearing. A further set of amended conditions dated 12 September 2019 was provided to us by counsel for Panuku at the resumed hearing on 24 September 2019. These are referred to as "Version 3". We were told that, while Version 3 was fully supported by both Panuku and the Council, as noted in the comment boxes in the set there were a number of the conditions which the s 274 parties did not accept.

² There were 19 s 274 notices filed opposing the appeal, however two were withdrawn during the case management phase of the appeal and the remainder did not file evidence or participate in the hearing. We have however read and carefully considered the fact of their opposition and the s 274 notices they filed, even though their positions on the amended proposal cannot be assumed.

³ Ms Dobson, evidence-in-chief, at [4.1].



road that bypassed Dominion Road to the east of the Dominion and Valley Road Town Centre and reconnected to Dominion Road at 214-222 Dominion Road. After an options assessment was undertaken by Auckland Transport,⁴ it was decided that accommodating a rapid transit network within the existing Dominion Road was a better option than continuing with the dedicated bus road. Accordingly, the properties became surplus to Auckland Transport's requirements and further investigations revealed that they were not needed for any other Council services, nor were they of cultural interest or importance to mana whenua.

[9] In March 2015, 198-202 Dominion Road was purchased to amalgamate with the properties referred to above, bringing the total area of the land owned there by Panuku to a total of eight sites with a combined area of 5,173 square metres. We refer to these sites collectively in this decision as "the site". In terms of an inner city site, this is a large one.

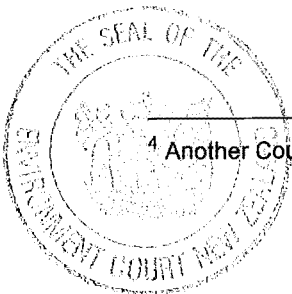
[10] The site is an "L" shape with prominent frontages to both Dominion and Valley Roads. It currently contains a mix of one- and two-storey buildings that front onto these roads. At present there are a variety of activities carried out in the buildings on the site, including retail, food and beverage, offices, services and a fitness studio. Some of the buildings are light industrial type buildings with car parks. The buildings facing Valley Road are vacant.

[11] The site has a "split" zoning. Most of it is zoned Business-Local Centre (**Local Centre Zone**) under the AUP, but a small portion at the northern end is zoned Terraced Housing and Apartment (**THAB**).

[12] Dominion Road is an arterial route. It is a busy transport corridor with frequent public transport services. Further public transport infrastructure is planned, including the prospect of light rail. The Local Centre and THAB Zone provisions encourage and enable intensified development along this corridor.

[13] The site contains two character-supporting buildings – the Universal Building and a building at 214-216 Dominion Road. These buildings are subject to the Special Character Areas Overlay – Business: Eden Valley in the AUP. There is another Special Character Overlay in the AUP that applies to some residential zones, but this does not apply to this site. When we refer to **Special Character Overlay** in this decision, we are referring to the one that applies to the Business: Eden Valley area.

⁴ Another Council Controlled Organisation set up following the reorganisation of Auckland Council in 2009.



[14] An important feature of the site is its topography. The site dips down towards its northern boundary so that its interior is lower than Dominion Road and the neighbouring land to the east. Another key feature of the site is the basalt that sits 1.5-2 metres below ground level. The presence of the basalt (part of the lava flow from Maungawhau/Mount Eden) has a significant impact on construction methodology. This aspect will also be considered in detail later in this decision.

[15] The adjoining properties to the east of the site comprise a bungalow converted to commercial use (111 Valley Road) and a light industrial building (109 Valley Road). These properties have the same Local Centre zoning as most of the site.⁵

[16] The properties further to the east are zoned Residential/Single House (**Single House Zone**). They include the residential properties at 107 and 107A Valley Road and beyond that the property at 105 Valley Road owned by Mr Dexter and Ms Modrow, s 274 parties, who oppose the proposal.

[17] The adjoining property to the north (9-15 Carrick Place) comprises a retirement village with single-storey units including Mrs Smith's unit (also a s 274 party who opposes the proposal). This property has the same THAB zoning as the northern portion of the site. Surprisingly, neither the witnesses for the Council nor Panuku addressed the ownership of the retirement village in their evidence.

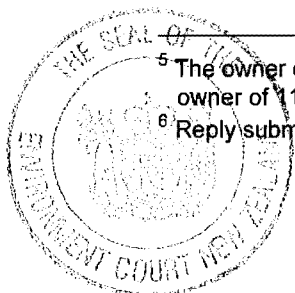
[18] We heard from the s 274 parties that the land at 9-15 Carrick Place had been gifted to the Council and was subject to a 999-year lease. This, on the face of it, had implications for how much weight we should give the THAB zoning over it, even though Panuku did not mount a permitted baseline argument with reference to it. We asked for the ownership of this property to be properly addressed by Panuku in its closing. We were advised that:⁶

The Carrick Place Village is run as an Own-Your-Own pensioner village whereby Council sells the individual units to eligible parties (pensioners) and then buys them back when the pensioners move on to other premises. The ability to buy these units back are secured by a covenant signed by the "private" owners and a caveat registered against the property. The purchase price for the units are approximately 50% of market value as Council only owns a half share of the underlying fee simple of the cross lease units.

The above does not address the lease issue, so the evidence of the s 274 parties about this is uncontested.

⁵ The owner of 109 Valley Road filed a s 274 notice opposing the proposal, but withdrew it before the hearing. The owner of 111 Valley Road did not file a s 274 notice.

⁶ Reply submissions on behalf of Panuku, dated 24 September 2019 at [6.5].



[19] Properties on the opposite side of Carrick Place (including Mr Lange's property at 16 Carrick Place) are in the Single-House Zone. These are typically villas on wider sections of approximately 19 metres. The exception is the property at the end of Carrick Place (21 Carrick Place) which contains three more-modern-style flats that overlook the light industrial building at 109 Valley Road, including one owned by Mr Peters and Mr Bannan, also s 274 parties who oppose the proposal. These properties are more elevated and look down on the site. Mr Whiley lives at 3 Carrick Place.

[20] There are commercial buildings opposite the site on Dominion Road and on Valley Road, including a Countdown supermarket and carpark opposite Mr Dexter and Ms Modrow's property at 105 Valley Road.

The initial proposal and the Independent Hearing Commissioners' decision

[21] The application before the Court was for a mixed-use but primarily residential development comprising of four buildings (Buildings A, B, C and D) varying in height and internal layout with nine retail units, a basement carpark for residents and four at-grade parking spaces off Carrick Place to service the retail units.

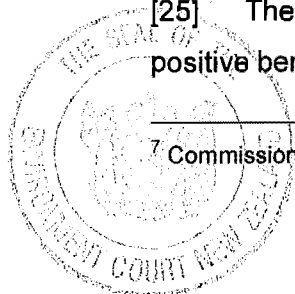
[22] The design presented to the Commissioners included two five-storey buildings (Buildings A and C) each with a maximum height of 20.5 metres, and two four-storey buildings (Buildings B and D) with a maximum height of 18.5 metres and 17 metres respectively. An internal courtyard area and bicycle parking for occupants and visitors were provided as communal areas. The heights of these buildings contravened the AUP provisions.

[23] A number of resource consents were required for the proposal, virtually all to be assessed as restricted discretionary activities.

[24] The Commissioners determined that, although many of the adverse effects arising from the development could be appropriately mitigated, the intensity of the proposed development overall would not be compatible with the amenity values for the properties in the immediate vicinity, particularly in relation to the adjoining residential amenity and character to the east.⁷

[25] The Commissioners acknowledged that the proposal was not without merit and the positive benefits that residential intensification would offer this part of the inner city. However,

⁷ Commissioners' decision, dated 10 August 2018 at [314].



the Commissioners identified that the scale, bulk and intensity of the proposed development within this part of the Local Centre Zone was not in keeping with the planning outcomes identified in the AUP for the surrounding environment. That was particularly in relation to the special character values of the Eden Valley area and the height limit imposed by the Height Variation Control.

[26] As well, the Commissioners considered that the demolition of the Universal Building would have a significant adverse effect on the special character of this business area because “the group coherence with the adjoining two storey character-defining buildings...would be lost, as would the contribution that the building makes in its own right”. The Commissioners referred to a lack of evidence provided to support the removal of the Universal Building.⁸

[27] In relation to the height exceedances, the Commissioners determined that this, coupled with the bulk and scale of the buildings, would result in “unacceptable visual, bulk, shading and dominance” effects on the neighbourhood character and immediate area. They considered that Panuku had placed “far too high a reliance on the redevelopment of the surrounding sites at 9-15 Carrick Place and 111 and 109 Valley Road as mitigating, longer-term, the effects of the proposed development”. They agreed with the Council’s planner that there was no certainty about whether these developments would occur, or the form that they might take.⁹

[28] In relation to the AUP, the Commissioners noted that the proposal was contrary to certain key objectives and policies, and they considered that Panuku’s experts had placed too much reliance on the higher-level Regional Policy Statement (RPS), Urban Growth and Form objectives and policies, and the non-statutory documents in developing the proposal, rather than applying the provisions of the AUP to the site.

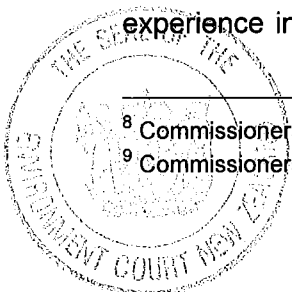
[29] Under s 290A of the Resource Management Act (RMA) we must have regard to the Commissioners’ decision in determining the appeal.

The proposal

[30] Following the Commissioners’ decision an updated design was developed. This was presented to the Court for Panuku by Mr de Graaf, a registered architect with considerable experience in master planning and urban design of intensive residential developments. Mr

⁸ Commissioners’ decision, dated 10 August 2018 at [316].

⁹ Commissioners’ decision, dated 10 August 2018 at [317]



Minhinnick, counsel for Panuku, referred to the first revision of the design as the "Evidence Design", a term we adopt to distinguish it from the changes to the design made during the hearing, which was referred to as the "Closing Design" and a term which we also adopt. We will start by referring to the Evidence Design because the Closing Design added to it rather than replacing it in its entirety.

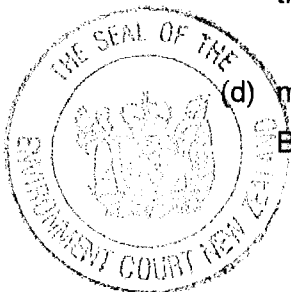
The Evidence Design

[31] The Evidence Design comprised the following:

- (a) 92 residential units (down from 102 under the hearing design) including removing an entire storey from building A (taking it from five to four storeys) and an entire storey from building D (taking it from four to three storeys);
- (b) Provision of 104 basement car parks (down from 112 car parks under the hearing design) but with four at-grade car parks on Carrick Place still being proposed, one of which is to be a dedicated loading space;
- (c) 105 cycle parks; 98 of which will be located in the basement (an increase of 20 secure cycle parks provided under the hearing design) and seven cycle parks at podium level;
- (d) Nine retail units at ground level (no change from the hearing design).

[32] - In terms of the Commissioners' findings about visual dominance and shading effects, the Evidence Design also:

- (a) made changes to the Dominion Road façade to provide greater articulation and modulation as well as to change refinements to some of the materials to be used;
- (b) made changes to the Valley Road façade to remove the mansard roof;
- (c) made changes to the eastern façade to avoid compromising the future development of 111 and 109 Valley Road while providing treatment for the party wall condition that will exist in the meantime;
- (d) made changes to the northern façade for the western units on levels 3 and 4 of Building C, including to the louvre design and spacing, to further minimise the

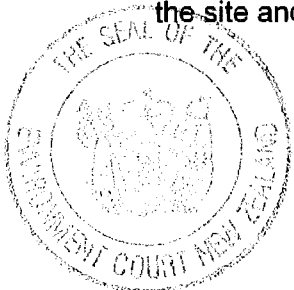


potential for overlooking two neighbouring properties (particularly the retirement village at 9-15 Carrick Place).

[33] In summary, under the Evidence Design:

- Buildings A and B each comprise four levels;
- The Dominion Road elevation for both buildings will be at or below 13 metres, apart from a portion of the roof profile which will up to 1.5 metres high when viewed from Dominion Road, however the apex of it would be set well back from Dominion Road;
- Building C will continue to be five levels up to a maximum height of 20.5 metres, but the justification given to us for this is that the maximum height coincides with the lowest part of the site making it purportedly less dominant when seen from the street, and to ensure any associated effects are internalised i.e. absorbed within the site;
- Building C is set back 12.7 metres from the northern site boundary with the upper level (level 5) set back a further six metres from the northern face of levels 1-4 providing a purported significant buffer between the northern end of Building C and the properties to the north;
- Building C is also set back from the eastern boundary, with Building D being located between Building C and the bulk of the eastern site boundary. This purportedly mitigates the potential effects of Building C's additional height on the neighbouring properties to the east;
- Building D comprises three levels and has a maximum height of 13.4 metres. Panuku contends that the eastern façade has been designed so as not to compromise the future development of the adjoining Local Centre zone sites while ensuring appropriate treatment of the party wall in the meantime.

[34] At the hearing, Panuku contended that the revisions it had made resulting in the Evidence Design were "significant concessions", substantially affecting both the utilisation of the site and the yield that it will be able to generate from the development.



The Closing Design

[35] Panuku proposed two revisions to the design of the project in its closing submissions. These relate to:

- (a) amending the roof design for Building C; and
- (b) amending the configuration of the basement and Carrick Place parking design.

[36] The amendments are depicted in the Closing Design versions of the Resource Consent Drawings and Mediation Summary Report.¹⁰

Amendments to Building C roof design

[37] The effect of the amendments to the Building C roof design can be seen at Resource Consent Drawing 3.2, which shows Building C as it would be viewed from both Dominion Road and Valley Roads. Resource Consent Drawing 3.4 shows the amended (lower) roof form from all elevations.¹¹ Pages 18-21 of the Mediation Summary Report show how the revised roof form will be incorporated into the overall design of the proposal.

[38] Mr de Graaf told us that the impact of these changes will be that:

- (a) two of the units on the fifth floor (Units 501 and 506) are reduced in size from 3-bedroom to 2-bedroom units;
- (b) the fifth floor of Building C is now set back further from the Valley Road frontage, which will reduce the deck space available for the units.

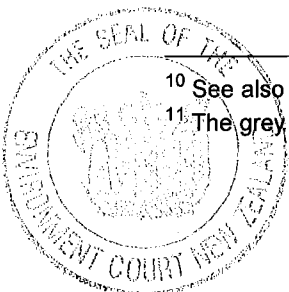
[39] Mr de Graaf explained that the purpose of the revised roof form is to increase the setback to further mitigate overlooking privacy, bulk and dominance effects on neighbouring properties.

Carparks

[40] Although covered in detail later, the Closing Design results in a reduction in the number of carparks available for residential use in the basement (from 104 to 93 carparks) with eleven basement carparks being provided for retail parking to accord with the provisions in the AUP.

¹⁰ See also Panuku Exhibits 4A and 4B.

¹¹ The grey line indicates the Evidence Design and the black line shows the Closing Design.



This means that the total number of carparks located within the basement remains at 104, but the configuration of the carparks changes. It means, however, that the three carparks for the retail staff originally proposed to be situated on Carrick Place (although within the site) are now increased to 11 and are accommodated within the basement.

[41] The Closing Design still proposes to include a loading bay for the retail units on Carrick Place, but within the site owned by Panuku.

Other amendments to proposed conditions

[42] There were other amendments made to the proposed conditions to manage construction noise and vibration to deal with the demolition of the Universal Building, geotechnical issues, the storage volume for the stormwater detention tanks, and provisions dealing with vehicles exiting the basement carpark onto Valley Road. These amended proposed conditions where relevant will be dealt with in this decision when each of the issues they address are analysed.

Summary of residents' concerns

[43] Because the opposition to the proposal, as it has been amended, comes from the s 274 parties, we set out in more detail the specific nature of their concerns, which will then be dealt with in detail in our analysis of the various effects of the proposal on the environment.

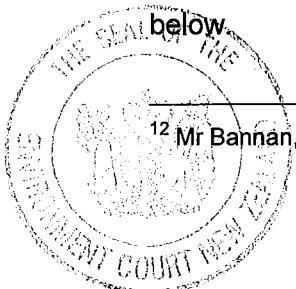
[44] Of the 19 s 274 parties who lodged notices of wishing to be heard in opposition to the proposed development, written evidence was provided by Mr Peters on behalf of the co-owners of 21 Carrick Place,¹² Mr Lange of 16 Carrick Place, Ms Modrow and Mr Dexter of 105 Valley Road, and Mrs Smith of 9 Carrick Place in the retirement village. At the end of the hearing each of these parties, apart from Mr Lange, also made a closing submission.

[45] Mr Whiley of 3 Carrick Place did not provide evidence, but made a closing submission.

[46] The common theme in each of the s 274 notices was that the height and bulk of the development as well as the demolition of the Universal Building would result in unacceptable adverse effects on them to varying degrees as neighbours. In addition to these matters, in their evidence and submissions the s 274 parties raised a range of other issues as set out

below.

¹² Mr Bannan, a co-owner of 21 Carrick Place with Mr Peters questioned several of the experts on certain topics.



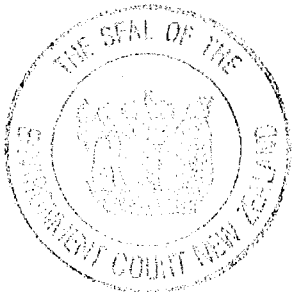
Owners of 21 Carrick Place

[47] In his evidence, Mr Peters identified two primary concerns for the owners of 21 Carrick Place. There were that:

- (a) the excessive height, bulk and form of the proposal would cause adverse visual, shading and dominance effects on the character and amenity of the surrounding neighbourhood. He referred to the height and length of Building C and the mass of Buildings A and D;
- (b) Related to this, the development did not comply with the height restrictions in the AUP, with Building C being 7.5m over-height, Building A up to 1.5m over-height and Building D 400mm over-height.

[48] In his closing submission, Mr Peters raised the following points:

- He accepted that residents would be adversely affected by construction activities in the short-term, and that reasonably some disruption could be expected although he considered that there needed to be greater noise mitigation than that provided in the Construction Noise and Vibration Management Plan (**CNVMP**). Conversely, he said that any adverse effects from the completed development needed to be minimised as these would last for generations.
- He agreed that the reduction in the heights of Buildings A, B and D and the setback of the buildings in relation to the road frontage and Carrick Place were positive, but he was still concerned about the height of Building C.
- He considered that in the long term (10 – 15 years) it would be accepted that a development of this nature could be built without carparks. He submitted that, if the carparks were removed from this development it would enable the basement to be removed, resulting in less excavation, reduced times for construction noise and vibration to be experienced by neighbours, and a reduction in the height of Building C to about the AUP height limit. (We are not sure we agree with Mr Peters' reasoning on this last point as the building height is measured from the existing ground level, a point we develop later in this decision).



Owners of 16 Carrick Place

[49] Mr Lange acknowledged the amendments which had been made to the original design including the Dominion Road façade, the lowering of the heights of Buildings A and D and the increase in the set back of the northern end of Building C. His primary concern about the modified proposal was the adverse effects of dominance and shading on neighbouring properties because of the height of Building C. He said that if the fifth floor of this building was to be removed, his opposition to the development would disappear.

Owners of 105 Valley Road

[50] Ms Modrow was concerned about:

- (a) the scale and heights of Buildings C and D, which she contended would result in adverse shading and dominance effects at 105 Valley Road;
- (b) vehicles entering and leaving the site, which she contended would increase traffic congestion on the local roading network, particularly during peak hours. If the basement carparking was removed, she said that the additional traffic congestion would not arise, it would not be necessary to construct the basement, and there would be a substantial reduction in the volume of basalt to be excavated from the site; and
- (c) the demolition of the Universal Building, which she said was historic.

[51] In her closing submission, Ms Modrow:

- (a) assessed that, currently on the site there was a combined area of about 4,100m² of retail, community-focused businesses, and "community socialising opportunities". By comparison, she highlighted that the new development provided about 915m² of retail space. She considered it unlikely that a similar community supporting environment to that which currently exists would be provided for by the development. She said that this was inconsistent with the Local Centre Zone, which was a Business Zone; and
- (b) was concerned about the noise, vibration and dust that would occur during construction, and the effect this would have on the elderly residents of 9 – 15 Carrick Place. She referred to the potential for problems to arise such as respiratory issues, the inability to dry washing outside, and disruption to the ventilation of the houses



from having to keep windows closed to mitigate the intrusion of noise and dust. She said that requests had been made to Panuku for mechanical ventilators to be installed in the homes and for the homes to be washed, but that these requests had been declined.

[52] In his evidence, Mr Dexter said that:

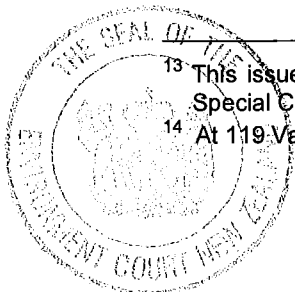
- (a) the neighbouring properties would be adversely affected by the bulk, dominance, shading, loss of privacy and loss of amenity from the new development;
- (b) he was concerned that the development would impact adversely on the Special Character Overlay which applied to the local residential area,¹³ and
- (c) the development would add significantly to the existing traffic congestion on the local roading network.

[53] Following on, in his closing submission, Mr Dexter:

- (a) listed the provisions in the AUP which he considered would be contravened by the proposed development;
- (b) contended that the split of commercial, community service, and residential use in the development did not reflect the intent of the AUP, with an under-provision of commercial and community service facilities in the development;
- (c) questioned the findings of the traffic experts that there would be minimal impact on the local roading network from the traffic generated by the development;
- (d) contended that there had been no evaluation of the effects of the development on the Dominion Building and Cross Bar¹⁴ and the property at 107a Valley Road. He considered that the effects on each of these properties should have been assessed and included in the overall evaluation of the effects of the development on the surrounding properties; and
- (e) requested that the appeal be dismissed, as the proposal did not satisfy the kind of development he said was envisaged in the AUP for this site.

¹³ This issue was not developed during the proceedings, but we have identified that this Overlay exists in the Special Character section.

¹⁴ At 119 Valley Road, next to the site.



9-15 Carrick Place – retirement village

[54] Mrs Smith was concerned about the potential for adverse effects relating to:

- (a) the dominance of Building C and the impact this would have on her privacy. She asked that the fifth floor of this building be removed;
- (b) noise and vibration during construction. She was worried about her wellbeing during this period as she is retired and therefore at home a lot during the day; and
- (c) the safety of residents, because commercial vehicles will be using Carrick Place to access the new development.

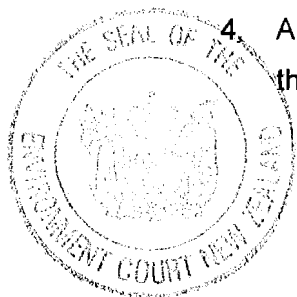
Owners of 3 Carrick Place

[55] In his closing submission, while acknowledged the improvements made to the design since the Council hearing, Mr Whiley echoed the concerns of other s 274 parties about shading, noise and vibration during construction, and the adverse effects of commercial vehicles (and construction traffic) using Carrick Place.

Issues

[56] Arising from the above, the main issues we need to determine are:

1. Does the height, bulk and form of the buildings create adverse effects on the s 274 parties' properties that are to be considered as restricted discretionary activity matters for the Local Centre Zone and THAB Zone and are these consistent with the relevant objectives, policies and assessment criteria in the AUP?
2. Should the Universal Building be demolished, and if so do the proposed conditions mitigate any adverse effects caused by its loss including in relation to the timing of its demolition and the construction of the proposed development?
3. Are any adverse construction noise and vibration effects on s 274 parties' properties able to be adequately avoided, remedied or mitigated in terms of the relevant objectives, policies and assessment criteria in the AUP?
4. Are any other potentially adverse effects relating to flooding and stormwater and those relating to ground contamination and earthworks able to be avoided,



remedied or appropriately mitigated in line with the matters discretion is restricted to and considering the relevant objectives, policies and assessment criteria in the AUP?

5. Are the parking provisions and traffic effects adequately dealt with and consistent with the relevant objectives, policies and assessment criteria in the AUP?

[57] There were several other issues to do with how we should approach certain planning provisions, which we deal with under our section entitled "Planning framework – general issues".

Legal framework

[58] Because the proposal has an overall restricted discretionary activity status, the key statutory tests are contained in s104 and s104C of the RMA. Section 87A(3) is also relevant. It provides:

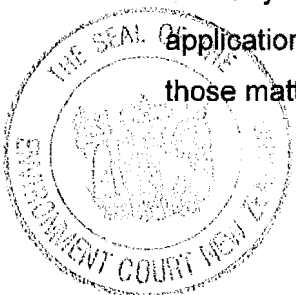
If an activity is described in ... regulations (including any national environmental standard), a plan or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and –

- (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, **is restricted to the matters over discretion is restricted** (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
- (b) if granted, the activity must comply with the requirements, conditions and permissions, if any, specified in the Act, regulations, plan or proposed plan.

[59] Section 104C specifies:

- (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which –
 - (a) a discretion is restricted in national environmental standards or other regulations:
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.
- (2) The consent authority may grant or refuse the application.
- (3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which –
 - (a) a discretion is restricted in national environmental standards or other regulations:
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.

[60] Section 104 requires the Court, when determining the application, to consider the effects of allowing the proposal (both positive and adverse), the relevant planning framework and any other matters considered relevant and reasonably necessary to determine the applications. In undertaking that assessment, s104C restricts the Court's consideration to those matters where its discretion is restricted by the AUP.



[61] We briefly refer to Part 2 of the RMA, and in particular the Court of Appeal decision in *R J Davidson Family Trust v Marlborough District Council*,¹⁵ which confirmed that although the Court can look to Part 2 when determining resource consent applications, where a plan has been competently prepared such an assessment under Part 2 should not alter the assessment under the AUP itself. We agree that an additional assessment of the kind anticipated under *Davidson* is not required in this case.

Planning framework-general issues

[62] We have outlined above the two zones that apply to the site, the Local Centre Zone and the THAB Zone. We have also outlined that the Special Character Overlay – Business applies as well and that overall the development is to be assessed as a restricted discretionary activity.

[63] The various restricted discretionary matters that apply are complex and occupied numerous pages of planning evidence. In fact, the development triggers a requirement to consider 26 restricted discretionary activities; 15 for the activity itself and 11 because a standard in the AUP is infringed.¹⁶ That number expanded during the application and hearing process.¹⁷

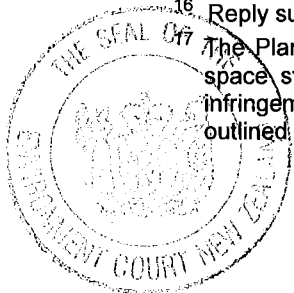
[64] There were several of what we would describe as “legal planning issues” that arose during the hearing. We refer to them as this because they require more of an interpretive approach than an analysis of evidence. These issues are:

- To what extent we can and/or should take into account the general restricted discretionary matters provided in the AUP and how that might impact or potentially conflict with the more specific matters?
- How should we interpret the AUP provisions and the evidence that referred to “planning outcomes”?
- Does the Local Centre Zone contemplate development that is more business than residential focused?

¹⁵ *R J Davidson Family Trust v Marlborough District Council (Davidson)* [2018] NZCA 316.

¹⁶ Reply submissions on behalf of Panuku, dated 24 September 2019 at [3.3] – [3.4].

¹⁷ The Planning Joint witness statement (JWS) dated 9 September 2019 refers to infringement of the outlook space standard H11.6.8 (as outlined in Mr Lala’s supplementary statement dated 26 August 2019) and infringement of the rear yard standard between the Local Zone and the THAB zone at 9-15 Carrick Place (as outlined by Mr Pope when he gave evidence on 27 August 2019) and considers these infringements.



[65] The approach taken by the expert witnesses to their evaluation of the restricted matters of discretion and assessment criteria also requires some comment, because overall the approach taken has required us to take undertake a more fulsome analysis of the evidence than might otherwise have been required.

To what extent we can and/or should take into account the general restricted discretionary matters provided in the AUP and how that might impact or potentially conflict with the more specific matters?

[66] For the activity itself, General Rule C1.8 in the AUP provides:

- (1) When considering an application for resource consent for an activity that is classed as a restricted discretionary, discretionary or non-complying activity, the Council will consider all relevant **overlay, zone, Auckland-wide and precinct objectives and policies that apply to the activity or to the site where that activity will occur.**
- (2) When considering an application for resource consent for an activity that is classed as a discretionary or non-complying activity, the Council will have regard to the standards for permitted activities on the same site as part of the context of the assessment of effects on the environment.¹⁸
- (3) The absence of any specific reference to positive effects in the objectives, policies, matters of discretion or assessment criteria does not mean that any positive effects of allowing an activity are not relevant to the consideration of an application for resource consent for that activity.

(emphasis added)

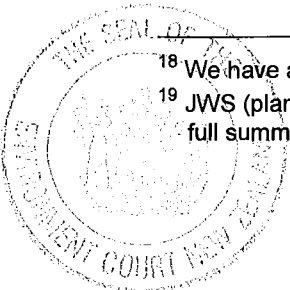
[67] For the infringement of standards, General Rule C1.9 in the AUP provides:

- ...
- (3) When considering an application for a resource consent for a restricted discretionary activity for an infringement of a standard under Rule C1.9(2), the Council will restrict its discretion to all of the following relevant matters:
 - (a) any objective or policy which is relevant to the standard;
 - (b) the purpose (if stated) of the standard and whether that purpose will still be achieved if consent is granted;
 - (c) any specific matter identified in the relevant rule or any relevant matter of discretion or assessment criterion associated with that rule;
 - (d) any special or unusual characteristic of the site which is relevant to the standard;
 - (e) the effects of the infringement of the standard; and
 - (f) where more than one standard will be infringed, the effects of all infringements considered together.

[68] We note here that the specific rules for matters of discretion for the infringement of standards do not align with General Rule C1.9 but the flow charts from the planners¹⁹ and counsel for the Council submitted that we should consider not only the specific rules but also

¹⁸ We have added this provision because it may be relevant to statutory interpretation.

¹⁹ JWS (planning), dated 9 September 2019 of Mr Lala and Mr Pope states that the planners met and prepared a full summary of the reasons for consent (Attachment A) and three flow charts (Attachment B).



the general rules. The approach suggested could be adopted in this case, because it does not make any difference to our decision. This is because the issues we need to determine do not involve a conflict between the general and specific rules that apply. Such a conflict could however arise in other cases. Because the point is moot in this case however, we do not determine it.

How should we interpret the AUP provisions and the evidence that referred to "planning outcomes"?

[69] An interpretation issue arose in relation to the provisions for Chapter 11 Local Centre Zone, which refer to 'planning outcomes'.²⁰ Objective H11.2(7) and Policy H11.3(3)(a) were specifically referred to during the hearing. They provide:

(7) The scale and intensity of development within local centres is in keeping with the planning outcomes identified in this Plan for the surrounding environment.

...

(3) Require development to be of a quality and design that positively contributes to:

(a) planning and design outcomes identified in this Plan for the relevant zone;

[70] The Council accepted²¹ that a permitted baseline cannot be applied in this case, primarily because all new buildings in both the Local Centre and THAB Zones require resource consent for a restricted discretionary activity. However, the Council's submission is that the reference to 'planning and design outcomes':²²

... extends beyond those activities that are permitted by the AUP and requires a wider view of the relevant plan provisions in order to understand the type of development envisaged in either the surrounding environment or relevant zone. This understanding is also necessary to ensure that the assessment of the application is undertaken in the correct context.

The Council considers that such outcomes should primarily be identified with specific reference to any relevant zone and overlay descriptions, objectives and policies, activity table rules, standards, and standard purpose statements.

In this regard, an activity may require consent but still be in keeping with the planning and design outcomes identified for the surrounding environment or relevant zone. The Council's view is that the proposal achieves those outcomes.

[71] Counsel for Panuku submitted:²³

[6.2] To be clear, Panuku is not seeking to rely on any form of permitted baseline or to rely on future development of other sites to mitigate the effect of the Project. However, the AUP specifically directs consideration of the planned outcomes for the area. This includes the bulk and form anticipated by the AUP. In other words, it requires decision-makers to take into account the strategic direction of the AUP in relation to the bulk and form of development that is contemplated by the AUP (and importantly focuses on the AUP outcomes rather than requiring decision-makers to crystal ball gaze about what levels of development are fanciful or non-fanciful for a range of surrounding sites).

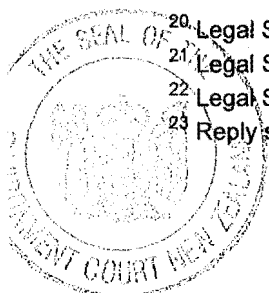
...

²⁰ Legal Submissions of Counsel for Auckland Council in Reply, dated 24 September 2019 at [28].

²¹ Legal Submissions of Counsel for Auckland Council in Reply, dated 24 September 2019 at [30].

²² Legal Submissions of Counsel for Auckland Council in Reply, dated 24 September 2019 at [31]-[33].

²³ Reply submissions on behalf of Panuku, dated 24 September 2019 at [6.2], [6.4]-[6.6].



[6.4] As a result, the evidence for both Panuku and the Council focused on the assessment of effects against the receiving environment as it currently exists. However, the planning assessment also takes into account the outcomes anticipated by the AUP. This can particularly be seen with reference to 9-15 Carrick Place.

[6.5] The Carrick Place Village is run as an Own-Your-Own pensioner village whereby Council sells the individual units to eligible parties (pensioner) and then buys them back when the pensioners move on to other premises. The ability to buy these units back are secured by a covenant signed by the "private" owners and a caveat registered against the property. The purchase price for the units are approximately 50% of market value as Council only owns a half share of the underlying fee simple of the cross-lease units.

[6.6] We recognise that this means that it is unlikely that these would be sold and redeveloped in the foreseeable future. Panuku's experts have acknowledged that the underlying zoning for 9-15 Carrick Place is THAB and provides for intensification with unlimited density.²⁴ However, their assessments have not relied on the potential development of this zoning. To the contrary, the use of setbacks, louvres, planting and building articulation all act to reduce the effects of the [proposal] on the modest height of the flats at 9-15 Carrick Place.²⁵ The attention paid to this sensitive interface is also shown by Panuku exhibit 5A, which demonstrates the development potential of the THAB zoned portion of the [proposal] site.

[72] Some of the evidence appeared to rely on general and speculative statements about the planning and design outcomes envisaged in the Local Centre and THAB Zones and made comparisons with 'compliant' developments. What informed these statements and comparisons was often unclear. This evidence was unhelpful given the large number of different restricted discretionary activities involved in this proposal and in most instances, it was not relevant to the issues we need to determine. Furthermore, it did not align with the submissions made by counsel for Panuku that a permitted baseline argument was not being advanced on appeal.

[73] We note that the approach taken by the Commissioners was to inform their assessment by a consideration of the effects of the proposal against the existing environment and with reference to any relevant resource consent approvals.²⁶ We adopt that approach here.

Does the Local Centre Zone contemplate development that is more business than residential focused?

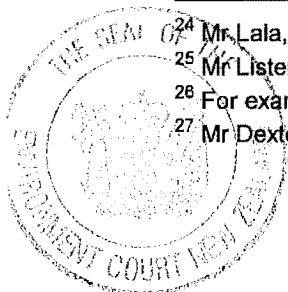
[74] Mr Dexter considered the zone description to make it clear that once sufficient space is available for business use extra space can be used for residential where it is not on the ground floor.²⁷ He also referred to sections of Buildings C and D as containing nothing but residential apartments as going against the zone provisions.

²⁴ Mr Lala, evidence-in-chief, at [5.12]

²⁵ Mr Lister, evidence-in-chief, at [5.65]

²⁶ For example see the Commissioners' decision, dated 10 August 2018 at [233].

²⁷ Mr Dexter, Closing Submissions, at [5].



[75] We do not read the zone description in that way, recognising the general nature and limitations of a short zone description and the need to drill further into the objectives, policies and rules of the zone.

[76] The Local Centre Zone specific objectives refer to the role of local centres as enabling commercial activity which primarily services local convenience needs and provides residential opportunities (H11.2(6)) and as an attractive place to live, work and visit (H11.2.(8)). The nine retail units will primarily provide for the local convenience needs of surrounding residential areas as well as the residents thereby supporting local business viability.

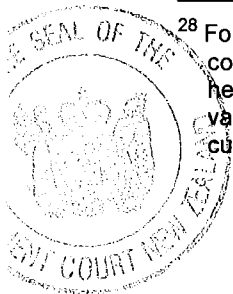
[77] We do not accept that the Local Centre Zone contemplates development that is more business than residential focused, particularly given that dwellings that meet the permitted activity standards are permitted activities (H11.4.1(A2)), as is also the position with supported residential care (H11.4.1(A5)), visitor accommodation.1(A6) and boarding houses (H11.4.1(A6)). While the zone has a standard at ground floor requiring dwellings including units not to locate on the ground floor of a building where the dwelling or unit has frontage to public open spaces including streets (H11.6.3(1)), that standard is not infringed. Neither do we accept Ms Modrow's argument that the proposal's approximately 915m² of retail space compared with what might once have been the situation in the current buildings make the proposal inconsistent with the Local Centre Zone.

General observations about the evidence

[78] Early in the hearing we expressed some concern about with the way the evidence had addressed the different restricted discretionary activities. In many cases, the evidence had not clearly and systematically set out and evaluated the matters of discretion required to be considered in relation to the individual restricted discretionary activities.²⁸ Some of the evidence, including the planning evidence, adopted an approach more in line with the assessment of the proposal as a discretionary activity.

[79] It is unfortunate that the expert witnesses did not appear to have been briefed on the scope of the restricted discretionary activity consents required and applied for. We would have expected at least the planning witnesses to have had a greater awareness of the need

²⁸ For example, Mr Lala's evidence-in-chief, Appendix B contained tables that addressed only what he termed key consent requirements and assessment criteria (and that was only specific assessment criteria) for the building height variation control infringement in the Local Centre Zone and the Special Character Overlay Business in varying and sometimes limited detail. His treatment of other consent requirements in Appendix B was largely cursory.



for all the expert evidence to directly and systematically address the matters of discretion, and the relevant assessment criteria and objectives and policies for each of the individual restricted discretionary activities. If that had been done, it would have made our decision-making task much more straightforward and less time-consuming.

[80] We suggested that flow charts setting out the AUP rule and related policy framework could better express and explain the approach we needed to take to address each individual restricted discretionary activity. Our concern was that, if we were having difficulty understanding how the planning provisions fitted together and what was relevant to the issues in contention, how would the s 274 parties (all self-represented with valid issues to advance) be able to do so?

[81] Late in the hearing the planners for Panuku and the Council produced a document labelled "AUP Framework" setting out three flow charts:²⁹

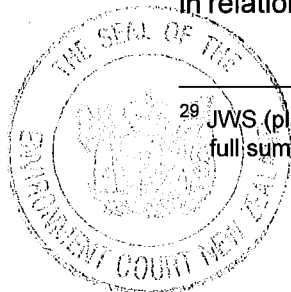
- (a) the first flow chart contained key restricted discretionary consent requirements dealing with the Business-Local Centre H11, Special Character Overlay Business D18 and THAB Zone;
- (b) the second flow chart set out other restricted discretionary consent requirements for natural hazards and flooding, transport, earthworks, noise and vibration, contaminated soil and street trees; and
- (c) the third flow chart set out the controlled activity consent requirements for stormwater and contaminated soil.

[82] We have found the flow charts informative and useful to refer to in writing this decision, however as will be evident from our observations above, it would have been preferable to have them at the start or even before the hearing. Unfortunately, applying the evidence as presented to us within the AUP framework provided in the flow charts was challenging.

Our approach to analysing the restricted discretionary activities

[83] Under the heading of legal framework, we outlined the restricted discretionary activity framework that we are required to work within, and the way in which we must approach s 104 in relation to the individual restricted discretionary activities. We must deal with each restricted

²⁹ JWS (planning), dated 9 September 2019 of Mr Lala and Mr Pope states that the planners met and prepared a full summary of the reasons for consent (Attachment A) and three flow charts (Attachment B).



discretionary activity separately and cover both the effects and the relevant AUP provisions set out in the matters for which our discretion has been restricted, and we must also evaluate the proposal under the assessment criteria provided under those restricted matters of discretion.

[84] We apply that approach to the restricted discretionary activities in the Local Centre and THAB zones in relation to the evidence we heard about landscape, visual amenity and urban design effects and amenity values. Because (as we have outlined above) expert witnesses did not always distinguish the specific zone and restricted discretionary matters in their evidence, we have decided to analyse their evidence in a general sense before evaluating the effects in terms of the matters of discretion and relevant AUP provisions for each restricted discretionary activity.

[85] We appreciate this is cumbersome, and at times results in seeming duplication, however the general observations we have made above about the process adopted to applying the evidence to the AUP framework have necessitated this.

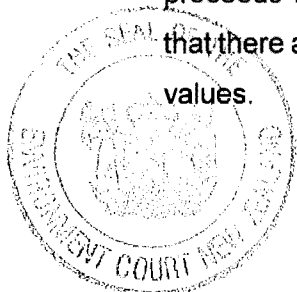
[86] Before doing so, we make some general observations about the term "amenity values" as this term was referred to in many of the matters of discretion, assessment criteria and relevant objectives and policies we are required to consider.

Amenity values

[87] Section 2 of the RMA defines "amenity values" as follows:

amenity values means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[88] Those members of the community and landowners giving evidence and making submissions set out their concerns about the effects of the proposal on what they considered to be the amenity values of the area. These effects extend beyond those people are likely to experience in their houses and businesses, but also include the effects they experience while going about their daily lives whether on foot or by car or public transport. Understandably there was considerable focus on the nature and length of construction effects and the impact the height exceedances would have on residential amenity values. If the development proceeds however, many of those giving evidence and making submissions acknowledged that there are elements of it that will positively contribute to their amenity and therefore amenity values.



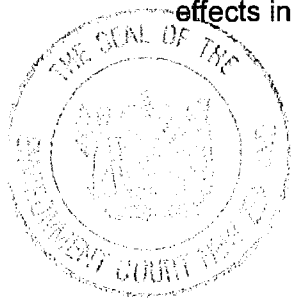
[89] The Commissioners at first instance acknowledged that the proposal was not without merit and the positive benefits that residential intensification would offer this part of the inner city. We too appreciate the proposal's potential for positive effects from the regeneration and intensification of development of a commercial and residential nature on this site and along a major public transport route in the inner city, as did the s 274 parties to varying degrees.

[90] Alongside those positive effects however, there is also the potential for adverse effects on amenity values to occur. In our view, given the definition of "amenity values" in the RMA, the residents evidence about what comprises the amenity values of the area they enjoy is equally important to consider as is the expert evidence about what the predicted effects might be that could affect those amenity values and how, if adverse (in the sense of comprising a change to the current values enjoyed) it is considered those adverse effects might be avoided, remedied or appropriately mitigated.

[91] We are also of the view that what might be appropriate mitigation of an adverse effect on amenity values is most likely to require not only a technical or expert suggested solution, but an understanding and appreciation of the amenity values that are currently enjoyed by those experiencing them, and an understanding in a practical sense of how that solution intersects with the way in which they are currently experienced. It is impossible to understand how a practical and suitable solution can be offered as mitigation to an adverse effect on amenity values without consulting those that enjoy that amenity value. It was therefore surprising that few if any attempts had been made by Panuku or the Council before the hearing to engage with the residents about these matters. However, as a result of this hearing, we now have a sound understanding of the amenity the residents that appeared before us consider they currently enjoy, and their concerns about how this could change if the appeal is granted.

Landscape, visual amenity and urban design effects

[92] In this section we deal with Issue 1, namely: Does the height, bulk and form of the buildings create adverse effects on the s 274 parties' properties that are to be considered as restricted discretionary activity matters for the Local Centre Zone and THAB Zone, and are these consistent with the relevant objectives, policies and assessment criteria in the AUP? To answer it, we need to analyse the evidence about landscape, visual amenity and urban design effects in the context of the relevant provisions of the AUP.



Overview

[93] As noted in the introduction to this decision, Panuku's proposal is to construct four new buildings to accommodate 92 residential apartments and 9 retail units all sitting above an interconnected underground basement carpark on land zoned Local Centre and THAB.

[94] For the Local Centre Zone restricted discretionary consent is required for the four new buildings, as well as for parts of the development that exceed the 13m (11m occupiable plus 2m for roof form) Building Height Variation Control Standard (H11.6.1.2 and 3). We refer to this control in this decision as **the height standard**. Restricted discretionary activity consents are also required for infringements of the standards for outlook space (H11.6.8) and minimum dwelling size (H11.6.9).

[95] For the THAB Zone, restricted discretionary consent is required for dwellings (H6.4.1(A3)), new buildings (A35)³⁰, infringement of Standard H6.6.9 Yards and the use of the Alternative Height in Relation to Boundary Standard (H6.6.7(1) and (2)). Part of Building D and a small portion of Building C extend into this zone.

[96] The four buildings have been identified as A, B, C, and D with:

- Building A being four stories high fronting Dominion Road and located at the north-western end of the site, with up to 1.5m exceedance of the height standard for the apex of the roof setback from Dominion Road;
- Building B also four stories high, also fronting Dominion Road and located south of Building A.
- Building C being 5 stories high, fronting Valley Road and extending northwards through the middle of the site to within about 12.7m of the boundary of 9 Carrick Place, with 7.5m exceedance of the height standard.
- Building D being three stories high extending from Valley Road northwards along the eastern boundary of the site to within 4 m of the boundary of 9 Carrick Place, with 400mm exceedance of the height standard.

³⁰ New buildings have the same activity status and standards as applies to the land use activity that the new building is designed to accommodate.



[97] We have outlined above the parts of the proposed development that do not meet the AUP provisions and require restricted discretionary activity consents. We have also determined that, from a legal perspective, the contraventions of these provisions do not provide a legal impediment to the proposal on the facts of this case, but our factual analysis of the effects arising from the contraventions may.

[98] Expert evidence on this topic was provided by Mr G Lister, landscape architect and Mr A de Graaf, urban designer for Panuku, and Mr P Kensington, landscape architect and Mr C Butler, urban designer, for the Council. In addition, Mr A England, a geospatial expert provided evidence on the preparation of the visual simulations used for the proposal for Panuku.

[99] We have looked carefully at the evidence. Where it strays into general statements about planning and design outcomes and compares theoretical "compliant developments" with the proposal, we have set that evidence aside to focus on the effects arising from it, for the reasons we gave earlier.

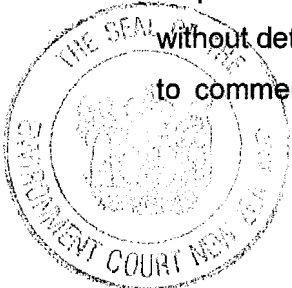
How accurate are the experts' visual simulations depicting the completed development?

[100] It is important that we are clear on the accuracy of the experts' visual simulations depicting the completed development because the potentially adverse effects of bulk and dominance, loss of privacy and shading rely on these predictive assessments.

[101] Mr Lister submitted a booklet of A3 visual simulations taken from 14 different viewpoints to show what the new development is expected to look like when it is completed.

[102] Mr Peters, Mr Dexter and Mr Lange each raised concerns as to accuracy of at least some of these simulations which they said appeared to have misrepresented the true extent of the development in some way, most noticeably in relation to the height of the roof of Building C.

[103] Mr Peters said that he and Mr Lange had engaged a survey company to fly a drone to take photos of the existing site and that these photos showed some features relative to others being in different locations from those shown in Mr Lister's visual simulations. Mr Lister responded that, while he was confident about the correctness of his visual simulations, but without details of the methodology used to produce the drone photos, he was not in a position to comment on them. He added that he was not an expert in the preparation of visual



simulations and that he had relied on others for this.

[104] Following ongoing questioning by Mr Peters, Mr Lange and Mr Dexter about the accuracy of the visual simulations, it was agreed that evidence should be sought from Mr England, the expert who had led the team which prepared the simulations.

[105] Mr England described himself as a geospatial specialist and chief pilot. He told us that the simulations were prepared using a technique known as "visual simulation technology".³¹ His evidence was set out under a number of headings which addressed viewpoint photograph capture, the preparation of visual simulations, the presentation of visual simulations, the accuracy of visual simulations, and the use of Remotely Piloted Aircraft Systems (RPAS) or drones. He said that his methodology for the production of the visual simulations had been based on the New Zealand Institute of Landscape Architects Best Practice Guidelines Version 10.2 referred to as NZILA BPG 10.2 (**the NZILA Guidelines**).³² Drones were not used for the production of visual simulations, as he said that these fell outside the scope of the NZILA Guidelines. The reason for this was that drones were subject to several dimensions of vertical and horizontal error such as air pressure and atmospheric interference such as wind.³³

[106] Mr England did not provide a specific measure as to the accuracy of the simulations developed for the Panuku development, other than to say that there had been a number of simulations prepared over time as more detailed information had become available.

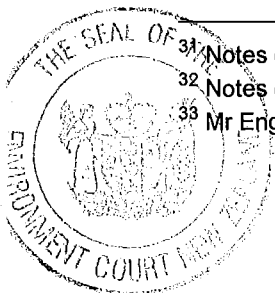
[107] In answer to a question from Mr Peters about the accuracy of the handheld GPS used in the preparation of visual simulations, Mr England said that this depended on the number of satellites which were available at the time the measurements were taken. While he was not able to advise on the accuracy of the measurements for the Panuku development, to minimise any inaccuracies, he said that the locations would have all been cross-checked against geo-referenced aerial photography.

[108] Mr England said that the accuracy of measurements by drones would depend on the type of drone used. In one situation he had been involved with, there had been as much as a 10m inaccuracy while at the lower end he had not experienced accuracies below plus or minus 500mm.

³¹ Notes of Evidence at page 385.

³² Notes of Evidence at page 38.

³³ Mr England, evidence-in-chief, at [7].



[109] When asked by Mr Peters whether the NZILA Guidelines should have been revised to take account of advances in drone technology since these guidelines were prepared in 2010, Mr England said that this was a matter for NZILA.

[110] There was an extended discussion between Mr Dexter and Mr England³⁴ about the basis for establishing the reference point(s) for the photographs used in the preparation of the visual simulations. We were not entirely clear at the end of this discussion whether Mr Dexter accepted Mr England's explanation or whether he continued to have reservations. At issue here was the accuracy of the elevation of the roofline of Building C depicted in the simulations with some s 274 parties including Mr Dexter contending it should have been shown at a higher elevation.

[111] Mr England was asked by the Court whether visual simulations on other developments had been "ground-truthed" against the completed developments to validate the accuracy of the simulations. While he said that he did not have any examples of his own, he referred to a series of photographs in the NZILA Guidelines that had compared the existing view, the simulated view and the as-built view for three different developments, all showing good correlation.

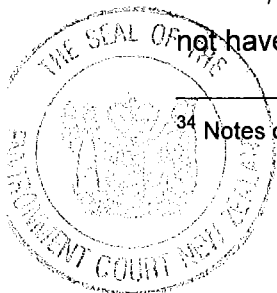
[112] As we have noted, it was not entirely clear to us whether the s 274 parties (Mr Dexter, Mr Peters and Mr Lange) accepted Mr England's evidence about the accuracy of Panuku's visual simulations and whether they considered that these portrayed a realistic picture of how the proposed development would look when completed.

[113] Mr England has significant expertise and experience in preparing visual simulations of the kind produced in this case, the production of which we are satisfied is highly technical. We find the simulations prepared by Mr English to be sufficiently accurate depictions of the proposed development from which we can evaluate the visual amenity urban design effects arising from the completed development.

The expert evidence about the bulk, height and dominance of the development

[114] It would have been helpful to the Court if the experts had used a common scale for assessing adverse effects of urban design elements of the development. Unfortunately, they did not, and we were not helped by the lack of explanation as to why a common scale could not have been adopted.

³⁴ Notes of Evidence at pages 406 – 409.



[115] Mr Kensington said that, on his scale, an adverse effect assessed as very low and negligible equated to *less than minor*, an adverse effect assessed as low equated to *minor*, an adverse effect assessed as moderate and high equated to *more than minor*, and an adverse effect assessed as high and extreme equated to *significant*.

[116] Mr Lister told us that the points on his seven-point scale were very low, low, low moderate, moderate, moderate high, high and very high.

[117] Mr Butler said that he was not sure whether the Council had a ratings system for assessing the urban design effects of developments and that urban design experts tended to use their experience from multiple assessment with a focus on three criteria, less than minor, no more than minor or more than minor. He said that where he had assessed effects as being minor this meant a marginal loss of existing or anticipated amenity.³⁵

[118] Starting with Mr Lister, with respect to his 7-point scale, even though he had assessed the adverse effects of two elements of the development as being low to moderate (as discussed below), Mr Lister's overall assessment was that the adverse effects of the development would be low.

[119] Mr Lister said that the three factors he had used for assessing bulk were the viewing position, what was between the viewer and the building and how the building was modulated and articulated.³⁶

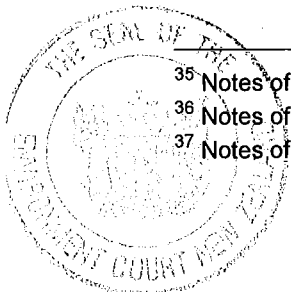
[120] It was suggested to Mr Lister in cross-examination that the development would seem bulky when viewed from angles other than from north to south where was articulation with the laneways between the buildings.³⁷

[121] While he agreed that the development would appear bulkier when viewed from the east because of the long party wall of Building D, he said that from the south on Valley Road and from other viewing points, the gaps between the buildings would articulate as separate buildings rather than as a single mass. He added that the bulk of the party wall would be mitigated with differentiation between the two storey texture and panel concrete wall and a folded roof form with dormer windows, modulation of the building into two parts on either side of a glazed circulation core and a 1m offset from the boundary and windows opposite 111.

³⁵ Notes of Evidence at page 555.

³⁶ Notes of Evidence at page 50.

³⁷ Notes of Evidence at page 48.



Valley Road which would become a light-well in the event of redevelopment on the boundary.

[122] When asked how the development would look when viewed from Mr Peter's property at 21 Carrick Place, he said that the current view was towards an existing utilitarian building, and that the view with the development in place would be somewhat similar in character, as the outlook onto both buildings would be to a commercial building. Mr Lister assessed the effects from this view as low to moderate on his 7-point scale.

[123] For views of the development from 9 – 15 Carrick Place (the retirement village) he said that, compared with the existing run-down two-storey commercial building along the boundary with 9 Carrick Place, while the new development would be more visually dominant, it would also be more attractive, and would be set back from the boundary and landscaped. He was confident that the proposed landscaping (Jacaranda trees and Nikau palms) would be able to grow on top of the concrete podium, as the trees would be planted in large planting boxes with depths varying between 800mm and 1.2m. He said that the function of the landscaping was to screen as well as to provide a foreground element to give depth perspective for softening the form of the buildings.³⁸

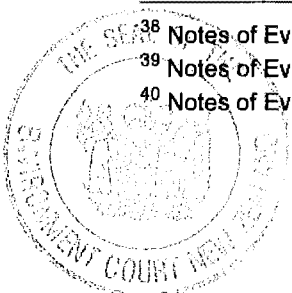
[124] Mr Dexter noted that the existing buildings on the site in front of Carrick Place were rundown and had not been maintained by the Council. He considered that it was unfair to use these buildings as a comparison rather than a new building which could be built on the site. In response, Mr Lister said that both the existing and anticipated environments were relevant and that he had taken account of both in his assessment of effects, although he had given more weight to the existing building as this was more conservative.³⁹

[125] In response to a question from Ms Modrow, Mr Lister said that the potential effects of dominance (and privacy) had been minimised by locating Building C in the central part of the site. He said that from Ms Modrow's home (105 Valley Road), her view of the top of this building would be past several other buildings. Conversely, if Building C had been located on the site of Building D, Mr Lister considered that the effects on Ms Modrow's property would have been much greater.⁴⁰

³⁸ Notes of Evidence at page 64.

³⁹ Notes of Evidence at page 71.

⁴⁰ Notes of Evidence at page 81.



[126] In relation to bulk and dominance, Mr de Graaf said that:⁴¹

The quality, scale and massing in combination with the overall appearance of the updated design (would), in (his) opinion, mitigate any adverse urban design effects on the surrounding environment...and... the updated design...(uses) a site layout strategically to deliver an appropriate variety of building form for the site.... and....the building blocks include a diversity of apartment topologies and sizes which are set amongst well-considered open spaces.

[127] In answer to questions from Mr Peters about how he would classify the degree of encroachment above the AUP height limits, Mr de Graaf said that he classified the encroachment of Building D (0.4m) as "very minor, but he classified the encroachment of Building C (7.5m) as "large".

[128] He went on to say that under the AUP, building heights were measured from the existing ground level and that Building C was located at the low point in a depression at the middle of the site. This meant that when viewed from the higher elevations outside the boundary, Building C would appear in fact to have a lesser height encroachment (between 4.5m to 5.5m).

[129] In terms of longer views, Mr Lister agreed that someone viewing the development from further away along Dominion Road would sense a degree of bulk, although this sense would reduce as the distance increased.⁴² He added that the differences in the heights of the four buildings would also counter any sense of there being one mass.⁴³

[130] Asked whether there would be adverse visual effects when the development was viewed from the top of Maungawhau (Mt Eden), Mr Lister said that he did not consider that this would be the case from such a distant viewing point.

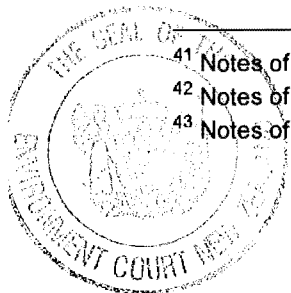
[131] Mr Butler said that his role on behalf of the Council had been to comment on the development in the context of privacy, visual dominance and shading. Having taken account of the gaps between the buildings, the end elevations, the articulations including the stepped forms, the balconies, the extent of glazing and the use of different use of materials, he had assessed the visual dominance effects of the development for the residents of 9-15 Carrick Place (the retirement village) as being "minor".

[132] Mr Kensington said that, as a result of the changes made to the design since the Council hearing, he was satisfied that the built form of the revised design would have low

⁴¹ Notes of Evidence at page 127.

⁴² Notes of Evidence at page 136.

⁴³ Notes of Evidence at page 137.



adverse visual dominance effects and positive visual effects. He also considered that the proposal would result in positive urban generation.

[133] Mr de Graaf concluded that the way in which the quality, scale and massing of the development had been designed would mitigate any adverse effects on the surrounding environment while offering a series of positive benefits. In his opinion, the building blocks provided a diversity of typologies and sizes all set amongst well considered open spaces.

[134] We analyse this evidence later in this section of our decision once we have outlined the evidence about the issues related to this topic and once we have outlined and assessed the relevant AUP provisions.

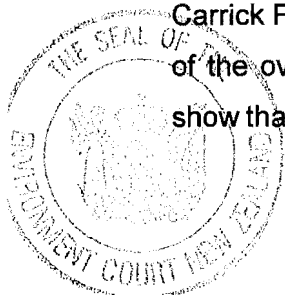
The loss of privacy for neighbours

[135] Mr Dexter was concerned about the loss of privacy for the residents of Carrick Place because of the prospect that residents in Buildings C and D could look over their properties. Mr Lister responded that there was no absolute privacy in an urban setting and that, while they would not prevent someone from looking into Carrick Place, the buildings had been designed with a package of measures to protect privacy. These included the landscaping, building setbacks, apartment orientation and the use of louvres on the windows of the buildings.

The shading of neighbouring properties

[136] Ms Modrow said that she would normally arrive home at 4 30pm and, in March on a sunny day she would experience 2.75 hours of sunshine on her property, whereas with the proposed development this would reduce to 1.75 hours. Mr Butler's response was that, in March, a compliant building on the site would result in a loss of sunlight through Ms Modrow's lounge window at 6.30pm, with the over-height component of the development causing this loss to start at 6.15pm. He said that an equivalent period of loss would apply in mid-winter and at the September equinox, while at the summer solstice there would be no additional shading from the over-height component of the new buildings. Taken overall, his assessment was that the effects of shading from the new development on Ms Modrow's property would be "no more than minor".

[137] Mr Lister was asked by Mr Lange (speaking on behalf of Mrs Smith, the owner of 9 Carrick Place in the retirement village) whether she should have to lose any sunlight because of the over-height Building C. In response, Mr Lister explained that the shading diagrams show that, at the time of the summer solstice, by 4pm one of the existing buildings on Dominion



Road would cast a shadow on the outdoor area of Mrs Smith's property; at 5pm the shadow from the top of Building A would reach the boundary of the property; by 6pm this shadow would have crossed the outdoor area and reached the house; and by 6.30pm the shadow from a compliant building would cover the whole of the outdoor area. This meant that Mrs Smith would lose 30 minutes of sunlight at the time of the summer solstice because of the non-compliant building. He added that, with a compliant development, Mrs Smith would have no sun on her home after 7pm. Mr Lister's assessment was that the effects of shading from the development on Mrs Smith's property would be "low to moderate".⁴⁴

[138] We note that the shading analysis evidence was initially prepared on the basis of comparisons with a theoretical permitted bulk and location design.⁴⁵ In our view, an assessment of shading solely based on a comparison with a speculative compliant development is evidentially unreliable for the reasons we have already expressed elsewhere in this decision. However, Mr Butler also helpfully undertook a different assessment, using the shading diagrams prepared by Mr Lister, but considering the outcomes themselves and the effects on residents rather than on a comparative basis.

[139] In terms of the shading of neighbouring properties, Mr Butler gave evidence that the AUP is silent about what a 'reasonable' level of sunlight hours in the Local Centre, THAB and Single House Zones might be.⁴⁶ However, he referred to the AUP approach in H4.8.2(4) to the situation where a new building infringes the Height in Relation to Boundary standard but complies with an Alternative HIRTB in the Residential-Mixed Housing Suburban (MHS) and Residential-Mixed Housing Urban (MHU) zones. H4.8.2(4) requires:

...
Four hours of sunlight is retained between the hours of 9am – 4pm during the Equinox (22 September):

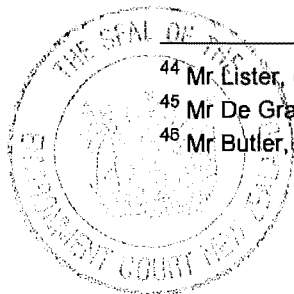
- (i) over 75% of the existing outdoor living space where the area of the space is greater than the minimum required by Clause H4.6.13; or
- (ii) over 100% of existing outdoor living space where the area of this space is equal to or less than the minimum required by Clause H4.6.13.

[140] Mr Butler's evidence was that using this criterion, the proposed development easily achieves the minimum of 4 hours of sunlight between 9am and 4pm during the September Equinox. Overall, his opinion was that any adverse effects from the Evidence Design would be minor.

⁴⁴ Mr Lister, evidence-in-chief, at [5.69].

⁴⁵ Mr De Graaf, evidence-in-chief, at [3.10(d)].

⁴⁶ Mr Butler, evidence-in-chief, at [7.67].



[141] We accept Mr Butler's evidence about the shading effects that are likely to arise when assessed in accordance with H4.8.2(4), which is the criterion used in other residential zones to determine what amounts to a 'reasonable' level of sunlight hours.

The late changes made by Panuku to the configuration of the fifth storey of Building C

[142] In answer to a question from the Court about whether it would be better for Building C to have four storeys rather than five, Mr de Graaf said that a potential improvement could be to retain the fifth storey, but simplify its roof form and increase the setback from Valley Road, while retaining the northern end setback.

[143] Following up on this, after he had finished being heard on his primary and rebuttal evidence, Mr de Graaf was released to prepare sketches showing how a reconfiguration of the fifth storey of Building C might look. He returned with two overlays sketched on copies of Visual Simulation 4.⁴⁷ The first of these depicted how a reconfigured northern end of the fifth storey of Building C might look in comparison with the original layout while the second showed the same reconfiguration with the original layout removed.

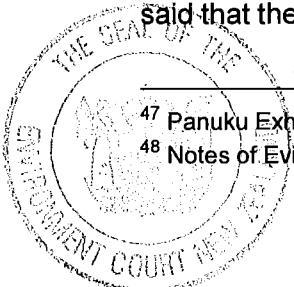
[144] When asked to comment on Mr de Graaf's overlays, Mr Lister said that they would provide a more elegant appearance through achieving commonality between the fifth-floor roof form and the roof form of Buildings A and B.⁴⁸ His opinion was that the increased setback would be an incidental benefit in achieving a slight reduction in bulk.

[145] In its closing legal submissions, Panuku confirmed that its design had been revised in line with Mr de Graaf's sketches as shown on Closing Design Resource Consent Drawings 3.2 and 3.4. In addition, pages 18 to 21 of the Closing Design Mediation Summary Report showed how the revised roof form would be incorporated within the overall design. Counsel advised that the cost to Panuku for this was that two fifth floor three-bedroom units have had to be reduced in size to two two-bedroom units.

[146] Mr Kensington said that as a result of the changes made to the design since the Council hearing (prior to the late changes made by Mr de Graaf), he was satisfied that the built form of the revised design would result in "low adverse visual dominance effects" and "positive visual effects". With the late changes made by Mr de Graaf to the roof form of Building C, he said that these would further assist with the mitigation of adverse landscape and visual effects

⁴⁷ Panuku Exhibits 4 and 4A.

⁴⁸ Notes of Evidence at page 565.



with a visually lighter appearance for this roof and a better integration with the roof forms of Buildings A and B.⁴⁹

[147] Mr Dexter had asked what the effects would be if the southern end of Building C was extended into the THAB Zone. In response, Mr de Graaf produced conceptual sketches⁵⁰ for this and a consequential modification to the northern end of Building D (which already extends into this zone). Apart from a brief discussion on these concepts at the hearing, they were not supported by Panuku and were not incorporated in any way in the final design. This evidence has no bearing on our decision.

[148] For the Dominion Road elevation, Mr de Graaf said there had been discussion about providing a balanced variety to the façades of the six individual buildings that made up this elevation, while at the same time achieving an overall consistency. He considered that the final design had achieved the desired consistency through materiality and the repetition of modules, textures and colours.⁵¹ Mr Lange said that he supported this design even if it was a “little busy” for him.

Analysis

[149] We now evaluate the evidence in relation to each individual restricted discretionary activity in terms of the matters of discretion and the relevant assessment criteria, including relevant objectives and policies. We first deal with the provisions under the Local Centre Zone, then the THAB Zone.

Height variation control in the Local Centre Zone (H11.6.1(2))

[150] We recognise that parts of each of the proposed buildings comply with the height standard, however part of Buildings A, C and D do not. The degree of exceedance of the height standard for buildings A, C and D that trigger the restricted discretionary activity are as follows:⁵²

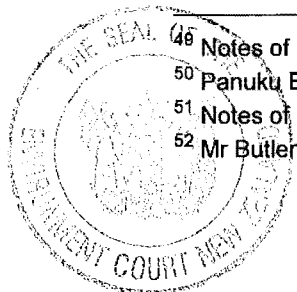
- Building A – up to 1.5m (this applies to the apex of the roof – setback from Dominion Road);
- Building C - 7.5m (total building height of 20.5m); and

⁴⁹ Notes of Evidence at page 593.

⁵⁰ Panuku Exhibits 5 and 5A.

⁵¹ Notes of Evidence at page 183.

⁵² Mr Butler, evidence-in-chief, at [7.15].



- Building D – 400mm (total building height of 13.5m).

[151] As we have said there are matters of discretion in H11.8.1(8), some of which differ from those in C1.9(3). We refer to both, with the general added in brackets, as follows:

- (a) any [objective] or policy which is relevant to the standard;
- (b) the purpose of the standard [and whether that purpose will still be achieved];
- (c) the effects of the infringement of the standard;
- (d) the effects on the amenity of neighbouring sites;
- (e) the effects of any special or unusual characteristic of the site which is relevant to the standard;
- (f) the characteristics of the development;
- (g) any other matters specifically listed for the standard,⁵³ and
- (h) where more than one standard will be infringed, the effects of all infringements [considered together].

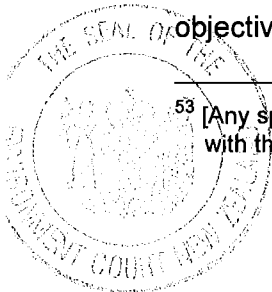
[152] Specific policies listed as assessment criteria for buildings that do not comply with the height standard (H11.8.2(8)(a)) are Policies H11.3(a) and (b), H11.3(8), H11.3(13) and H11.3(14) under the heading of general policies for all centres. There are also general objectives for all centres and more particularly specific Local Centre Zone objectives. We factor in these objectives and policies to our consideration of the matters of the discretion.

[153] The specific policies set out in H11.3 of particular relevance are:

- ...
 - (3) Require development to be of a quality and design that positively contributes to:
 - (a) planning and design outcomes identified in this Plan for the relevant zone;
 - (b) the visual quality and interest of streets and other public open spaces;
 - ...
 - (8) Require development adjacent to residential zones ... to maintain the amenity values of those areas, having specific regard to dominance, overlooking and shadowing.
 - ...
 - (13) In identified locations within the centres zones ... enable greater building height than the standard zone height, having regard to whether the greater height:
 - (a) is an efficient use of land;
 - (b) supports public transport, community infrastructure and contributes to centre vitality and vibrancy;
 - (c) considering the size and depth of the area, can be accommodated without significant adverse effects on adjacent residential zones; and
 - (d) is supported by the status of the centre in the centres hierarchy, or is adjacent to such a centre;
 -

[154] Notwithstanding that the specific assessment criteria do not refer to the Local Centre objectives, we note that there are general objectives applicable to all centres (H11.2(1)-(5))

⁵³ [Any specific matter identified in the rule or any relevant matter of discretion or assessment criterion associated with that rule.]



that also apply to the Local Centre Zone, as well as specific objectives that apply to it.

[155] In particular, the Business – Local Centre Zone objectives (H11.2) inform the implementing policies referred to in the specific assessment criteria:

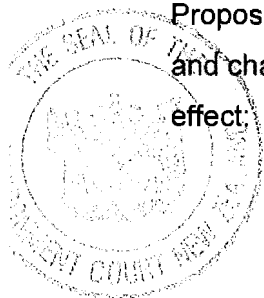
-
- (6) Local centres enable commercial activity which primarily services local convenience needs and provides residential living opportunities.
 - (7) The scale and intensity of development within local centres is in keeping with the planning outcomes identified in this Plan for the surrounding environment.
 - (8) Local centres are an attractive place to live, work and visit.

[156] The site is of a considerable size and depth, with part of it a THAB zone that extends across a retirement village and with an adjoining single house zone elsewhere. The issue is whether there are significant adverse effects on those adjacent residential zones from the additional height. That includes consideration of whether the amenity values of those areas are maintained, with specific regard to dominance, overlooking and shadowing.

[157] The purpose of the height standard in the Local Centre Zone is to:

- manage the effects of building height;
- allow reasonable sunlight and daylight access to public open space excluding streets and nearby sites;
- manage visual dominance effects;
- allow an occupiable height component to the height limit, and an additional height for roof forms that enables design flexibility, to provide variation and interest in building form when viewed from the street;
- enable greater height in areas identified for intensification; and
- provide for variations to the standard zone height through the Height Variation Control, to recognise the character and amenity of particular areas and provide a transition in building scale to lower density zones.

[158] In their Joint Witness Statement of 9 September 2019, the planners referred to Proposed Plan Change 16 (notified during the first week of the hearing on 22 August 2019) and changes to an aspect of the purpose of the building height standards (H11.6.1) with legal effect:



- ~~allow reasonable sunlight and daylight access~~ manage shadowing effects of building on to public open space, excluding streets and nearby sites;

[159] The planners said this does not alter their view about the purpose of the rule, which still requires the effect of building height to be assessed.

[160] There was no suggestion that any matter, such as the purpose of the standard, had any priority over any other. We now work through the matters of discretion in the order in which they appear in the general rule in the AUP, noting that there is no priority in the order.

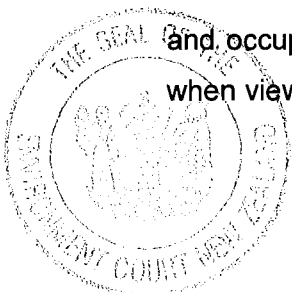
Purpose of the height standard

[161] The purpose of the height standard in the Local Centre Zone is to:

- manage the effects of building height;
- allow reasonable sunlight and daylight access to public open space excluding streets and nearby sites;
- manage visual dominance effects;
- allow an occupiable height component to the height limit, and an additional height for roof forms that enables design flexibility, to provide variation and interest in building form when viewed from the street;
- enable greater height in areas identified for intensification; and
- provide for variations to the standard zone height through the Height Variation Control, to recognise the character and amenity of particular areas and provide a transition in building scale to lower density zones.

[162] Some of these purposes do not advance our consideration of effects given their use of the neutral word 'manage' in terms of specific effects and we therefore focus on other elements referred to in the purpose.

[163] The evidence was that the additional height would still allow reasonable sunlight and daylight access to public open space excluding streets and nearby sites. The landscape and urban design witnesses were of one mind that the design and location of the additional height and occupiable components of the buildings provides variation and interest in building form when viewed from the street.



[164] Mr Lala gave evidence that the AUP provisions seek to intensify development in locations on a public transport arterial route and within a centre, referring particularly to the RPS objectives and policies of the AUP.⁵⁴ However, we do not need to place great weight on this point as we are satisfied that the other purposes relating to effects are achieved.

[165] Does the proposal recognise the character and amenity of the area? The landscape, urban design and planning evidence is that the additional height and its design treatment contributes positively to the character and amenity of the area. We acknowledge that the area extends beyond the more immediate residential neighbours and the amenity effects on residents that was the focus of the hearing.

[166] Does the proposal provide a transition in building scale to lower density zones? The planning evidence is that the proposal includes development on an adjoining higher density THAB zone that is of a building scale that provides a better transition to the lower density single house zone than might be possible in a THAB zone.⁵⁵

Effects of infringement of the standard

[167] What are the effects of infringement of the standard? The evidence is that there are no effects of concern for the neighbouring Local Centre zoned areas. We deal with the effects on the amenity of neighbouring sites under the next heading.

Effects on the amenity of neighbouring sites

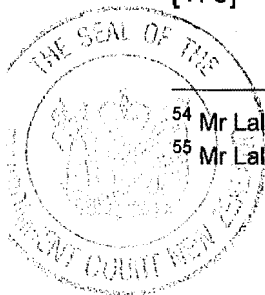
[168] We need to consider the nature and magnitude of the effects on the amenity values of neighbouring sites in residential zones from the height of the proposed development, including the way it is configured. These effects include dominance, overlooking and shadowing.

[169] We are satisfied with the evidence given by the landscape and urban design witnesses that the attention paid to reducing the potential for effects on dominance, overlooking and privacy in the proposal means any adverse effects are at an acceptable level outside the site. Much of this is a result of locating the taller built elements of Building C in the depression towards the centre of the site and in the design detail.

[170] With respect to the shading effects of the over-height buildings, we have carefully

⁵⁴ Mr Lala, summary statement, dated 26 August 2019 at [2.10].

⁵⁵ Mr Lala, evidence-in-chief, at [5.7]-[5.11].



considered the predicted 30 minute loss of late afternoon sunlight on Mrs Smith's property at the summer solstice. While the shading is generated from a development in the recently re-zoned Local Centre and THAB Zones through the AUP process, we accept that it is appropriate to assess the shading effects by applying criteria used in other residential zones for a 'reasonable' level of sunlight hours.

Special or unusual characteristics of the site

[171] The development site is a large land holding, with part of it (recently) zoned THAB and separated from some of its neighbours by the Carrick Place legal road.

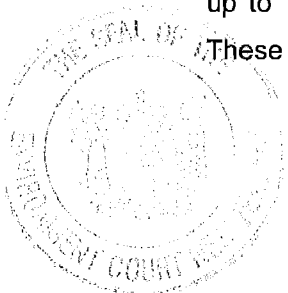
[172] There are also the physical characteristics of the site. As Mr de Graaf pointed out, Building C is located at a low point in a depression in the middle of the site. This means that the building appears to have a lesser height encroachment when viewed from higher elevations outside the boundary. He estimated the height encroachment to be between 4.5 to 5.5 metres rather than the 7.5m measured under the rolling height from the existing ground method used in the AUP. This means that when viewed from outside of the site, Building C will be less dominant than it would have been if the site had been level over its full extent. In addition, as we have noted elsewhere in this decision the late changes made to its roof form mean that Building C will have a visually lighter appearance, and be better integrated with the roof forms of the other three buildings on the site.

Characteristics of the development

[173] The development has two major road frontages in Dominion and Valley Roads and its orientation and design reflects these. Many of the characteristics of the development fronting Dominion Road and the comparatively small increase in height of Buildings A and B accord with the streetscape and special character of the Special Character Area (and is discussed in the section of the decision on the Special Character Areas). Building C is set well back from the Special Character Area, located at a low point in a depression as already referred to therefore reducing its viewed height from higher elevations in residential properties and the surrounding streets.

Effects of all infringements considered together

[174] The infringements of height for Buildings A and D involve small areas, with Building A up to 1.5m for the apex of the roof setback from Dominion Road and Building D 400mm. These infringements are not such as to add to the matters we have considered for the height



of Building C.

Objectives and policies

[175] Mr Lala considered that the building heights proposed support an efficient use of land (Policy 11.3(13)(a)), supported public transport (given the increased intensity of residential use) and would contribute to centre vitality and vibrancy (Policy 11.3(13)(b)), and would not compromise the centres hierarchy of the AUP (Policy 11.3(13)(d)). We accept that evidence.

[176] We are satisfied from the evidence given by the landscape and urban design witnesses that the attention paid to reducing the potential for effects on dominance, overlooking and privacy means that the proposal will maintain the amenity values of residential zones in accordance with Policy 11.3(8). We accept that there is no absolute privacy in an urban setting, and that the measures in the proposal designed to protect privacy are a reasonable response. The size and depth of the site, along with its topography, has assisted with accommodating the built proposal without significant adverse effects on adjacent residential zones (Policy 11.3(13)(c)). We find that much of this is a result of taking advantage of the depression in the site for the location of the taller Building C towards the centre of the site and in the design detail.

[177] In terms of the specific Objective H11.2(8) for the Local Centre Zone we find that the height of the buildings and particularly Building C, as designed, will not detract from the attractiveness of the centre as a place to live, work and visit.

Conclusion

[178] After considering all the matters of discretion and relevant objectives and policies and assessment criteria, we are satisfied that the building heights now proposed can be approved.

New Buildings in the Local Centre Zone (H11.4.1(A44))

[179] A long list of matters of discretion are included in H11.8.1(4) which deals with new buildings in the Local Centre Zone. Rather than repeating them, we focus on those in contention. They are:

- (a) the design and appearance of buildings in so far as it affects the existing and future amenity values of public streets and spaces used by significant numbers of people. This includes:
 - (i) the contribution that such buildings make to the attractiveness pleasantness (*sic*) and enclosure of the public space;



- (ii) the maintenance or enhancement of amenity for pedestrians using the public space or street;
- (iii) the provision of convenient and direct access between the street and building for people of all ages and abilities;
- ...
- (g) the positive effects that landscaping, including required landscaping, on sites adjoining public spaces is able to contribute to the amenity values of the people using or passing through the public space;
- ...
- (i) all the above matters to be assessed having regard to the outcomes set out in this Plan and the functional requirements of the activities that the buildings are intended to accommodate.

[180] The matters of discretion particularly concern the public realm. The reference to amenity values is to effects on people using public streets and spaces and not to residential neighbours.

[181] Specific assessment criteria of relevance (H11.8.2(4)) are Policies H11.2(3) (a) and (b), 11.3(8) and 11.3(13) and we set these out earlier.

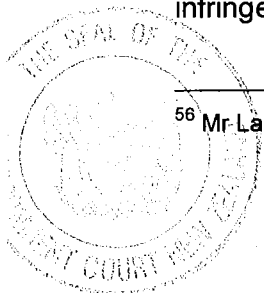
[182] The urban design, landscape and planning evidence identifies the design of the proposal will add to the amenity values of public streets and spaces used by significant numbers of people. That includes the positive effects of the required landscaping on the amenity values of people using or passing through public space. We accept that evidence.

[183] After considering the matters of discretion and relevant objectives and policies and assessment criteria related to the new buildings and their effects, we are satisfied that the new buildings can be approved.

Other restricted discretionary activities in the Local Centre Zone

[184] There are exceedances of the Outlook Space Standard (H11.6.8), which has as its purpose to ensure a reasonable standard of visual privacy between habitable rooms of different buildings on the same or adjacent sites and manage visual dominance effects within a site by ensuring that habitable rooms have an outlook and sense of space. The degree to which several of the units infringe the provisions of the standard for bedrooms and living areas is set out in Mr Lala's summary statement dated 26 August 2019.⁵⁶ Both planners considered the development provides a reasonable level of amenity for the adjoining business zoned sites consistent with Policy H11.3(2) in managing reverse sensitivity effects where these infringements occur and that the infringements do not affect adjoining or adjacent residential

⁵⁶ Mr Lala, Summary Statement, dated 26 August 2019 at [2.2(a)].



sites.⁵⁷

[185] There are also infringements of the Minimum Dwelling Size Standard (H11.6.9) for two units as set out in Mr Lala's summary statement.⁵⁸ However, we are unclear as to the final tally and degree of infringement of the minimum dwelling size standard⁵⁹ following the additional redesign that occurred during the hearing. As said earlier, counsel advised that the two fifth floor three-bedroom units have had to be reduced in size to two two-bedroom units.

[186] No party specifically challenged these infringements or further infringements arising from the additional redesign during the hearing. As these were not issues of concern for anyone including the Council, who we can legitimately assume would raise it as a barrier to the consents if it was, we do not take these infringements further.

THAB Zone

[187] For the THAB Zone, restricted discretionary consent is required for dwellings (H6.4.1(A3)), new buildings (A35),⁶⁰ infringement of Standard H6.6.9 Yards, and the use of the Alternative Height in Relation to Boundary Standard (H6.6.7(1) and (2)). Part of Building D and a small portion of Building C extend into this zone.

[188] Relevant objectives of the THAB zone that provide context are:

H6.2

- (1) Land adjacent to centres and near the public transport network is efficiently used to provide high-density urban living that increases housing capacity and choice and access to centres and public transport.
- (2) Development is in keeping with the areas planning urban built character of predominantly five, six or seven storey buildings in identified areas, in a variety of forms.
- (3) Development provides quality on-site residential amenity for residents and the street.

[189] Relevant policies of the THAB zone to implement the objectives that provide context (and some of which are referred to in specific assessment criteria) are (H6.3):

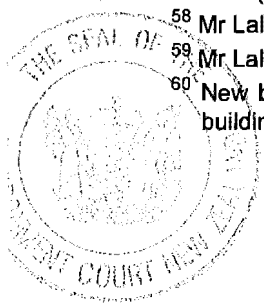
- (1) Enable a variety of housing types at high densities including terrace housing and apartments and integrated residential development such as retirement villages.
- (2) Require the height, bulk, form and appearance of development and the provision of setbacks and landscaped areas to achieve a high density built character of predominantly five, six or seven storey buildings in identified areas, in a variety of forms.
- (3) Encourage development to achieve attractive and safe streets and public open spaces

⁵⁷ JWS (planning), dated 9 September 2019.

⁵⁸ Mr Lala, Summary Statement, dated 26 August 2019 at [2.2(b)].

⁵⁹ Mr Lala, Summary Statement, dated 26 August 2019 at [2.2(b)].

⁶⁰ New buildings have the same activity status and standards as applies to the land use activity that the new building is designed to accommodate.



including by:

- (a) providing for passive surveillance
 - (b) optimising front yard landscaping
 - (c) ...
- (4) In identified locations, adjacent to centres, enable greater building height through the application of the Height Variation Control where the additional development potential enabled:
- (a) provides an appropriate transition in building scale from the adjoining higher density business zone to neighbouring lower intensity residential zones; and
 - (b) supports public transport, social infrastructure and the vitality of the adjoining centre.
- (5) Manage the height and bulk of development to maintain daylight access and a reasonable standard of privacy, and to minimise visual dominance effects to adjoining sites and developments.
- (6) Require accommodation to be designed to meet the day to day needs of residents by:
- (a) providing privacy and outlook; and
 - (b) providing access to daylight and sunlight, and providing the amenities necessary for those residents.
- (7) Encourage accommodation to have useable and accessible outdoor living space.
- (8) Restrict the maximum impervious area on a site in order to manage the amount of stormwater runoff generated by a development, and ensure that adverse effects on water quality, quantity and amenity values are avoided or mitigated.
- (9) ...
- (10) Recognise the functional and operational requirements of activities and development.

Dwellings (H6.4.1(A3))

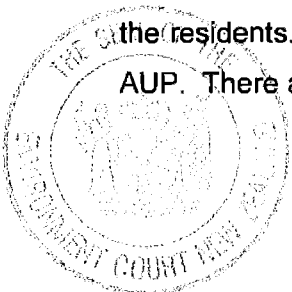
[190] Dwellings H6.4.1(A3) contain the following matters of discretion H6.8.1.2:

H6.8.1(2)

- (a) the effects on the neighbourhood character, residential amenity, safety and the surrounding residential area from all of the following:
 - (i) building intensity, scale, location, form and appearance:
 - (ii) traffic; and
 - (iii) design of parking and access.

[191] The specific assessment criteria for dwellings refer to Policies 6.3(1) – 6.3(8). These policies are encouraging of a well-designed high density built character, with height and bulk maintaining daylight access and a reasonable standard of privacy and minimising visual dominance effects on adjoining sites and development. We are satisfied that the design intention of the proposal meets the THAB policies.

[192] We accept that the development will change the character of the neighbourhood and surrounding residential area and will impact, to a degree, on the amenity currently enjoyed by the residents. That change, however, reflects the nature of the zoning of the site under the AUP. There are benefits from the proposal, as acknowledged in the urban design, landscape



and planning evidence along with points fairly made by members of the community and landowners that appeared before us.

[193] We conclude that the proposal is not only consistent with the policies referred to in the specific assessment criteria in the AUP for the THAB Zone, but it is also consistent with the objectives that those policies implement.

Alternative Height in relation to Boundary Standard H6.4.1 (A34)

[194] New buildings that do not comply with Standard H6.6.6, but do comply with Standard H6.6.7 Alternative height in relation to boundary Standard H6.4.1 (A34) H6.6.7(1) and (2)), set out the matters of discretion in H6.8.1(5):

- (a) visual dominance effects;
- (b) attractiveness and safety of the street; and
- (c) overlooking and privacy.

[195] Specific assessment criteria H6.8.2(4) elaborate on the above matters of discretion (none of which refer to specific objectives or policies). They are:

Visual dominance

- (a) The extent to which buildings as viewed from the side or rear boundaries of adjoining residential sites or developments are designed to reduce visual dominance effects, taking into account:
 - (i) the planned urban built character of the zone;
 - (ii) the location, orientation and design of development; and
 - (iii) the physical characteristics of the site and the neighbouring site.

Attractiveness and safety of the street

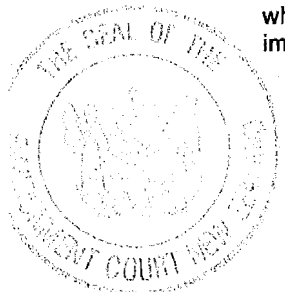
- (b) The extent to which those parts of buildings located closest to the front boundary achieve attractive and safe streets by:
 - (i) providing doors, windows and balconies facing the street;
 - (ii) optimising front yard landscaping;
 - (iii) providing safe pedestrian access to buildings from the street;

Overlooking and privacy

- (c) The extent to which direct overlooking of a neighbour's habitable room windows and outdoor living space is minimised to maintain a reasonable standard of privacy, including through the design and location of habitable room windows, balconies or terraces, setbacks, or screening.

[196] The purpose of Standard H6.6.7 is:

...to enable the efficient use of the site by providing design flexibility at the upper floors of a building, while maintaining a reasonable level of daylight access and reducing visual dominance effects to immediate neighbours.



[197] We are satisfied with what we can abstract from the urban design and landscape evidence that the infringement achieves the purpose of the Standard by maintaining a reasonable level of daylight access and by reducing visual dominance effects to immediate neighbours and that overlooking and privacy has been adequately catered for. This has been achieved to a large extent through the provision of generous laneways between each of the buildings, limiting the height of Building D to three levels and through the setbacks provided in the roofline of Building C. In addition, the package of measures to protect privacy, including landscaping, building setbacks, apartment orientation and the use of louvres on the windows of the buildings, are a suitable response to a level of privacy that is reasonable in an urban setting.

THAB Zone – Side yard infringement H6.6.9(1)

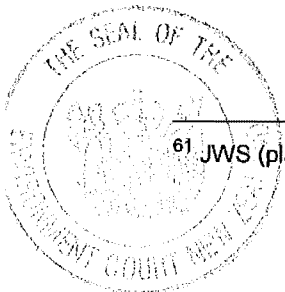
[198] There is an infringement of the side yard standard between the Local Centre Zone and the THAB zone at 9-15 Carrick Place (the retirement village). The AUP requires a 3m yard on this boundary. The proposed basement podium wall is located 1.5m from this boundary and is 1.5m above existing ground level.

[199] In relation to the purpose of a yard (H6.6.9), of relevance is 'to maintain a reasonable standard of residential amenity for adjoining sites'. Specific assessment criteria H6.8.2(9) refer to Policies H6.3(1), (2), (4) and (5).

[200] The planners⁶¹ gave evidence that the proposed building is at an appropriate setback distance for a landscape buffer for the adjoining retirement units at 9-15 Carrick Place, with appropriate landscape planting for a landscape buffer and visual screening of this part of the podium when viewed from the retirement units. They referred particularly to proposed condition 23 on finalised landscape design drawings, specifications and maintenance requirements.

[201] We accept the evidence that the development, with its setback distance and landscape buffer and planting, will maintain a reasonable standard of residential amenity for the adjoining retirement units in line with the purpose of a yard. The policies referred to in the specific assessment criteria relate to effects considered as part of residential amenity and we need not cover them separately.

⁶¹ JWS (planning), dated 9 September 2019.



Special Character Overlay issues

[202] In this section we deal with Issue 2, namely should the Universal Building be demolished, and if so, do the proposed conditions mitigate any adverse effects caused by its loss including in relation to the timing of its demolition and the construction of the proposed development? To answer it, we need to analyse the evidence about the special character overlay in the context of the relevant provisions of the AUP.

[203] As outlined above, part of the site proposed for the development lies within the Special Character Overlay of the AUP,⁶² which extends along both sides of Dominion Road. The Special Character Area Statement Schedule (15.1.6.4 of the AUP) contains a map showing the location of sites with character-defining and character-supporting buildings within the Eden Valley Special Character Area,⁶³ and a summary of special character values under the headings "historical" and "physical and visual qualities".⁶⁴ We have identified that the site contains two character-supporting buildings – the Universal Building and a building at 214-216 Dominion Road.

[204] Restricted discretionary activity consents are required:

- (a) for the demolition of the two character-supporting buildings (D18.4.2 (A18)) of the AUP and the other buildings in the site of the development because they are within the Special Character Overlay (D18.4.2 (A26) of the AUP));⁶⁵ and
- (b) for the construction of new buildings within the Special Character Overlay (D18.4.2(A20) and (A27) of the AUP).

[205] The matters of discretion are set out below, with D18.8.1.2(1) applying to demolition and both D18.8.1.2(1) and (2) applying to new buildings:

D18.8.1.2. Special Character Business Areas

- (1) For all restricted discretionary activities:
 - (a) the effects of the activity on the streetscape and special character context as outlined in **the special character area statement**,⁶⁶
 - (b) the integrity of the building in its current state, having regard to its architectural form and style and the authenticity of its component parts as well as its contribution to the streetscape character;

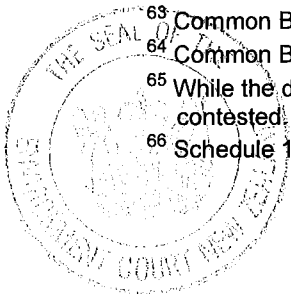
⁶² Common Bundle, at page 18.

⁶³ Common Bundle, at page 481.

⁶⁴ Common Bundle, at pages 482-483.

⁶⁵ While the demolition of other buildings (A26) also requires restricted discretionary activity consent, this was not contested.

⁶⁶ Schedule 15.1.6.4 Special Character Areas Overlay – Business: Eden Valley.



- (c) the building's relationship to other adjacent buildings, and if it contributes to a group in such a way that its demolition, alteration or addition would result in the loss of a character value attributable to the group; and
 - (d) the condition of the building, and the practicality and cost of any necessary rehabilitation, and the ability to achieve reasonable amenity for occupants and reasonable compliance with any requirement of the Building Act 2004.
- (2) for an infringement of any of the standards on the zone in which the building is located:
- (a) the effects of the infringement of the standard on the streetscape and special character context as outlined in the special character area statement.

Note 1

Where more than one standard is infringed, the effects of all infringements on the streetscape and special character context as outlined in the special character area statement will be considered together.

[206] There are also assessment criteria in D18.8.2.2, with several referring to Policies D18.3(8) to (14) and containing several other broad factors. We do not need to recite all the specific assessment criteria but consider them as necessary to address particular issues. We do, however, set out Policies 18.3(8) to (12), and (14):

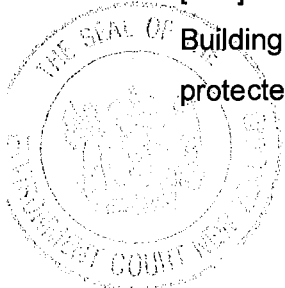
Policies

D18.3

...

- (8) Require all development and redevelopment to have regard and respond positively to the identified special character values and context of the area as identified in the special character area statement.
- (9) Identify individual buildings that contribute to the identified special character according to the following descriptions:
 - (a) character defining – makes a considerable contribution to the character of the area because of historical, physical and visual qualities; and
 - (b) character supporting – makes a moderate contribution to the character of the area. The building should contribute to the appearance, quality, and identify of the area and should be consistent with the values of character-defining places.
- (10) Require any application for demolition or removal of a character-defining and character-supporting building in a Special Character Area – Business to, on its own or cumulatively as a result of other demolition, demonstrate that the loss of the building:
 - (a) would not erode the identified special character values of the area; and
 - (b) would not disrupt the cohesiveness of the streetscape and wider special character area, including links with scheduled historic heritage places.
- (11) Discourage the removal or substantial demolition of buildings that contribute to the continuity or coherence of the special character area as identified in the special character area statement.
- (12) Require new buildings ... or infrastructure, which are within the overlay but are not character defining or character supporting buildings, to maintain the integrity of the context of the area by providing quality design, materials, colour and decoration which respects and enhances the built form and streetscape of the area.
- (13) ...
- (14) Encourage the ongoing use and maintenance of buildings in special character areas.

[207] The main issue under this topic was to do with the demolition of the Universal Building, which was opposed by Ms Modrow. Her position was that every character-protected building (we assume she was referring to the character-supporting buildings)



should be protected and not demolished as, once gone it was gone forever. She also relied on the Independent Commissioners' findings about built heritage and the Special Character Overlay, and their conclusion that the demolition of the Universal Building was a significant unmitigated adverse effect justifying (with other matters) their decision to decline the application.

[208] Before us, Panuku submitted, and the Council agreed, that there is evidence to support the demolition of the Universal Building because of its limited contribution to the Special Character Area and the positive effects the proposal will have on the special character of the area once it has been completed.

[209] The Special Character Overlay also applies to the new buildings proposed to be constructed on the site. There was no real challenge to the evidence by Panuku supported by the Council that the restricted discretionary matters can be met in respect of them, however for the sake of completeness we address the evidence about this below.

[210] The built heritage witnesses who provided evidence on this topic were Ms Rebecca Fogel (Team Leader Built Heritage Implementation) for the Council and Mr John Brown (an independent expert) for Panuku.

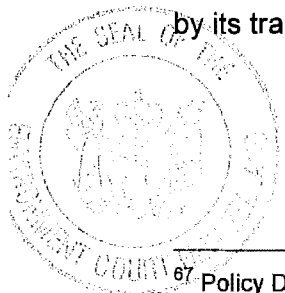
[211] The discussion must start by identifying the special character values and context of the special character area described in the special character area statement.⁶⁷ We then deal with the evidence in relation to the proposed demolition of the two character supporting buildings and the new buildings, before undertaking our analysis of both.

The Special Character Area and special character values

[212] Ms Fogel⁶⁸ described Dominion Road as one of Auckland's key traditional town centres that was developed along the electric tram routes in the early 20th century, with the main period of development for Eden Valley being in the 1900s to 1920s. She said that the character statement in the AUP is clear that Dominion Road has a strong, cohesive character defined by its traditional buildings.

⁶⁷ Policy D18.3(8).

⁶⁸ Ms Fogel, evidence-in-chief, at [7.2]-[7.5].



[213] Ms Fogel agreed with Mr Brown's assessment that the context⁶⁹ for the Eden Valley Special Character Area exhibits the following characteristics:

- (a) a prevalence of one-to-three- storey but predominantly two-storey commercial and residential developments dated from the late 1800s or early 1900s to the early 1920s;
- (b) buildings constructed in a range of classically derived architectural styles popular during that period and exhibiting the use of traditional building materials such as brick and tile or plastered finishes;
- (c) buildings constructed to the street edge with a largely consistent sense of enclosure arising from construction to the full width of the subdivision, punctuated by narrow access to rear lots;
- (d) buildings demonstrating a high degree of vertical and horizontal modulation through clear vertical division of bays and clear horizontal division of floor levels and parapets; and
- (e) street frontages exhibiting a strong degree of articulation arising from the use of applied ornate details with deep relief and shadow.

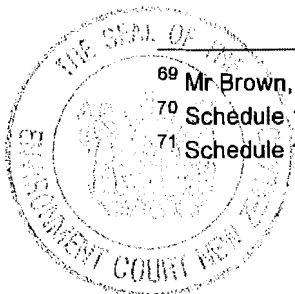
[214] The character-defining and supporting buildings which make an important contribution to the area are shown on the map.⁷⁰ These include the Auckland Meat Company Building (219-225 Dominion Road), the Worata Building (277-231 Dominion Road) and the Bridgman Building (234 Dominion Road) located on three of the four corners of the Dominion Road/Valley Road intersection and examples of 1910s to 1920s commercial main street buildings.⁷¹

[215] Against this context we set out the evidence we received about the effects of demolishing the two character-supporting buildings subject to the Special Character Overlay. We then set out the evidence we received about the proposed development and how the new buildings relate or interact with the special character values identified in the AUP.

⁶⁹ Mr Brown, evidence-in-chief, at [4.3]-[4.4].

⁷⁰ Schedule 15.1.6.4 Special Character Areas Overlay – Business: Eden Valley.

⁷¹ Schedule 15.1.6.4.3 Description of physical and visual qualities.



Can the proposed demolition of the character-supporting buildings meet the AUP provisions?

The building at 214-216 Dominion Road

[216] Notwithstanding the description of “character-supporting” in Policy D18.3(9)(b) outlined above, Mr Brown gave evidence⁷² that the character-supporting building at 214-216 Dominion Road makes a low contribution to the Special Character Area, largely because of the significant alterations made to its façade over time. He said the redevelopment as a post-war “modern” commercial building has resulted in it now lacking the architectural detail and articulation that appears in the original drawings for the early 20th century building.

[217] Mr Brown’s opinion was that the demolition of this building would not generate adverse effects in terms of the special character values set out in the Special Character Overlay. Ms Fogel did not disagree with Mr Brown’s opinion and we note that the Independent Hearing Commissioners at the Council hearing were also of this view.⁷³

The Universal Building

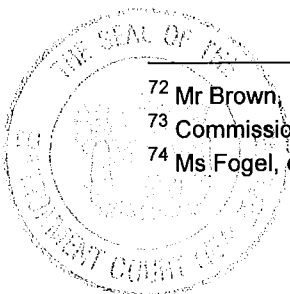
[218] The Universal Building was originally built as a single-storey garage in 1932, with its present appearance dating from 1949 after it was remodelled by A.C Jefferies, a notable architect at the time.⁷⁴ Ms Fogel’s evidence was that, even though the Universal Building is a modest building post-dating the key period of significance (1900 -1920s), it is still an authentic building reflecting the growth of the Dominion Road corridor as a “tram suburb”. She said that the mass, fenestration and materials comprising the Universal Building are important qualities that are relevant to the special character of the area. Her view was that the Universal Building complements the group of character-defining buildings adjacent to it.

[219] Ms Fogel’s opinion was that, while regrettable, the loss of the Universal Building would be adequately mitigated by providing an appropriately scaled new development. She accepted that the size and positioning of the Universal Building made it awkward to incorporate into the proposed development, and if this occurred, could result in a worse design outcome in terms of “streetscape”. She considered that the requirement to record photos and drawings (archival recording) prior to demolition (proposed condition 20) would ensure that some knowledge of the building would be retained for future generations, and would go some way towards mitigating its loss. Also, in her view the requirement to incorporate interpretive

⁷² Mr Brown, evidence-in-chief, at [4.5].

⁷³ Commissioners’ decision, dated 10 August 2018 at [210].

⁷⁴ Ms Fogel, evidence-in-chief, at [9.1]-[9.5].



signage (proposed condition 21) would ensure that the history of the building would not be entirely forgotten.

[220] Mr Brown's evidence⁷⁵ was that the Universal Building's character-supporting contribution to the Special Character Overlay arises from its width, the materials used in its construction (it is a plaster-clad masonry building) and its general scale (it is a two-storey building). However, in his opinion, the integrity of the building has been reduced by the modifications made to it, which include a 1949 façade of a different architectural style. As a result, Mr Brown's opinion was that little of its original architectural character of the building is left, particularly as it is expressed to the streetscape, however he identified two features that provide some architectural interest as it presents to the street - the applied lettering and the negative parapet detail. Mr Brown's opinion was that the Universal Building does not share the ornate architectural qualities of key late Victorian and Edwardian commercial buildings along Dominion Road that define the architectural values of the Special Character Overlay.

[221] Mr Brown's opinion was that the Universal Building bears no close relationship, in age or spatially, to the character-defining buildings near to it, which are of a different architectural scale, notwithstanding it having a similar façade "rhythm" to them.⁷⁶ He contrasted the Universal Building with the qualities of the nearby character-defining buildings – their high integrity, variety of materials, finely grained nature and detailed neo-classical and Italianate architectural styles. In his opinion, the removal of the Universal Building would not affect the coherence of the character-defining buildings nearby, and would not erode the identified special character values associated with late 1800s to 1920s commercial development. Unlike Ms Fogel, he considered that the northern gateway to the Special Character Overlay area is demarcated by character-defining buildings at the intersection of Dominion Road, Walters Road and Valley Road which are outside the site for the proposed development.

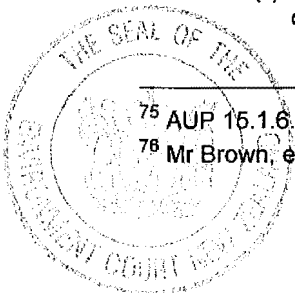
[222] In addition to the restricted discretionary matter "the condition of the building, and the practicality and cost of any necessary rehabilitation ... (D18.8.1.2(1)(d))" there is assessment

criteria D18.8.2.2(1)(a), which requires an assessment of:

- ...
- (v) whether the costs of restoration and repair are significantly greater in comparison to the costs of a new building of similar size and quality.

⁷⁵ AUP 16.1.6.4 Special Character Areas Overlay – Business: Eden Valley.

⁷⁶ Mr Brown, evidence-in-chief, at [5.36].



[223] Mr de Graaf undertook a quantitative analysis⁷⁷ and considered the potential costs of restoring and repairing the Universal Building, or replacing it with a like-for-like replacement. His evidence (on which both built heritage experts relied) was that the cost of restoration would be considerably higher, and conservatively of the order of 20% or \$200,000 more than replacing it with a building of the same sort.

[224] Mr Brown also referred to potential restoration and repair costs, but his view was that it would be difficult to rehabilitate the 1932 single-storey garage, which he said was modified "beyond recognition".

[225] In closing,⁷⁸ counsel for Panuku submitted there would be additional costs, associated with retaining the Universal Building, including lost yield because of the reduced number of residential units (estimated at 1-5 units), the loss of developable land (26m²-39m²) and the likely increased complexity of construction. Mr Lala (the planner for Panuku) considered these broader costs would need to be considered under D18.8.1.2 relating to "the condition of any building, and the practicability and cost of any necessary rehabilitation".⁷⁹

[226] Given Ms Fogel's reliance on the implementation of the proposal to justify the demolition of the Universal Building, the Court asked what conditions would guard against an outcome that resulted in the Universal Building being demolished as a stand-alone action, without the full proposed redevelopment of the site, as anticipated, being undertaken. The final version of the proposed set of conditions contained proposed condition 21A, which Panuku contended met this difficulty by specifying that the demolition of the Universal Building cannot occur until building consents for Buildings A and B have been issued.⁸⁰ It provides:

21A Demolition of the Universal Building shall not take place until building consent applications for all of Buildings A and B have been approved. The purpose of this condition is to ensure these character buildings are not demolished without sufficient certainty that the consented replacement buildings will be constructed shortly after demolition of the Universal Buildings and in accordance with the design approved under this resource consent.

Can the proposed new buildings meet the AUP provisions?

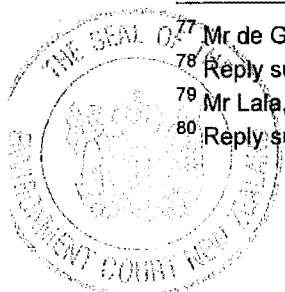
[227] Ms Fogel's evidence was that the Dominion Road frontage is the most important part of the design from a special character perspective, as the development is located at a prominent site at the 'gateway' to the Eden Valley area with a strong collection of character-

⁷⁷ Mr de Graaf, evidence-in-chief, Table 1.

⁷⁸ Reply submissions on behalf of Panuku, dated 24 September 2019 at [6.26].

⁷⁹ Mr Lala, evidence-in-chief, Attachment B – Consent requirements and Assessment Criteria.

⁸⁰ Reply submissions on behalf of Panuku, dated 24 September 2019 at [2.16(a)].



defining buildings immediately adjacent to the site. While she considered it to be a sensitive historic environment, she acknowledged the area is not a "static museum piece"⁸¹ and that there are benefits from the redesigned proposal, not just for the site but for other parts of the Special Character Overlay area. She approved of the proposed architectural design of the new buildings and proposed conditions of consent (including proposed conditions 17 and 18 which require further information on final materials and developed design details selection to be certified by the Council at a later date). Ms Fogel concluded that the proposal, as now redesigned, will maintain and enhance the special character values of the Eden Valley area, with the adverse effects of subdivision, use and development on the identified special character values of the areas being avoided, remedied or mitigated (D18.2 Objectives (1) and (3)).

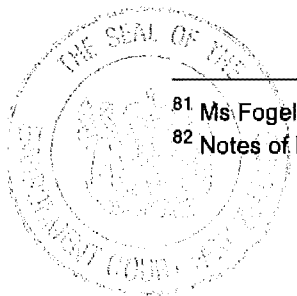
[228] Ms Fogel noted that, in terms of height, the top level of Building B is set back behind the street wall and is designed in a lightweight recessive manner which she considered would avoid visual dominance.⁸² She was also of the view that the height infringement of Building C would not have an appreciable effect on Dominion Road because of its placement set well back from the frontage of, and its minimal visibility from, Dominion Road. She referred to the further revisions (made by Mr de Graaf during the hearing) to the top level of Building C to flatten the roof form and align the architectural treatment of it with Buildings A and B. She considered this would further reduce any effects on the special character values of Dominion Road.

[229] In relation to the design of the new buildings fronting on to Valley Road, Ms Fogel considered that the proposed height and architectural treatment of them, including, specifically, more openings, a simpler roof form and especially the height sloping down towards the adjacent residential properties, have improved this frontage. In her view, the new buildings were, from a design perspective, less disruptive and provided more neutral elements to the streetscape.

[230] Mr Brown's opinion was that the designs of Buildings A and B employ a range of methods to respond positively to the Special Character Area, including division of the façade elements, the façade elements themselves and the materials used. Mr Brown concluded that the presence of Buildings C and D would have a minor adverse effect on the Special Character Overlay. Overall, Mr Brown's opinion was that the new design addressed the Commissioners'

⁸¹ Ms Fogel, evidence-in-chief, at [8.3].

⁸² Notes of Evidence, at page 500.



concerns. He concluded that the new design and proposed conditions (including recording and some interpretive material), adequately mitigated any potentially adverse effects of the new building on special character values.⁸³

[231] In terms of the AUP, Mr Brown's opinion was that the relevant policies in D18.3(8) to (14) were satisfactorily addressed by the proposal as a whole.⁸⁴ He considered that the updated design responded positively to the values of the Special Character Area, as required by Policy 18.3(8).⁸⁵ Also, his opinion was that the proposal satisfied Policy D18.3(10a and 10b).⁸⁶ The removal of the character-supporting Universal Building would not affect the group coherence of nearby character defining buildings, or erode the identified special character values associated with late 1800s to 1920s commercial development as stated in the Special Character Values Statement. Additionally, he considered the updated design provided adequate mitigation for the loss of the Universal Building, addressing Policy D18.3(12), which requires new buildings to maintain the integrity of the context of the area by providing quality design, materials, colour and decoration that respects and enhances the built form and streetscape of the area.

Findings

[232] Unlike the Commissioners, we were presented with a re-design of the proposed development paying greater attention to its special character values. We were provided with more evidence on the topic, and a more robust set of conditions designed to counteract the potential for adverse effects on the special character values of the area. In short, the case presented to us in relation to this topic was considerably different from that which had been presented to the Commissioners. Both Mr Brown and Ms Fogel agreed that the proposal including the demolition of the Universal Building would maintain the identified special character values of the Eden Valley area. In addition, both considered that any adverse special character effects would be adequately mitigated by the design and proposed conditions of consent.

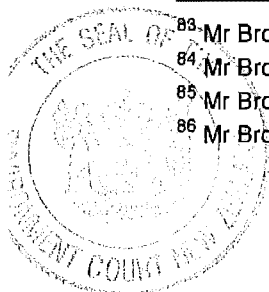
[233] We accept that the condition now agreed between Panuku and the Council for the timing of the demolition of the Universal Building goes some way towards trying to lock in the development as a prerequisite to demolition. We also accept that it does not provide complete

⁸³ Mr Brown, evidence-in-chief at [6.10-7.3].

⁸⁴ Mr Brown, evidence-in-chief at [4.6] – [4.8], [5.13], [5.28], [5.33]; rebuttal at [2.3].

⁸⁵ Mr Brown, evidence-in-chief at [5.31], [5.32].

⁸⁶ Mr Brown, evidence-in-chief at [5.33].



certainty that, once the building permits for the consented development are obtained, the development will proceed in the form relied on by Ms Fogel in reaching her opinion. This is because a consent is permissive, and there is nothing to stop an application for a variation or, indeed, a new (and different) proposal and required applications for a development being lodged with the Council.

Construction noise and vibration issues

Overview

[234] In this section we deal with Issue 3, namely are any adverse construction noise and vibration effects on s 274 parties' properties able to be adequately avoided, remedied or mitigated in terms of the relevant objectives, policies and assessment criteria in the AUP? To answer it, we need to analyse the evidence about the noise and vibration effects predicted to occur during construction, and how they relate to the relevant AUP provisions.

[235] When Mt Eden erupted some millions of years ago, lava flowed from the volcano and deposited a layer of very hard basalt rock across the site. This rock, which underlies overburden material, will need to be excavated using rock breakers and possibly blasting to form the building platform for the new development. A primary and legitimate concern of the s 274 parties was that they would have to endure highly annoying noise and vibration effects for many months while this excavation is being undertaken. This was a concern they had raised at the hearing before the Independent Commissioners.

[236] On the topic of construction noise and vibration, the Commissioners had before them evidence from two acoustic experts, Ms Siiri Wilkening for Panuku and Mr Peter Runcie for the Council. These experts also gave evidence before us. Mr Nicholas Speight (a geotechnical engineer) also assisted us to understand the volume of material (including rock) that would need to be excavated during construction.

[237] The Commissioners accepted the experts' evidence that the proposed construction activities could generally comply with the relevant construction noise and vibration criteria contained in the AUP. They did however note that rock breaking and blasting activities were predicted to exceed the performance criteria where they occurred in close proximity to neighbouring buildings and that the proposed rock breaking activities were predicted to exceed the cosmetic building damage criteria and the noise criteria at 15 Carrick Place (the retirement village), 109 and 111 Valley Road and 198 Dominion Road. We find the decision of the Commissioners confusing in its reference to noise and vibration 'criteria' when what appears



to be meant is compliance with 'standards' for permitted activity status for construction noise and vibration. Non-compliance with those standards is the reason for the need for a restricted discretionary activity consent.

[238] The Commissioners noted that the acoustic experts had identified the preparation of a Construction Noise and Vibration Management Plan (**CNVMP**) and its implementation as the primary mitigation and management measure to address the any adverse noise and vibration effects during the construction phase of the project. Their decision noted "the CNVMP is seen as a living document that will be expanded and updated as the project progresses, and work conditions become clearer".⁸⁷ Overall, the Commissioners agreed with Ms Wilkening and found that, subject to the imposition of conditions, construction noise and vibration effects would be minor.⁸⁸ We signal that we have reached a different view about the adequacy of what is proposed and the Commissioners' conclusion about this topic. We apprehend that we heard considerably more evidence about this topic than the Commissioners, but even if that is not the case, we do not agree that the proposal before the Commissioners enabled them to conclude that construction noise and vibration effects would be minor for the reasons we set out below.

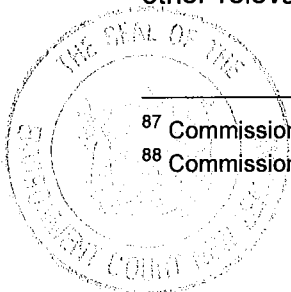
[239] As well as the three versions of the proposed conditions we received during the hearing, we were given two versions of the draft CNVMP, an initial version dated 4 August 2019 (**CNVMP 1**) and an amended version dated 6 September 2019 that had been prepared by Panuku between the first and second hearing dates (**CNVMP 2**).

[240] We agree with the s 274 parties, who raised this as an issue, that the draft CNVMP and proposed conditions put to us in the evidence in chief for Panuku provided little certainty or comfort about potential exceedances of the relevant noise and vibration conditions during construction and raised issues about the use of the CNVMP to deal with some matters which might more properly have been required to be the subject of conditions. For this reason, we paid some attention to this topic during the hearing.

[241] Although trite to say so, the RMA requires that any adverse effects arising from a proposal are either avoided, remedied or mitigated and s 16 establishes a duty to avoid unreasonable noise. The approach we take to our analysis is to first set out the AUP and other relevant provisions (which is the framework for setting the noise and vibration limits),

⁸⁷ Commissioners' decision, dated 10 August 2018 at [309].

⁸⁸ Commissioners' decision, dated 10 August 2018 [307]-[311].



then we outline what is predicted in terms of effects, and then we evaluate aspects of the evidence including the measures proposed to avoid, remedy or mitigate them.

[242] We also record that, although by necessity this topic is one which requires considerable input from acoustic experts, their evidence is not the only evidence relevant to the topic. The evidence of those in the neighbourhood is also relevant. We signal our view that a more fine-grained approach to the topic is likely to be required in the future for proposed developments in intensified urban areas where there is an interface with residential and commercial activities that are likely to be impacted by adverse construction noise and vibration effects. While described as temporary, construction noise and vibration effects can only be regarded as such by reference to the fact that, at some point, they will cease. We address this and the general observations we make about the use of CNVMPs as a tool to assist in meeting outcomes set in conditions in our conclusion.

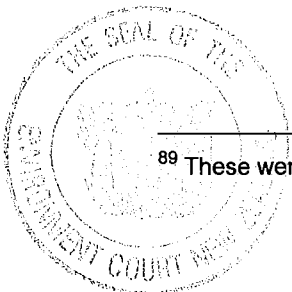
The framework for assessing noise and vibration

AUP provisions

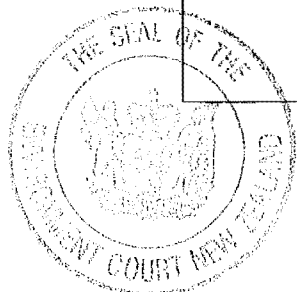
[243] A restricted discretionary activity consent is required for exceedance of internal sound level standards (E25.6.10). No party raised any concern in relation to this aspect of the development and we need not consider it further.

[244] The following AUP provisions are relevant to the restricted discretionary activity consents required for construction noise level exceedances for activities sensitive to noise (E25.6.27) and construction and demolition vibration limit exceedances (E25.6.30) arising from the development.⁸⁹

⁸⁹ These were identified by the planners in one of the flowcharts presented to us at the resumed hearing.



Matters of Discretion	
E25.8.1(1)	When assessing a restricted discretionary resource consent application, the Council's discretion is restricted to the effects on adjacent land uses and measures to avoid remedy or mitigate the adverse effects of noise
Assessment Criteria	
E25.8.2(1)	<p>The Council will consider the relevant assessment criteria for restricted discretionary activities from the list below for noise and vibration:</p> <p>(a) whether activities can be managed so that they do not generate unreasonable noise and vibration levels on adjacent land uses particularly activities sensitive to noise;</p> <p>(b) the extent to which the noise or vibration generated by the activity:</p> <ul style="list-style-type: none"> (i) will occur at times when disturbance to sleep can be avoided or minimised; and (ii) will be compatible with activities occurring or allowed to occur in the surrounding area; and (iii) will be limited in duration, or frequency or by hours of operation; and (iv) will exceed the existing background noise and vibration levels in that environment and the reasonableness of the cumulative levels; and (v) can be carried out during daylight hours, such as road works and works on public footpaths; <p>(c) the extent to which the effects on amenity generated by vibration from construction activity:</p> <p>....</p> <ul style="list-style-type: none"> i. will be mitigated by written advice of the activity to adjacent land uses prior to the activity commencing; and ii. can be mitigated by monitoring of structures to determine risk of damage to reduce occupant concern; and iii. can be shown to have been minimised by the appropriate assessment of alternative options; and iv. are reasonable taking into account the level of vibration and the duration of the activity (where levels of 10mm/s peak particle velocity may be tolerated only for very brief periods). <p>(d) whether the measures to minimise the noise or vibration generated by the activity represent the best practicable option.</p>
Relevant Objectives and Policies	
E25.2 (1) – (4)	<p>(1) People are protected from unreasonable levels of noise and vibration.</p> <p>(2) The amenity values of residential zones are protected from unreasonable noise and vibration, particularly at night.</p> <p>(3) Existing and authorised activities and infrastructure, which by their nature produce high levels of noise, are appropriately protected from reverse sensitivity effects where it is reasonable to do so.</p>



Relevant Objectives and Policies (continued)	
continued	(4) Construction activities that cannot meet noise and vibration standards are enabled while controlling duration, frequency and timing to manage adverse effects.
E25.3 (1) – (4) and (10)	(1) to (4) are general noise and vibration policies Construction, demolition and maintenance activities: ... (10) Avoid, remedy or mitigate the adverse effects of noise and vibration from construction, maintenance and demolition activities while having regard to: (a) the sensitivity of the receiving environment; and (b) the proposed duration and hours of operation of the activity; and (c) the practicability of complying with permitted noise and vibration standards.

Construction noise limits

[245] The construction noise limits to be measured and/or assessed at occupied buildings sensitive to noise prescribed in the proposed conditions are as follows:

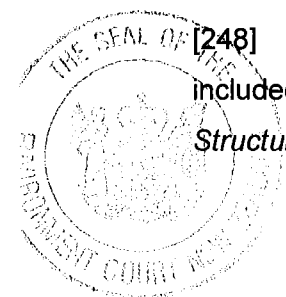
Time of Week	Time Period	Noise limit dBA	
		LAeq	LAmx
Weekdays	10.00pm -8.00am	45	70 (75)
	8.00am – 6.00pm	70	85
	6.00pm – 10.00pm	55	80
Saturdays	10.00pm – 8.00am	45	70
	8.00am – 1.00pm	70	85
	1.00pm – 10.00pm	55	80
Sundays and Public Holidays	7.30am - 6.00pm	55	80
	6.00pm – 7.30am	45	70

[246] Where effective acoustic screening cannot be provided, proposed condition 29C permits noise levels from works within 15m of receivers to exceed these limits by up to 5 dB (up to 75dBLAeq) for a total duration not exceeding 20 weeks.

[247] During rock breaking, condition 30 prescribes a noise limit of up to 85 dB LAeq when measured 1m from the façade of any occupied neighbouring building.

Construction vibration limits

[248] The cosmetic damage construction vibration guidelines provided for in the AUP and included in the conditions are based on the *German Industrial Standard DIN 4150-3 (1999) Structural Vibration – Part 3 Effects of Vibration on Structures*. Mr Runcie added that the



German Standard guidelines were significantly more stringent than the British Standard, which allows limits up to three times higher.⁹⁰

[249] The amenity vibration limits have been guided by a British Standard BS 5228-2:2009 'Code of practice for noise and vibration control of construction and open sites-Part 2: Vibration'.

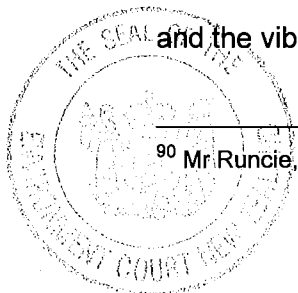
[250] Mr Runcie advised that rock-breaking and blasting are the only two construction activities expected to exceed the vibration limits set out in proposed condition 31 (the limits for construction generated vibration for cosmetic building damage) and proposed condition 32 (the vibration limits for the effects on people's amenity). This amenity condition sets a limit of 2mm/s peak particle velocity at defined locations within a building and is qualified with the words "as far as practicable".

[251] Mr Runcie advised also that exceedances of the cosmetic damage and amenity vibration condition limits are predicted to occur when works take place within 20m of a neighbouring property and that where no further physical mitigation measures are practicable (whatever that may mean), there must be regular communication with the surrounding receivers.

[252] Provision for this communication has been provided for under proposed conditions 32A to 32D. Proposed condition 32A requires the consent holder to request in writing the approval of identified adjoining property owners to undertake condition surveys of their buildings at the times listed in condition 32B, these being prior to construction commencing, during construction where vibration is measured to exceed the cosmetic building damage limits and/or in response to a reasonable claim of damage from construction vibration and at the completion of construction. This same condition defines the way in which the building condition survey is to be undertaken. If a survey demonstrates that damage has occurred as a result of construction activities, alternative construction methods are to be investigated and the consent holder is required to rectify the damage at the consent holder's cost.

[253] The CNVMP requires that where construction vibration from daytime works (8am to 6pm) is expected to exceed 2 mm/s PPV for more than 3 days, the occupants of all buildings within 100m must be advised of the works no less than 5 days prior to the works commencing and the vibration limit must not exceed 5mm/s. We are unclear as to what is required and the

⁹⁰ Mr Runcie, evidence-in-chief at [7.9].



basis for it. We direct further consideration of the approach later in this decision.

Predicted noise and vibration effects and how they are to be managed

[254] The excavation of rock from the site during construction is likely to be the noisiest construction effect and will also create the most vibration. Under this section we outline the evidence we heard about how long the excavation is anticipated to last and what the experience of it is likely to be with reference to similar developments. We then outline the measures proposed to mitigate any adverse noise and vibration effects, which are a combination of conditions setting requirements and a CNVMP condition addressing how those requirements are to be achieved.

Anticipated time for excavation

[255] Mr De Graaf advised that a key requirement of the design brief for the Panuku development was to avoid deep excavations in the rock so as to minimise the volume of rock excavation and the time required for this.⁹¹ As a result, the basement levels had been set as high as possible within the constraint of fitting the buildings within the AUP 13 metre height envelope for the site. This height limit constraint has been achieved (more or less) for Buildings A, B and D but not for Building C because of the extra floor proposed for this building.

[256] A key issue for us was to understand how long construction was anticipated to last, as it would be impossible to assess the adverse effects arising from it without understanding what was likely to be involved during the excavation process. One way of starting the analysis was to understand the volume of material that needed to be excavated on the site and the proportion of it that would be rock. Mr Kirkman helped us with this.

[257] While in his evidence-in-chief Mr Kirkman had stated that there would be about 15,000m³ of excavation,⁹² it emerged during the hearing that this figure had been considerably over-stated, with the correct volume being just under 9,000m³.⁹³ Having reviewed the site investigations data, Mr Speight said that he estimated about 20% of this total would be excavation in solid rock.⁹⁴

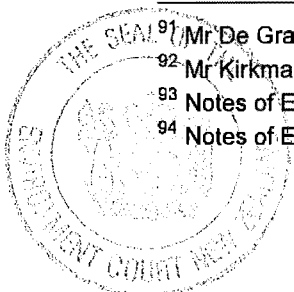
[258] When asked how long it might take to complete all of the excavation works,

⁹¹ Mr De Graaf, evidence-in-chief at [3.12].

⁹² Mr Kirkman, evidence-in-chief at [3.23].

⁹³ Notes of Evidence at page 278.

⁹⁴ Notes of Evidence at page 200.



Mr Speight said that this was difficult to assess, as it depended on the construction methodology employed by the contractor. He said that on a project he had been involved with, the excavation of about 4,000m³ took about 3 months, using a combination of heavy excavators and rock-breakers with no blasting. He said that he did not know the proportion of solid rock on that site.⁹⁵

[259] We note that section 2.2 of CNVMP 2 records that approximately 1,700m³ of rock excavation will be required, we presume based on about 20% of the overall excavation volume of 9,000m³. Given that the detention tanks have a volume of about 1,200m³, this would leave about 500m³ of rock to be excavated over the balance of the site. While this figure seems somewhat low, we find any slight increase not to be critical to our findings.

[260] Relying on the evidence of Mr Speight and Ms Wilkening, in his closing legal submission counsel for Panuku submitted that the excavation of the site could take around 6 to 7 months to complete, with rock breaking occurring for about half of this time as a worst-case scenario.⁹⁶

Experience from other sites

[261] To obtain an indication of the degree of adverse effects that could arise, at the Court's request Ms Wilkening obtained some statistics about a site which one of her colleagues had been involved with during 2015. Of the total 48,000m³ excavated on that site some 27,000m³ was solid basalt, which was removed using a combination of rock breaking and blasting. She said blasting had reduced the excavation period from an estimated 40 months (if only rock breaking had been used) to about 6 months.

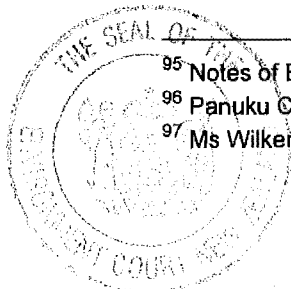
[262] We were told that this site was bordered on three sides by houses with a road on the fourth side. The nearest houses to the site were about 15 metres from the closest rock breaking and 25 metres from the closest drilling and blasting.

[263] Noise mitigation measures employed included the placement of a row of double stacked containers on three of the boundaries, delaying the demolition of an existing building until last (so that it served as a noise barrier) and surrounding the drilling and rock breaking activities with 3m-high plywood barriers.⁹⁷

⁹⁵ Notes of Evidence at page 197.

⁹⁶ Panuku Closing Submissions at [4.7] –[4.8].

⁹⁷ Ms Wilkening, copy of 22 August 2019 Marshall Day Internal Memo.



[264] While noise exceedances of up to 12dB over the specified limits had been predicted to occur at over 30 houses if there had been no mitigation, the mitigation measures which were adopted had limited exceedances to 4dB at 4 dwellings.

[265] In answer to a question from the Court about whether double height containers might be effective noise barriers on the Panuku site, Ms Wilkening said that she was unwilling to recommend containers because she did not know the way in which the contractor would undertake the construction operations. She agreed that if there was enough room, containers could be an option.

[266] While it provided background, we did not find this evidence substantially helpful, as it was too incomplete to be reliable. For example, there was no information about how many of the residents were home during the day during the construction period or any analysis of the complaints received. For these reasons we find that we cannot rely on this evidence to assist us with our evaluation of the effects of the rock excavation at the Panuku site.

Overview of the conditions and the CNVMP

[267] Under proposed condition 8 of the Version 3 condition set, it is CNVMP 2 that the consent holder must submit for certification by the Council.

[268] Ms Wilkening said that CNVMP 2 contained a series of recommended noise mitigation measures which included installing temporary barriers, limiting the time periods for undertaking rock breaking or blasting activities, pre and post construction building condition surveys and an active programme of communication with affected parties.

[269] During the hearing, the Court expressed concern that a number of the noise (and vibration) requirements in CNVMP 1 stated as being mandatory had not been included in Version 1 of the proposed conditions. We are pleased to note that Version 3 of the proposed conditions includes the following mandatory provisions replicated from CNVMP 2:

- proposed condition 30B requiring a 2m high acoustic barrier with a minimum surface weight/surface mass of 10 kilograms per square metre to be erected along the boundary of the site of 9-15 Carrick Place (the retirement village) prior to construction and to be in place until all construction is completed.
- proposed condition 32 E for noise and vibration monitoring to be undertaken at the first occurrence of rock breaking.



[270] Ms Wilkening agreed that the wording of proposed condition 30 of Version 3 should be consistent with that in proposed condition 29B, and that the words "sensitive to noise" should be inserted after "occupied buildings" in proposed condition 30. This amendment needs to be made as it does not yet appear in Version 3 of the proposed conditions.

[271] We also have a concern about the wording of condition 8(i) which refers to the CNVMP setting our 'details of the management and mitigation measures required to comply with the relevant noise and vibration criteria as set out in conditions 30, 31, 32'. The word 'criteria' is imprecise, misleading and unnecessary and the condition should be reworded to read:

Details of the management and mitigation measures required to comply with conditions 29A to 32E inclusive.

[272] We note that other conditions may need to be added and amended as a consequence of this decision and particularly the review of the approach to conditions we require.

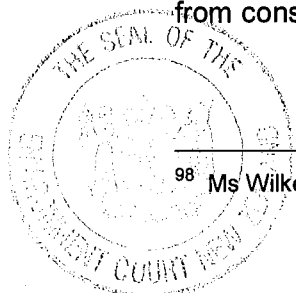
Noise and vibration monitoring and surveys

[273] Proposed condition 32E requires that noise and vibration monitoring is to be undertaken during the first occurrence of rock breaking, signature hole analysis (test blast), production blasting and any other activities that are predicted to exceed the noise or vibration limits. It then requires that the results of this monitoring are to be used to verify the appropriateness of the methodology to undertake the works within the noise and vibration limits prescribed in proposed conditions 29-32.

[274] Ms Wilkening's opinion was that the avoidance of cosmetic building damage (under AUP Rule E25.6.30) could be achieved if high-vibration works are undertaken no closer than 10 metres from neighbouring residential buildings nor more than 7 metres from commercial buildings.⁹⁸ If undertaken closer than these distances, she said that there would be the potential for cosmetic building damage such as plaster and paint cracking - although this should be repairable.

[275] In this context, proposed conditions 32A and 32B require building condition surveys to be undertaken prior to construction commencing, during construction if the measured vibration exceeds the cosmetic building limits and/or in response to any reasonable claim of damage from construction vibration and at the completion of construction.

⁹⁸ Ms Wilkening, evidence-in-chief at [3.8].



[276] Proposed condition 32C sets out the methodology for undertaking the building condition surveys and proposed condition 32D the procedure to be followed for undertaking repairs if there has been construction related damage.

[277] If they sought to have the building condition surveys peer reviewed, and if this resulted in a difference of views, the s 274 parties sought that there be a condition for arbitration or mediation for resolving any differences. Panuku responded that it did not consider that providing a condition for this was appropriate based on concerns about enforceability and the potential for Panuku to have to meet the costs of such a process.⁹⁹

[278] Mr Dexter sought reassurance from Ms Wilkening that vibration from the rock breaking or blasting on the site would not trigger the damage or in the extreme the collapse of the two very heavy chimneys in his house at 105 Valley Road.¹⁰⁰ Her response was that the vibration levels which would be received even at the closest houses would be relatively low and in her opinion from what she had seen and measured, these would not be high enough to cause a catastrophic failure. The predictions of the vibration levels included a 100% safety factor to account for variations in geology.¹⁰¹

Blasting

[279] The proposed conditions Version 3 and CNVMP 2 provide for blasting to be used to speed up excavation. Proposed condition 30A sets out the way in which blasting is to be measured and assessed with a peak sound pressure limit of 120 dB to apply. This condition is consistent with the blasting limits set down in AUP E25.6.31.

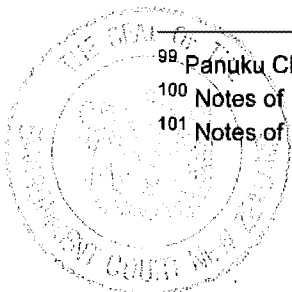
[280] Ms Wilkening advised that blasting could be managed to ensure that the AUP limit applies through the provision of suitable separation distances, limited charge weights and time delayed charge activation.

[281] Counsel for Panuku agreed that the mandatory hours restricting when blasting can be undertaken (in section 5.6 of the CNVMP 2) should also be replicated in Version 3 of the proposed conditions and we require this.

⁹⁹ Panuku Closing Legal Submissions at [2.17].

¹⁰⁰ Notes of Evidence at page 337.

¹⁰¹ Notes of Evidence at pages 337, 338.



Extent of acoustic protection

[282] In response to queries from some s 274 parties about why the Carrick Place acoustic barrier could not be made higher and thicker Ms Wilkening said that the barrier would be erected on top of an existing retaining wall which had the effect of making the wall 3 to 3.5m above the ground level of the adjoining retirement village properties. Her opinion was that a higher and thicker barrier would provide no additional benefit for these properties as the main path of the sound was over or around the barrier and not through it.¹⁰²

[283] Asked by Mr Lange about acoustic protection for those houses sited at higher levels on the opposite side of Carrick Place (including his own), Ms Wilkening said that it would be impractical to erect an acoustic barrier of sufficient height to protect these houses. She added that all of these properties were located at distances of 15m or more from the site¹⁰³ and while she had not recommended any form of acoustic protection for them, under CNVMP 2 the contractor would be required to incorporate customised acoustic protection to match the chosen construction methodology.

[284] In answer to a question from the Court about noise protection for the rock breaking equipment, Ms Wilkening said that fitting noise reduction shrouds to this equipment was well proven technology and that this option could be included in the CNVMP.¹⁰⁴

Health effects

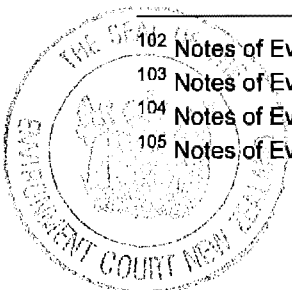
[285] Mrs Smith, a s 274 party and resident of the retirement village, asked Ms Wilkening whether there were any contingency plans for neighbours who might suffer serious stress and medical problems from the effects of construction noise and vibration.¹⁰⁵ Ms Wilkening replied that construction was never quiet, and that while there was a package of proposed mitigation measures, in the end there was only so much that could be done to reduce construction noise. She said that while the CNVMP included the option for temporarily relocating someone on a case by case basis, the effects of relocation on the individual needed to be very carefully assessed. In answer to a follow up question from the Court, Ms Wilkening confirmed that temporary relocation was an option on a case by case basis if it was shown that there was stress or serious health issues arising during construction.

¹⁰² Notes of Evidence at pages 396, 397.

¹⁰³ Notes of Evidence at page 450.

¹⁰⁴ Notes of Evidence at page 807.

¹⁰⁵ Notes of Evidence at page 345.



[286] Mr Lala was asked whether the proposed Community Liaison Group should be involved in assessments for temporary relocations in exceptional cases where all of the practicable noise and vibration management measures had been implemented and significant noise effects were still predicted.¹⁰⁶ He responded that the CNVMP required that advice on this be sought from an acoustic expert, and that while relocation could also be discussed with the Community Liaison Group, the final decision would be for the affected party and the consent holder to make.¹⁰⁷ We question his understanding of the position. While the affected party would certainly need to agree to relocation it would be up to the consent holder to support, fund and potentially arrange a suitable relocation.

Community Consultation

[287] Proposed condition 8(g) requires the CNVMP to include details as to when higher noise and vibration levels can be expected, the likely sources of noise and vibration, the methods for monitoring and reporting on noise and vibration, working hours, a contact phone number for registering concerns and the scheduling of works to avoid the worst of the effects for the receiver. These have been provided for in section 5.7 of CNVMP 2.

Evaluation against AUP provisions

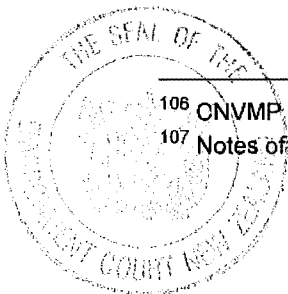
[288] As noted in the table at the start of this section, under AUP E25.8.2(1) the matters of discretion for noise and vibration are restricted to the noise and vibration effects on adjacent land uses particularly activities sensitive to noise and measures to avoid, remedy or mitigate the adverse effects of noise. These are broad matters of discretion.

[289] There are a number of assessment criteria (as set out in the table) to consider for noise and vibration to inform making a decision as to whether or not a restricted discretionary consent should be granted to enable the required site works to be undertaken for the proposed development. We deal with each of these in turn before considering relevant objectives and policies.

[290] We note that assessment criterion (a) refers to not generating 'unreasonable noise and vibration levels on adjacent land uses particularly activities sensitive to noise', with assessment criterion (b) elaborating on what might inform a decision on what is 'unreasonable' and assessment criterion (c) referring specifically referring to the effects on amenity generated

¹⁰⁶ CNVMP section 6.1, final bullet point.

¹⁰⁷ Notes of Evidence at page 783.



by vibration.

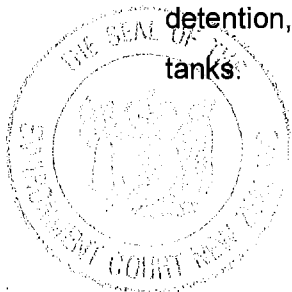
[291] Considering (b)(i) the extent to which the noise or vibration generated by the activity will occur at times when disturbance to sleep can be avoided or minimised, the hours when noisy activities can be undertaken are outside of sleeping times for most people. For (b)(v) physical works are to be largely carried out during daylight hours, with an accepted exception for transport onto and off the site of oversize plant equipment such as cranes and large machinery, and building elements such as pre-cast steel with the approval of the Council.

[292] In terms of (b)(ii) there is the potential for noise to be incompatible with activities occurring in the surrounding area, such as for those in the retirement village living close to the site. That is the reason for conditions limiting and dealing with unacceptable incompatibilities for residential activities and for strengthening the conditions for residents of the retirement village.

[293] For (b)(iii) effects will be limited in duration, or frequency or by hours of operation in conditions as we have found. Under (b)(iv) the noise and vibration will exceed the existing background noise and vibration levels in that environment. The proposed conditions require considerable amendment to bring the cumulative levels to a reasonable level.

[294] Assessment criterion (c) deals with (the extent to which the effects on amenity generated by vibration from construction activity are to be addressed. For (c)(i) under proposed condition 12(b) the consent holder is required to provide the neighbours with written advice to include a brief overview of the construction works, the mitigation to be implemented, details of the monitoring to be undertaken where concerns about noise or vibration are raised, the working hours, a contact phone number for any concerns regarding noise and vibration, construction traffic or any other matter associated with the works and copies of the CNVMP, CMP and CTMP.

[295] Concerning whether the vibration effects can be shown to have been minimised by the appropriate assessment of alternatives under (c)(iii), we were told that the design of the development has been based on keeping the basement level providing for stormwater detention and car parking as high as possible so as to minimise the volume of excavation required. An alternative design without car parking would still have had to provide stormwater detention, which would involve considerable vibration during the excavation of the detention tanks.



[296] Assessment criterion (d) is 'whether the measures to minimise the noise or vibration generated by the activity represent the best practicable option'. We note that the RMA (and the AUP) defines the 'best practicable option' as:

Best practicable option, in relation to ... an emission of noise, means the best method for preventing or minimizing the adverse effects on the environment having regard, among other things, to –

- (a) The nature of the ... emission and the sensitivity of the receiving environment to adverse effects; and
- (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
- (c) The current state of technical knowledge and the likelihood that the option can be successfully applied.

We did not have sufficient certainty about the construction methodology and any evidence about comparators that would provide the basis for a reliable finding in relation to the 'best practicable option'.

Overall Finding

[297] There is no disagreement that in order to form the building platform, rock breaking (and most likely blasting) will be required and that the construction noise and vibration levels when these activities are undertaken will not meet the relevant AUP noise and vibration standards for quite extended periods at a number of the neighbouring properties.

[298] In consequence, a range of measures have been proposed to mitigate the adverse effects of non-compliances. We summarise these as follows:

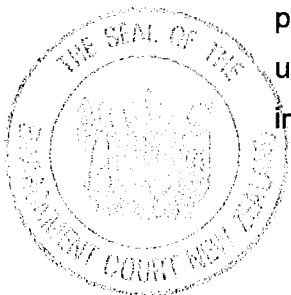
- The times when rock-breaking can be undertaken are to be restricted to the hours of 8am to 6pm on weekdays and from 8am to 1pm on Saturdays and blasting between the hours of 9am and 5pm Monday to Friday and at set times.
- A key requirement of the design brief has been to minimise the volume of rock to be excavated by setting the basement levels as high as possible.
- It is not possible to reduce the volume of rock to be excavated for the detention tanks as the volume and levels of these tanks are fixed by the stormwater requirements for the site.
- An acoustic barrier is to be erected along the boundary with 9-15 Carrick Place (the retirement village).



- Where effective acoustic screening cannot be provided for other properties on Carrick Place, proposed condition 29C allowing the noise limits to be exceeded by 5dB will not apply as these properties are all further than 15m from the site boundary.
- As detailed in section 5.5 of CNVMP 2, initial rock breaking is to be undertaken at the perimeter of the site to enable monitoring of the highest vibration levels and to mitigate the vibration transfer from subsequent rock breaking.
- A community liaison group (CLG) is to be established (under proposed conditions 4 and 5) and there is a notification requirement (under proposed condition 12) for the consent holder to provide progressive information to the neighbours when rock breaking and/or blasting.
- Under proposed conditions 32B, 32C and 32D, there is a requirement for pre and post condition surveys to be undertaken for neighbouring buildings and dwellings, with the consent holder to be responsible for making good any damage caused by the site works.

[299] Having identified the key mitigation measures proposed, we make the following findings about the adverse effects of construction noise and vibration:

- (a) In order to form the building platform, rock breaking (and most likely blasting) cannot be avoided;
- (b) The noise and vibration levels from these activities will not meet the relevant AUP construction noise and vibration standards for permitted activities;
- (c) The hours when noisy activities can be undertaken are outside of sleeping times for most people, and are a compromise over the alternative of having longer hours and a lesser overall construction period;
- (d) The chosen design minimises the volume of rock to be excavated and the time required for this excavation;
- (e) The CNVMP requirement for the initial rock excavation to be undertaken at the perimeter of the site to limit vibration on neighboring properties when excavation is undertaken over the balance of the site needs to be reinforced through its replication in the proposed conditions;



- (f) Contingent on the conditions which require a 5-day notice period for informing neighbouring residents and for prior Council approval to be obtained on each occasion that such activity is planned, in order to limit disruption to daytime traffic movements on the surrounding road network, oversize plant and equipment may be brought onto and taken off the site outside of normal construction hours;
- (g) There would be no additional benefit gained from increasing the height or density of the acoustic barrier to be erected along the boundary with 9-15 Carrick Place (the retirement village) over that provided for in proposed condition 30B;
- (h) Customised noise protection measures which match the chosen construction methodology are to be provided by the contractor in accordance with the requirements prescribed in section 5.4 to 5.6 of the CNVMP;
- (i) There are to be defined procedures for keeping local residents informed about planned construction activity with details to be provided for residents to contact the responsible person on site;
- (j) The s 274 parties' request for the inclusion of an arbitration or mediation condition for an owner to have a building condition survey peer reviewed is not supported;
- (k) As the volume of rock to be excavated and the contractor's construction methodology are both unknown at this time, limited reliance can be placed on the estimates of how long rock breaking and blasting might take;

[300] As already indicated we are unclear about what is intended by proposed condition 32 (we assume the vibration limits for the effects on people's amenity). That states:

Vibration levels arising from construction activity on the site shall not exceed, as far as practicable, 2 mm/s peak particle velocity in buildings in any axis when measured in the corner of the floor of the storey of interest for multi-storey buildings, or within 500mm of ground level at the foundation of a single-storey building as specified in AUP (OP) E25.6.30(1)(b).

[301] We are aware that CNVMP section 3.3 Vibration states:

Where construction vibration from daytime works (8am to 6pm) is predicted to exceed 2 mm/s PPV for more than three days, the occupants of all buildings within 100m must be advised of the works no less than 5 days prior to the works commencing and the vibration level must not exceed 5 mm/s (Section 5.7).

[302] That comes after a description of guidance in Section 3.2 British Standard BS 5228-2:2009 "*Code of practice for noise and vibration control on construction and open sites – Part 2: Vibration*" as providing guidance on the amenity effects of vibration as follows:



- 0.14 mm/s PPV Just perceptible in the particularly sensitive environments
- 0.3 mm/s PPV Just perceptible in normal residential environments
- 1 mm/s PPV Typically acceptable with prior notification
- 10 mms/ PPV Likely to be intolerable for any more than a very brief period.

[303] We note that assessment criterion E25.8.2(1)(c)(iv) is:

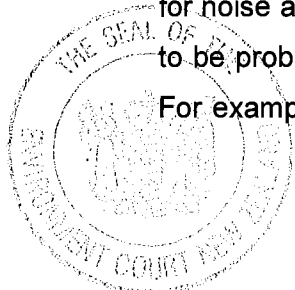
the extent to which the effects on amenity generated by vibration from construction activity ... are reasonable taking into account the level of vibration and the duration of the activity (where levels of 10mm/s peak particle velocity may be tolerated only for very brief periods).

[304] We question what the qualification 'as far as practicable' is intended to cover, given its lack of certainty and why it is needed. A vibration limit of 5 mm/s (if that is justified) should be in proposed condition 32 and not just in the CNVMP. We require further consideration of these points.

[305] We are not persuaded that the conditions proposed to deal with construction noise and vibration will mitigate them to an acceptable degree to avoid adverse effects on the neighbours, particularly those in the retirement village. This difficulty has arisen because consents are being sought by Panuku as landowner rather than as the developer of the project. If Panuku was the developer, the construction methodology is likely to have been more carefully thought through and we are likely to have received a more detailed plan about what could be achieved in terms of mitigation. Although it is always a matter for an applicant, in our view where, as in this case there are sensitive receivers very near to a proposed development, it may be preferable for a more detailed construction methodology to be presented with the application rather than leaving it to be determined at a later date through a CNVMP process.

[306] By its nature a management plan is designed to be adaptive in its approach to meeting bottom line requirements. This is desirable given the need for a flexible and responsive approach to be taken during construction. The degree of flexibility provided is however always the issue and the question must also be asked, who does this flexibility benefit?

[307] As it was presented to us, the CNMVP in this case, while containing reference to limits for noise and vibration, was short on what would be done if noise and vibration effects prove to be problematic for the neighbouring residents, particularly those in the retirement village. For example, what if the ongoing effect of construction noise and vibration causes distress



and impacts on the health and wellbeing of the retirement village residents? In our view, the measures signaled as options in the CNVMP were insufficiently detailed and certain to satisfy us that such measures would adequately deal with any adverse noise and vibration effects on residents.

[308] In this case, the best estimate is that construction will occur over a 6-7 month period and it may (and we consider mostly likely) will include blasting. There was little definitive information provided about how long this process would last or how long noisy equipment would be operating each day within the specified daily hours set out in the conditions. All of this is left until the detailed design stage of the project.

[309] As well as this lack of detail, we received very little evidence about the residents of the retirement village as no social impact assessment was presented to us by either Panuku or the Council. This need not have been an expensive exercise given that the village is small. We do not know for example if any of the residents are housebound, whether any have special health needs or whether they have other places to go during the day when particularly noisy parts of the construction programme are likely take place. The example of the Campbell Road project provided by Ms Wilkening, while informative was not particularly useful because there was not enough detail provided about it for us to make a valid comparison with projected excavation at the Dominion Road site.

[310] The other submission we had was from Mr Lange who described the excavation that took place recently next door to him as follows:¹⁰⁸

... it probably went on for a month, probably about 10 truckloads of rock came out They needed to get a drive-through so they had to remove that whole small hill of solid basalt so they brought in quite a substantial digger they kept some of the rocks for themselves.

And it's one of those things ... but the fact is that it just became quite – I mean on one level you kind of got used to it, but on another level you realized it's a bit like hitting your head on a wall, it's so nice when it stops ... I took a walk to the top of Mount Eden one day and you could hear it up there, it's quite a loud noise. ...

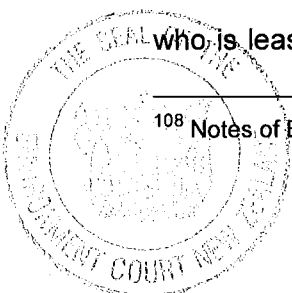
They were there for a good six hours every day ... but they certainly weren't there on Sundays ... And Saturdays maybe not so much ...

...

[The real issue was] mostly the noise [as opposed to the vibration].

[311] The proposed mitigation measures in the CNVMP in the main leaves the decisions about whether to implement them to the developer (albeit in conjunction with the Council). In our view this places the "power" of the decision about mitigation in the hands of the person who is least affected by it and correspondingly provides no certainty to those who are most

¹⁰⁸ Notes of Evidence at pages 746-749.



likely to be affected by the potentially adverse effect.

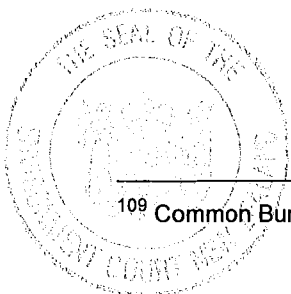
[312] In our view, a situation could well arise where because of noise and vibration effects residents from the retirement village should have the option of being relocated during the day for some of the construction period. The CNVMP provision about this is, for the reasons we express above inadequate. Given this is a significant area of concern to us, we have decided to allow the parties further time to see if they can come up with an acceptable resolution or if not, proposals upon which we can make a final determination about the matter. To provide some guidance, in our view it is reasonable for affected parties to engage in some "self-help." If for example they have options to leave their homes during the day for some of the time at no cost to themselves, then it is reasonable for them to do so. If however, this is not an option or the nature of the very noisy construction activities is longer than several weeks, then it would be reasonable to expect Panuku to relocate them and/or compensate them in a meaningful way. The expectation is that whatever is offered is certain and not reliant on the developers sole approval at a later date.

Flood hazard risks and stormwater

[313] In this and the following section we deal with Issue 4, namely are any other potentially adverse effects relating to flooding and stormwater and those relating to ground contamination and earthworks able to be avoided, remedied or appropriately mitigated in line with the matters discretion is restricted to and considering the relevant objectives, policies and assessment criteria in the AUP?

[314] The issue of concern to the s 274 parties about flooding and stormwater was raised by Mr Dexter who questioned whether the new development would divert stormwater from the site onto neighbouring properties.

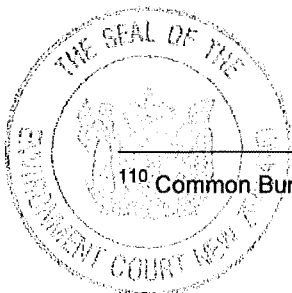
[315] Evidence about the way in which natural hazards, flooding and stormwater are to be managed in the completed development was provided by Mr JM Kirkman, a senior civil engineer with Beca Ltd. We were also referred to the supporting Beca Civil Infrastructure Report which was also prepared by Mr Kirkman.¹⁰⁹



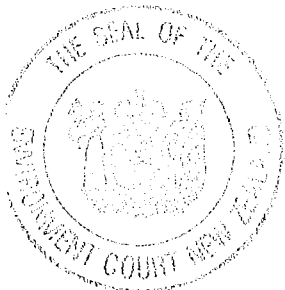
Flooding hazard risk*The AUP provisions*

[316] The *Flow Chart* prepared by Mr Lala and Mr Pope identified the following natural hazard and flooding provisions in the AUP as being relevant to the restricted discretionary assessment of natural hazards and flooding for the development.¹¹⁰ The table outlined below sets out the relevant activities arising from the proposed development that require this issue to be addressed, as well as the relevant matters of discretion and assessment criteria that apply.

Activities in the 1 per cent exceedance probability (AEP) floodplain	
E36.4.1 (A26)	Below ground parking.
E36.4.1 (A38)	Use of new buildings to accommodate more vulnerable activities
E36.4.1 (A42)	Any other buildings or other structures including retaining walls...
Relevant matters of discretion	
E36.8.1 (5)	For below ground parking... (a) the effects of the location of the structures and building platforms ... (d) the effects of the location and design of roads, accessways and parking areas.... (f) the effects of potential changes in flood depth, velocity and frequency on adjoining sites, including upstream and downstream from buildings and structures.... (g) the extent to which methods for long term maintenance of areas affected by flooding such as easements are provided for ...
E36.8.1 (9)	For new structures and buildings.. (a) the effects of the location of the structures and building platforms ... (d) the effects of the location and design of roads, accessways and parking areas ... (f) the effects of potential changes in flood depth, velocity and frequency on adjoining sites, including upstream and downstream from buildings and structures.... (g) the extent to which methods for long term maintenance of areas affected by flooding such as easements are provided for



Relevant matters of discretion (continued)	
E36.8.1 (13)	For any buildings or structures located in an overland flow path ... (c) the extent to which the design of the building allows for safe access..
Relevant assessment criteria	
E36.8.2(5)	For below ground parking... (a) whether the parking can be located outside of the 1%AEP floodplain so as to not block or impede the flood hazard (b)...how the parking area can be designed and managed to minimise any increase in flood related risks to people and property on the site and to other properties upstream or downstream of the site...
E36.8.2(9)	For new structures and buildings.. (b) where the building cannot be practically located outside or above the floodplain, how the building can be designed to minimise increase in flood related risks experienced by other properties... (c) whether buildings likely to be affected by flood waters should be wet proofed or dry proofed...
E36.8.2(12)	For diverting the entry or exit point (a) the extent to which the continuity of the overland flow paths both within the site and upstream will be maintained; (b) the extent to which and how the effects on other properties from the diversion or alteration of the overland flow path will be avoided or mitigated; ... (e) the extent of long term maintenance proposed, ensuring that, when appropriate, an easement in favour of the Council is created to limit further changes to the overland flow path.
Relevant objectives and policies	
E36.2(1) (Objective)	This Objective refers to subdivision outside of urban areas and is not relevant
E36.2(2) (Objective)	Subdivision use and development including redevelopment in urban areas only occurs where the risks of adverse effects from natural hazards to people, buildings infrastructure and the environment are not increased overall and where practicable are reduced taking into account the likely long-term effects of climate change.
E36.2(5) (Objective)	Subdivision use and development including redevelopment is managed to safely maintain the conveyance function of floodplains and overland flow paths.
E36.3 (Policies) General, Floodplains in urban areas, Floodplains General	The General Policies are (1) (a) to (d), 2, 3 (a) to (k), 4 (a) to (d) The Urban Floodplain Policies are (13) (a) and (b), 14 (a) to (e) and 15 The relevant content of each of these policies is addressed in detail in the Matters of Discretion and Assessment Criteria listed above.



What is proposed to deal with flood hazards?

[317] As will be evident from the AUP flood hazard provisions identified by Mr Lala and Mr Pope, the site is located within a 1% AEP floodplain. Overland flow-paths enter the site from the north and east before combining and flowing out onto Valley Road and from there along Valley Road towards Dominion Road.

[318] Proposed condition 61 requires that the development does not result in any increase in peak flows from the site during a 1% AEP event and proposed condition 62 provides that the development does not increase peak flows and water levels of overland flow paths on other properties in the vicinity of the site including Dominion and Valley Roads.

[319] Our understanding from the Beca Infrastructure Report is that in preparing his assessment of these flood hazards, Mr Kirkman reframed the AUP assessment criteria E36.8.2(12) (a) and (b) to read:

The 1% AEP flood works must¹¹¹:

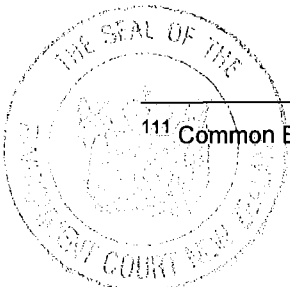
- maintain the same entry and exit point of the overland flow path(s) at the site boundaries;
- must not alter the volume and velocity of water flow at the boundaries;
- must not cause additional adverse flooding effects on neighbouring sites; and
- that alterations are permitted to the overland flow path(s) within the site.

We accept that this reframing is a reasonable interpretation of E36.8.2(12).

[320] The new development will displace some 1,211 cubic metres of floodwater storage currently provided in a more or less bowl-shaped depression located in the middle of the existing site. With Mr Kirkman's reframed assessment criteria requiring that the volume and velocity of the water leaving the site must be maintained, two underground stormwater detention tanks are to be constructed on the site. The combined volume of these tanks will be the same as the displaced volume (1,211 cubic metres).

[321] The northern overland flow-path will be collected at the northern boundary of the site and conveyed in a channel along the line of the northern boundary to the first flood detention tank. Once this tank is full, water will flow through a pipe to the second detention tank. When both tanks are full, stormwater will then discharge from the second tank into Valley Road. After a storm has passed, the water in the detention tanks will empty through soak holes drilled

¹¹¹ Common Bundle at page 1068.



under each tank into the underlying fractured basalt.¹¹²

[322] The eastern flow-path travels along open space between residential buildings before it enters the site. From here, the new development has been designed to redirect this flow-path south in an open channel to exit onto Valley Road approximately 40m upstream from the current exit location. Mr Kirkman said that this 40m length of Valley Road can accommodate the additional 1%AEP flow without adversely affecting flood risks to existing buildings. The flow-path will then re-join its original path at the corner of Dominion and Valley Roads.

[323] The Beca Infrastructure Report records that the design of the new development has been based on the interpretation of E36.8.2(12) that the exit point may be anywhere on Valley Road and Dominion Road.¹¹³

[324] A bund which will provide 140mm of freeboard above the 1% AEP flood level is proposed to be formed at the entry to the basement carpark to prevent floodwater from the eastern flow path from entering the carpark.

[325] The podium level has been set a minimum of 500mm above the 1% AEP flood level.

Findings - flood hazard risk

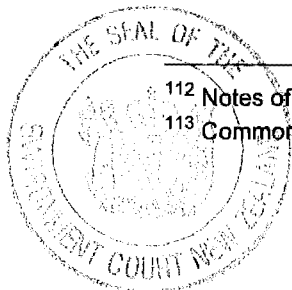
[326] Mr Kirkman's uncontested evidence was that the proposed stormwater design for the site meets assessment criteria E36.8.2(12) as he reframed it. We accept his evidence that:

- the existing entry and exit points of the overland flow path(s) at the site boundaries have been maintained;
- the volume and velocity of water flow at the boundaries have not been altered;
- there will be no additional adverse flooding effects on neighbouring sites;
- all alterations to the existing overland flow path(s) have been contained within the site.

[327] In terms of the other assessment criteria in E36.8.2, we accept that if car-parking is to be provided in the development, it will need to be located in a below ground car-park which is

¹¹² Notes of Evidence at page 299.

¹¹³ Common Bundle at page 1068.



located within the flood plain.

[328] We find that adequate consideration has been given to the management and minimisation of flood related risks to people and property on the site. This includes the requirement for the bund to be constructed at the entrance to the car-park and the minimum clearance to be provided between the podium level and the 1% AEP flood level.

[329] We were not provided with any evidence about assessment criteria E38.8.12 (c) concerning the extent of any long-term maintenance proposed and whether there should be an easement in favour of the Council to limit further changes to the overland flow path. We leave this for the consent holder to resolve directly with the Council.

[330] Taken overall, we are satisfied that the design of the natural hazard and flooding components of the proposed development will satisfy the relevant AUP objectives, policies, matters of discretion and assessment criteria and will meet the requirements of proposed conditions 61 and 62 and in doing so approve the granting of a restricted discretionary consent for this activity.

[331] Having said this we note that proposed condition 40 as currently worded provides:

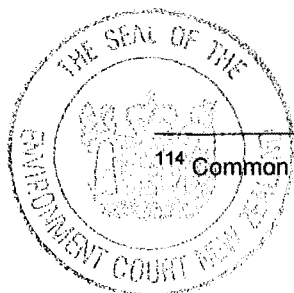
Stormwater: The consent holder shall ensure that the required freeboard to finished floor levels from overland flow paths within and adjacent to the site is maintained.

This condition should be reworded to specify what is required as it is too uncertain as drafted.

What is proposed to deal with stormwater from the site?

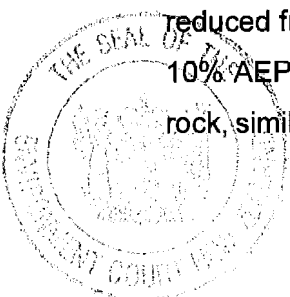
[332] As well, in the flow chart Mr Lala and Mr Pope identified the following stormwater provisions in the AUP as being relevant to the controlled activity consent requirements for the development.¹¹⁴

Stormwater – discharge and diversion	
E8.4.1 (A9)	Diversion and discharge of stormwater runoff from impervious areas greater than 1,000m ² and up to 5,000m ² within an urban area that complies with Standard E8.6.1 and Standard E8.6.3.1 is a controlled activity



Relevant matters of control	
E8.7.1(1)	(a) management of adverse effects on receiving environment buildings and property ... (d) location of discharge points and method of discharge and disposal (e) operation and maintenance requirements; (f) monitoring and reporting; and (g) duration of consent and the timing and nature of reviews of consent conditions.
Assessment criteria	
E8.7.2(1)	(a) whether adverse effects on the environment including buildings and property have been avoided or otherwise managed and mitigated through management practices; (b) whether the proposal has considered any relevant stormwater network discharge consent and/or precinct plan provisions; (c) whether stormwater flows and contaminants have been minimised or managed by using stormwater management devices; ... (e) whether any requirements for soakage, where this is a stormwater run-off disposal method are met
Relevant objectives and policies	
E1.2(3) Objective	Stormwater and wastewater networks are managed to protect public health and safety and to prevent or minimise adverse effects of contaminants on freshwater and coastal water quality
E1.3 (8)-(16) Policies	(8) Avoid as far as practicable, or otherwise minimise or mitigate, adverse effects of stormwater runoff....(a) to (e) (9) Minimise or mitigate new adverse effects of stormwater runoff....(a) to (e) (10) In taking an integrated stormwater management approach have regard to(a) to (e) (11) Avoid as far as practicable, or otherwise minimise or mitigate adverse effects of stormwater diversions and discharges, having particular regard to....(a) to (f) (12) Manage contaminants in stormwater runoff from high contaminant generating carparks.... (13) Require stormwater quality or flow management to be achieved on site.... (14) Adopt the best practicable option to minimise the adverse effects of stormwater discharges from stormwater network and infrastructure... (15) Utilise stormwater discharge to ground soakage in areas underlain by shallow or highly permeable aquifers...(a) to (d) ...

[333] Mr Kirkman's evidence was that the greenspaces proposed to be included in the new development will reduce the impervious nature of the site from the current 100% to 90%. This reduction means that the associated run-off from the site in a 10% AEP storm event will be reduced from 123 l/sec to 114 l/sec. Soakage capacity testing has established that all of this 10% AEP run-off can be disposed of through 5 on-site soak holes drilled into the underlying rock, similar to those currently installed. Stormwater run-off from the site will, therefore, reduce



slightly from that which currently exists.

[334] Proposed conditions 68 to 72 prescribe the way in which stormwater from the site is to be managed. They address the requirements for the soakage and treatment devices, confirmation that the design will not affect the capacity or performance of the stormwater management system, require a pre-construction meeting to be held with the Council and outline the information that is to be provided to the Council ahead of this meeting.

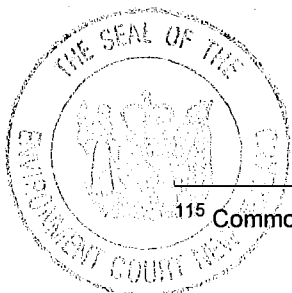
[335] We accept Mr Kirkman's evidence that stormwater from the site will not create any additional load on downstream systems or divert on to adjoining properties. Relying on this evidence, we find that, provided the proposed system is designed, constructed and operated in accordance with the prescribed conditions, the controlled activity consent requirements of the AUP will have been satisfied.

Ground contamination and earthworks issues

[336] A preliminary site investigation undertaken by Tonkin and Taylor in July 2015¹¹⁵ identified that activities that have the potential to cause land contamination as defined by the Ministry for the Environment in the Hazardous Activities and Industries List (**HAIL**) are and have been undertaken on the site. These include the placement of uncontrolled fill, automotive industrial activities, underground storage tanks, above ground storage tanks and buildings containing asbestos products.

[337] Two resource consents are required for dealing with this contaminated land, a restricted discretionary activity consent under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (**NES Soil**) for soil disturbance and a controlled activity consent under the AUP to disturb soil on land containing elevated levels of contaminants.

[338] The planners' flow charts identified the following AUP provisions that need to be addressed.



Restricted Discretionary Consent	
Potentially Contaminated Soil under NES Regulation 10(1) and 10(2)	Under 10(2): (a) a detailed site investigation report must exist (b) the report must state that the soil contamination exceeds the applicable standard in regulation 7; (c) the consent authority must have the report
Regulation 10(3) Matters of discretion	(a) the adequacy of the site investigation; (b) the suitability of the land (c) the approach to remediation (d) the adequacy of the site management plan/validation report (e) the proposed disposal process (f) the requirements for a financial bond (g) the timing and nature of the review of the conditions (h) the duration of the resource consent.
Controlled Activity Consent	
E30.4.1(A6)	Discharges of contamination into air, or into water or onto land not meeting permitted activity Standard A30.6.1.1 to E30.6.1.5
Matters of Control	
E30.7.1	The Council will reserve its control to all of the following matters when assessing a controlled activity resource consent application...[there is a long list of matters, including the adequacy of the detailed site investigation report including risk assessment and the need for and adequacy of a site management plan (contaminated land)].
Assessment Criteria	
E30.7.2	The Council will consider (1) whether the reports and information adequately address the effects of discharge into air, or into water, or onto or into water from contaminated land
Objectives and Policies	
E30.2(1)	The discharge of contaminants from contaminated land into air, or into water or onto or into land are managed to protect the environment and human health and to enable land to be used for suitable activities now and in the future



Objectives and Policies (continued)	
E30.3(2)	Require any use or development of land containing elevated levels of contaminants resulting in discharges to air, land or water to manage or remediate the contamination to a level that: (a) allows contaminants to remain in the ground/groundwater, where it can be demonstrated that the level of residual contamination is not reasonably likely to pose a significant adverse effect on human health or the environment; ... while taking into account (a number of matters including the use of best practice contaminated land management)

[339] Tonkin and Taylor prepared three reports, *Preliminary Site Investigation* dated May 2016, *Detailed Site Investigation* dated April 2017 and *Site Management Plan for Ground Contamination* dated April 2017 (**the SMP**).

[340] Under proposed conditions 42 to 47, the consent holder is required to implement the SMP contained in the April 2017 Tonkin and Taylor report which sets out the procedures for managing potential ground contamination-related effects on human health and the environment during the earthworks phase of the construction. These procedures address earthworks, soil characterization, soil disposal, site management and health and safety during soil disturbance works and compliance documentation after the works.¹¹⁶

[341] Relying on the Tonkin and Taylor reports, the SMP and the conditions and in the absence of any evidence to the contrary, we find that there is no barrier to granting consents required under the NES and the AUP for the management of contaminated soil during the development of the site.

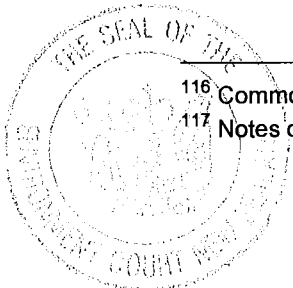
[342] As identified by Mr Bannan the reference in condition 44 should be to section 5 of the 2016 edition of the Good Practice Guide.¹¹⁷

Traffic issues

[343] In this section we deal with Issue 5, namely are the parking provisions and traffic effects adequately dealt with and consistent with the relevant objectives, policies and assessment criteria in the AUP?

¹¹⁶ Common Bundle at page 1239.

¹¹⁷ Notes of Evidence page 786, Reply submissions on behalf of Panuku, dated 24 September 2019 at [4.19].



[344] On the basis that the proposed new development was fully operational, the key traffic and parking issues raised by s 274 parties were:

- the adequacy of the carparking on the site;
- safety and congestion concerns for the Valley Road access;
- safety and congestion concerns for the Carrick Place access.

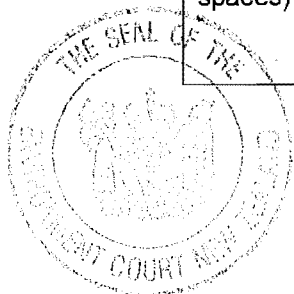
[345] Expert evidence on these issues was provided by Mr DJ McKenzie for Panuku and Mr TP Church for the Council, but the evidence of the s 274 parties on the last two issues were also important as they experience the local traffic environment on a daily basis, and most have observed these changes over a number of years.

AUP provisions

[346] The Flow Chart prepared by Mr Lala and Mr Pope identified the following AUP provisions as being relevant to the restricted discretionary assessment of transport (traffic and parking) for the development.

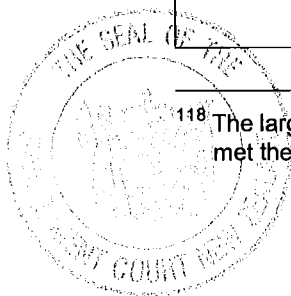
[347] However, by the end of the hearing the traffic experts had modified the proposal to incorporate the required minimum number of parking spaces and to meet the standards for the design of parking and loading spaces for all but seven parks.

Size, Number and Location – Parking/Loading, Vehicle Access	
E27.6.2.1	The Flow Chart has identified this provision which applies to the Business-City Centre Zone. This is incorrect as the correct zone identified under E27.6.2.2 (4) (c) is the Business - Local Centre Zone. For this zone, the applicable parking rates are set out in Table E27.6.2.3 as identified by the traffic experts. This table has no controls for residential parking and a requirement of one space per 30m ² GFA.
E27.6.3.1.1 (Size and location of parking spaces)	This provision includes a table and diagram which set out the minimum parking space and manoeuvring dimensions.
E27.6.3.2 (Size and location of loading spaces)	(1) Every loading space must: (a) comply with the minimum dimensions given in Table E27.6.3.2.1 and (b) be located on the same site ...and be available at all times... Table E27.6.3.2.1 requires a loading space with a minimum length of 18 m and a minimum width of 3.5m



Size, Number and Location – Parking/Loading, Vehicle Access (continued)	
E27.6.4.1(3)(c) (Vehicle access restrictions)	Sufficient space must be provided on the site so vehicles do not need to reverse off site or onto or off the road from any site where....access would be from an arterial road or otherwise within a Vehicle Access Restriction covered by Standard E27.6.4.1. This standard applies to this zone.
Relevant matters of discretion	
E27.8.1 (6), (9), (12)	(6) any activity or development which provides fewer than the required number of parking spaces ... (9) any activity which infringes the standards for the design of parking and loading spaces: (a) adequacy for the site and the proposal; (b) design of parking, loading and access; (c) effects on pedestrian and streetscape amenity; and (d) effects on the transport network. (12) construction or use of a vehicle crossing where a Vehicle Access Restriction applies under Standard E27.6.4.1(2) and Standard E26.6.4.1(3); (a) adequacy for the site and the proposal; (b) design and location of the access; (c) effects on pedestrian and streetscape network; and (d) effects on the transport network.
Assessment criteria	
E27.8.2 (5), (8), (11)	(5) any activity or development which provides fewer than the required minimum number of parking spaces ¹¹⁸ ... (8) any activity which infringes the standards for the design of parking and loading spaces: (a) effects on the safe and efficient operation of the adjacent transport network ; (b) effects on pedestrian amenity or the amenity of the streetscape ... (c) the practicality and adequacy of parking, loading and access arrangements ... [with (a) – (c) particularising considerations to have regard to and only referenced in our decision where necessary] (11) construction of a new vehicle crossing where a Vehicle Access Restriction applies: (i) effects of the location and design of the access on the safe and efficient operation of the adjacent transport network having regard to: (ii) the effects on the continuity of activities and pedestrian movement at street level in the Local Centre Zone; (iii) the practicality and adequacy of the access arrangements considering site limitations, arrangement of buildings and activities, user requirements and operational requirements, proximity to and operation of intersections, having regard to: [particularised considerations and only referenced in our decision where necessary].

¹¹⁸ The large number of matters referred to are not included given the number of parking spaces in the final design met the AUP standard.



Relevant objectives and policies	
E27.2(1) – (5) Objectives	(1) Land use and all modes of transport are integrated in a manner that enables: (a) the benefits of an integrated transport network to be realised; (b) the adverse effects of traffic generation on the transport network to be managed. (2) An integrated transport network including public transport, walking, cycling, private vehicles and freight, is provided for. (3) Parking and loading support urban growth and the quality compact urban form. (4) The provision of safe and efficient parking, loading and access is commensurate with the character, scale and intensity of the zone (5) Pedestrian safety and amenity along public footpaths is prioritised.
E27.3 (1), (3), (6), (6A), (8), (9), (14) – (18), (20) – (22) Policies	Those policies of particular relevance are referred to where necessary in the decision.

Is the parking provided on the site adequate?

Carparks

[348] At the start of the hearing we were told that a total of 108 carparks had been provided for in the new development comprising 104 residential spaces at basement level, three retail spaces “at grade” accessed from Carrick Place and one “at grade” loading space also accessed from Carrick Place.

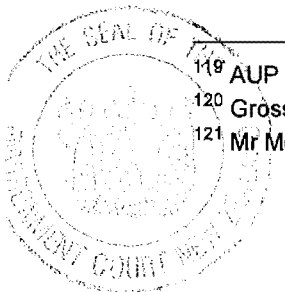
[349] Mr McKenzie confirmed that the AUP had no controls for residential parking¹¹⁹ at this location, whereas for retail activities, 1 parking space was required for each 30m² of GFA.¹²⁰ While this retail requirement would equate to 11 carparks, in his opinion the three carparks provided for the retail spaces proposed by Panuku were reasonable and appropriate because of the prime location of the site adjacent to Dominion Road and its transport links. While he said that this under-provision would be a “technical non-compliance” with the AUP, in his opinion it would not result in any significant, noticeable or measurable adverse effects.¹²¹

[350] Mr Church supported Mr McKenzie’s rationale for limiting the number of retail parking spaces to three. He said that Dominion Road had a high frequency bus route, there were a number of time-managed on-street parking spaces, and three spaces could operate in a complementary manner to the surrounding retail spaces.

¹¹⁹ AUP Table E27.6.2.3.

¹²⁰ Gross Floor Area.

¹²¹ Mr McKenzie, evidence-in-chief at [3.4].



[351] Notwithstanding this evidence, following the questioning of Mr McKenzie by the s 274 parties about the adequacy of the car parks proposed to be part of the development, the Court requested both experts to reconsider their evidence about the scale of the resident and retail parking to be provided on the site.

[352] In response, from his review of a number of residential developments in Auckland which he and his firm had been involved with over recent years, Mr McKenzie said that consents had been granted for on-site parking ratios of between 0.8 and 1.1 spaces per unit inclusive of resident and visitor parking. He referred to an industry standard which was based on the *New South Wales Roads and Maritime Services Guide to Traffic Generating Development*. For a high density residential development with ready public transport services available, the advice in this guide was to provide 0.6 spaces per 1-bedroom unit, 0.9 spaces per 2-bedroom unit, 1.5 spaces per 3-bedroom unit and 1 visitor space for every 5 units. For the proposed development, this would result in 87 resident spaces and 19 visitor spaces, or a total of 106 spaces averaging at 1.15 spaces per unit.

[353] Because of the ready availability of public transport services on Dominion Road, Mr McKenzie considered that an average of 1 space per unit would be more appropriate (a total of 92 spaces) and further, because the AUP did not set a maximum or minimum ratio, he said that a reasonable target would be an on-site ratio of 0.9 spaces inclusive of resident and visitor parking (or a total of 83 spaces).¹²²

[354] Mr Church provided us with a quite lengthy and somewhat discursive statement about parking provisions without listing any specific recommendations.¹²³ He said that an advantage of reducing the number of residential carparks would be to free up spaces for retail staff parking.¹²⁴

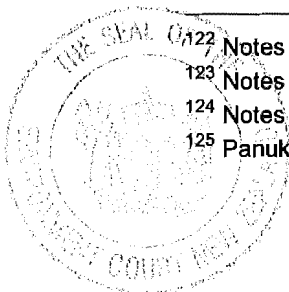
[355] Following these reviews by the two traffic experts, in his closing legal submissions, counsel for Panuku advised that as now prescribed in proposed condition 33, the number of residential spaces in the basement had been reduced from 104 to 93, with 11 spaces to be provided for staff and retail activities.¹²⁵ In addition, the three carparks on the site at the end of Carrick Place had been removed and, commensurately, the size of the loading bay at this location had been increased.

¹²² Notes of Evidence at pages 424-426.

¹²³ Notes of Evidence at pages 460-471.

¹²⁴ Notes of Evidence at page 465.

¹²⁵ Panuku Closing Legal submissions at [2.8]-[2.11].



[356] Accordingly, with these amendments to the design, both the number of retail parking spaces and the size of the loading bay now comply with the relevant provisions of the AUP.¹²⁶ Overall, the changes have resulted in the number of car parks in the development being reduced from 108 (as originally proposed) to 104.

[357] As the number of retail parking spaces now complies with the requirement of E27.6.2.2(4) (c) of the AUP, specific consent for this aspect of the carparking is no longer required.

[358] As the size of the loading bay now complies with the dimensions in Table E27.6.3.2.1, specific consent for the loading bay is no longer required.

Carpark design and operation

[359] Mr McKenzie pointed out that, while most of the perpendicular parking spaces and the manoeuvring aisles in the basement satisfied the relevant AUP requirements, seven of the spaces did not because there was only 6.1m of aisle manoeuvring space compared with the AUP requirement of 6.8m.¹²⁷ He said that he had undertaken a specific vehicle tracking assessment of the usability and practicality of these spaces and that this had shown that they were all workable and suitable for the development.

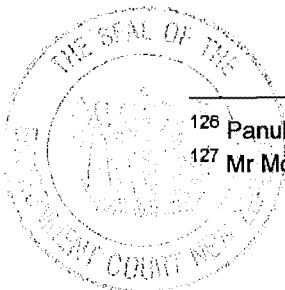
[360] While there would be a number of "blind aisles", he considered these to be acceptable as each space would be assigned to a specific apartment with adequate room for manoeuvring provided through a combination of the use of the parking space and the aisle.

[361] Apart from seven carparks, the remaining 86 carparks in the basement comply with the minimum carparking space and manoeuvring dimensions required under Table E27.6.3.1.1 of the AUP, and specific consent is not required for these.

[362] For the other seven parks which have a small under-provision of manoeuvring space, we accept the evidence of Mr McKenzie that, based on his vehicle tracking assessments, the operation of these spaces will be workable and suitable as will the operation of the spaces at the end of the blind aisles.

¹²⁶ Panuku Closing Legal Submissions at [5.3].

¹²⁷ Mr McKenzie, evidence-in-chief at [3.8].



Cycle parking

[363] To meet the requirements of the AUP, Mr Church assessed that a total of 102 cycle parking spaces would need to be provided comprising 95 secure spaces (92 for residents and 3 for retail users), 5 spaces for residential visitors and 2 spaces for retail visitors.

[364] Proposed condition 34 prescribes that 95 long-term spaces are to be provided internal to the development in a secure location and proposed condition 35 provides that 7 visitor spaces are to be provided at podium level making up the total of 102 spaces,¹²⁸ all consistent with the AUP.

*Are there safety and congestion concerns for the access to and from Valley Road and Carrick Place?**Accessways*

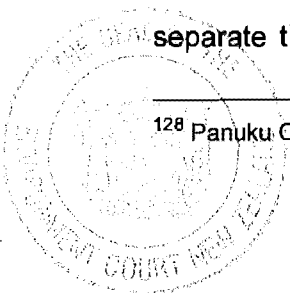
[365] There are to be two vehicle accessways to the site, a two-way driveway from Valley Road located about 60m from Dominion Road and an access from Carrick Place for rubbish collection and the delivery of retail goods and services.

[366] Mr Dexter raised concerns about the safety for children using the footpath to cross the Valley Road accessway on their way to and from school and the residents of Carrick Place had concerns about congestion and safety arising from the proposed use of this accessway by commercial vehicles.

[367] Mr McKenzie advised that the Land Transport Safety Authority (now NZTA) (RTS-6 document) Guidelines for Visibility at Driveways is commonly used in the design of accessways to calculate recommended sight distances, based on operating speed and the classification of the frontage road and the amount of traffic using the accessway. This guideline had been used in the design of the Valley Road accessway which would be 6m wide with the ramp to the basement having a maximum gradient of 1:8 flattening to 1:20 where it meets Valley Road. He said that all of these dimensions met the gradient requirements in the AUP.

[368] The visibility splay recommended in the guideline had also been adopted on the right-hand side for exiting vehicles and on the left-hand side a low wall less than 0.5 m high would separate the driveway from the buffer area and would not restrict visibility for drivers and

¹²⁸ Panuku Opening Legal Submissions at [4.27].



pedestrians.

[369] There would also be a 5m long stopping space on the site to accommodate at least one vehicle between the footpath and the card-controlled access gate to avoid blocking the footpath and the gate would limit the speed of vehicles accessing the site.¹²⁹

[370] Proposed condition 11 requires a Construction Traffic Management Plan (CTMP) to be prepared for certification by the Council. The objective of the CTMP is to ensure that during construction the surrounding road network including the footpaths operate safely and efficiently for all road users, residents and pedestrians.

[371] In proposed condition 11 there is also a requirement that the CTMP provide that construction traffic must not use this access between 8 am and 9am and 3pm and 6pm on weekdays. Also that this access is not be used by construction vehicles between 6pm and 8am apart from night-time deliveries of oversize plant and equipment and building elements. Even though the proposed conditions do not restrict construction traffic from using this access between 8am and 6pm on weekends, this traffic would still need to comply with the lower construction noise and vibration limits which apply after 1 pm on Saturdays and on Sundays.

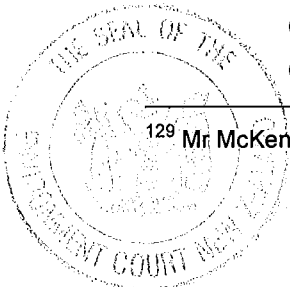
[372] The requirements in condition 11(h) should be a stand-alone condition, with the CTMP only a vehicle for identifying the actions the consent holder needs to ensure that these requirements are met. A new and standalone condition (before Construction condition 11 'Traffic Management Plan') needs to specify the limits on truck movements (such as under a heading 'Restriction on truck movements for construction' as follows:

Truck movements associated with the construction of the development (including the removal of existing buildings and fill) shall not queue to enter, enter or leave the site during the busy commuter peak hours of 8am to 9am and 3pm to 6pm weekdays; and shall not enter or leave the site between the hours of 6pm to 8am. Oversize plant, equipment (such as cranes and large machinery) and building elements (such as pre-cast steel) that would cause significant disruption to the surrounding road network may be brought onto, or taken off, site outside the above times, subject to at least 5 working days' advice to the owners and occupiers of the properties listed below and the approval of the Auckland Council Team Leader Central Monitoring.

The property owners and occupiers to be advised are:

- (i) all units at 9-15 Carrick Place;
- (ii) 111 Valley Road;
- (iii) 109 Valley Road;
- (iv) 107 and 107A Valley Road
- (v) 105 Valley Road;
- (vi) 21A, 21B and 21C Carrick Place;
- (vii) 18 Carrick Place;

¹²⁹ Mr McKenzie, evidence-in-chief at [3.14] – [3.15].



- (viii) 16 Carrick Place;
- (ix) 14 and 14A Carrick Place;
- (x) 12 Carrick Place;
- (xi) All Units at 236, 240 and 242 Dominion Road

[373] Mr Peters raised a concern about trucks forming a queue on Valley Road prior to entering the site to pick up excavated material from the site development works. Mr McKenzie agreed that controls on truck queueing should be provided for in the CTMP and provision for this needs to be included in the proposed condition 11 list of matters to be addressed in the CTMP.

[374] With respect to resident concerns about safety and congestion for the Carrick Place access, Mr McKenzie said that even with the originally proposed four parking spaces off Carrick Place, there would have been less than 10 individual traffic movements per hour at most and in his opinion, these movements would not affect traffic congestion nor safety for this access.¹³⁰

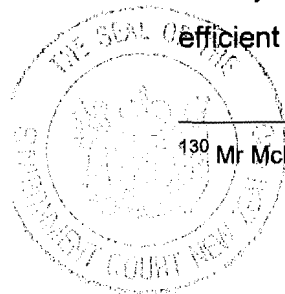
[375] Under proposed condition 13, Panuku is required to provide the Council with details of any agreements reached with Auckland Transport for the Valley Road and Carrick Place accessways onto the site.

[376] With respect to the Valley Road accessway, Mr McKenzie has confirmed that the gradient of this accessway meets the gradient requirement of the AUP E27.6.3.6 (which we note was not identified in the Flow Chart) and therefore a specific consent will not be required for this.

[377] Apart from this, there was no evidence as to whether consent(s) were required for any other aspects of the two vehicle accessways although we do note that locating the loading bay at the end of Carrick Place is consistent with AUP Policy E27.3 (15), which requires "access to loading facilities ...to minimise disruption on the adjacent transport network."

[378] Our finding on the accessways then is that, in terms of Policy E27.3(20), the accessways have been "...designed and located to provide for the safe, effective and efficient movement to and from the site and minimise potential conflicts between vehicles, pedestrians and cyclists on the adjacent road network to a standard which will provide for the safe and efficient operation of vehicles entering and exiting the site". In terms of Policy E27.3(21) "the

¹³⁰ Mr McKenzie, evidence-in-chief at [4.1].



location, number, and design of vehicle crossings and associated access (for the site) provides for the efficient movement of people and goods on the road network." We therefore conclude that the proposed design and conditions appropriately deal with safety and congestion concerns in relation to access to and from the development at Valley Road and Carrick Place.

Traffic Congestion

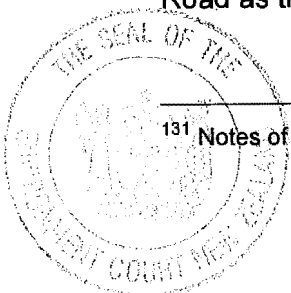
[379] Mr Dexter said that he was concerned about vehicles from the new development adding to the existing congestion in the 7.30am to 9.00am morning peak. In particular, during these hours he had observed a complex set of interactions at the Dominion Road/Valley Road intersection. These included city-bound traffic turning right from Valley Road into Dominion Road and parents driving their children to the Mount Eden Primary School turning right from Dominion Road into Valley Road.

[380] As a resident living opposite the Countdown supermarket, he had observed also that the peak time for traffic using the supermarket was in the evenings between 6pm and 7 30pm when the carpark was full. At these times Valley Road became completely clogged up and traffic turning into Valley Road from Dominion Road often needed to brake suddenly to avoid the line of cars waiting to turn into the supermarket carpark.¹³¹ He asked Mr McKenzie if he had undertaken traffic modelling for this 6pm to 7 30pm period.

[381] Mr McKenzie advised that he had had not undertaken traffic modelling for the early evening times when Mr Dexter said the traffic entering and leaving the Countdown carpark opposite his property in Valley Road was at its worst. The reason for this was that he was satisfied that there would be less traffic on the surrounding network at these times than during the modelled morning and late afternoon peaks.

[382] The peak traffic periods were between 7.30am to 9am in the mornings and in the afternoons, typically from 4pm to 6pm. He said that the collection of traffic data during the times of these peak traffic flows had formed the basis of his assessments of queueing and delays. During the 4pm – 6pm afternoon peak period, the Dominion Road/Valley Road traffic lights were phased to facilitate the passage of the high volumes of traffic using Dominion Road. He said that this phasing had the advantage of allowing relatively unimpeded movements for traffic turning left into Valley Road and at this time there would be few cars parked on Valley Road as their owners would still be at work.

¹³¹ Notes of Evidence at page 230.



[383] His traffic modelling had shown that the additional traffic from the new development would have a minor or less than minor effect on the operation of the adjacent road network including the Dominion Road/Valley Road intersection.¹³² He added that the residents living in the new development would most likely adjust their travel behaviours to respond to the prevailing traffic conditions with, for example, some choosing to use cars and others public transport.

[384] Mr McKenzie's overall conclusions (supported by Mr Church) were that the additional traffic generated by the new development would have minimal impact on the existing levels of traffic on the adjacent road network.

[385] There was no evidence as to whether the traffic effects from the development on the surrounding roading network required consents. On the basis that no specific consent(s) are required and having considered his evidence and responses to questioning from the s 274 parties, we accept Mr McKenzie's conclusion that the operational traffic effects of the Project will be no more than minor and well within the operating capacity of the adjacent road network.¹³³

Conditions

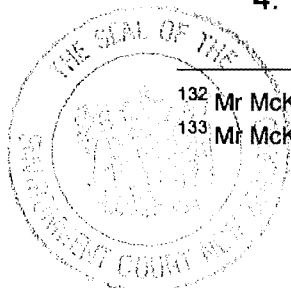
[386] Set out below are the amendments or additions we direct are to be made to Panuku's 12 September 2019 condition set. If it appears that the Court has either misinterpreted or misunderstood the meaning or intent of any particular condition, Panuku and the Council may make a submission about this.

1. Dates are to be added to the covers of the final set of Resource Consent Drawings and the Closing Design Mediation Summary Report. The dates are to be 24 May 2019 as shown in table in Condition 1.
2. A new condition is to be inserted in an appropriate location as follows:

Construction vibration is to be limited to the hours of 8am to 6pm on weekdays and from 8am to 1pm on Saturdays.
3. The wording of condition 30 should be consistent with that in condition 29B with the words "sensitive to noise" being inserted after "occupied buildings" in condition 30.
4. Reword condition 8 (i) to read:

¹³² Mr McKenzie, evidence-in-chief at [3.28-3.29].

¹³³ Mr McKenzie, evidence-in-chief, at [3.29].



Details of the management and mitigation measures required to comply with conditions 29A to 32E inclusive.

5. Amend condition 32E by replacing the words "conditions 29-32" with "conditions 30 and 30A" and add to this condition "Blasting shall be undertaken only between the hours of 9am and 5pm Monday to Fridays and at set times."
6. Consistent with section 5.5 of the CNVMP, a new condition is to be inserted after condition 30 as follows:

In order to enable monitoring of the highest vibration levels at nearby buildings, and to mitigate vibration transfer from subsequent breaking, initial rock breaking is to be undertaken at the perimeter of the rock excavation area"

7. For noise shrouds:
 - (a) a condition is to be included requiring the contractor to fit noise reduction shrouds on all rock breaking equipment;
 - (b) section 5.4.1 of the CNVMP is to be amended to include a provision for the contractor to attach noise shielding shrouds on all rock breaking equipment
8. Condition 40 as currently worded is:

Stormwater: The consent holder shall ensure that the required freeboard to finished floor levels from overland flow within and adjacent to the site is maintained.

The condition is too uncertain as drafted and should be reworded to specify what is required.

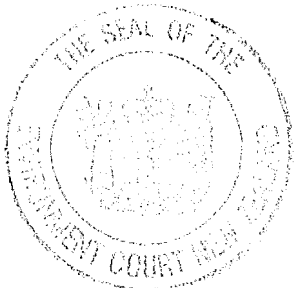
[387] Condition 44 is to be amended to refer to section of the 2016 edition of the Good Practice Guide.

[388] A new condition before condition 11 is to specify the limits on truck movements (such as under a heading 'Restriction on truck movements for construction)' as follows:

Truck movements associated with the construction of the development (including the removal of existing buildings and fill) shall not queue to enter, enter or leave the site during the busy commuter peak hours of 8am to 9am and 3pm to 6pm weekdays; and shall not enter or leave the site between the hours of 6pm to 8am. Oversize plant, equipment (such as cranes and large machinery) and building elements (such as pre-cast steel_ that would cause significant disruption to the surrounding road network may be brought onto, or taken off, site outside the above times, subject to at least 5 working days' advice to the owners and occupiers of the properties listed below and the approval of the Auckland Council Team Leader Central Monitoring.

The property owners and occupiers to be advised are:

- (i) all units at 9-15 Carrick Place;
- (ii) 111 Valley Road;



- (iii) 109 Valley Road;
- (iv) 107 and 107A Valley Road
- (v) 105 Valley Road;
- (vi) 21A, 21B and 21C Carrick Place;
- (vii) 18 Carrick Place;
- (viii) 16 Carrick Place;
- (ix) 14 and 14A Carrick Place;
- (x) 12 Carrick Place;
- (xi) All Units at 236, 240 and 242 Dominion Road.

The new condition will need to be referenced in condition 8(i).

[389] In reviewing the conditions and the Construction Noise and Vibration Management Plan we have concerns further to those we raised on specific conditions during the hearing. We find the approach to conditions and the management plans not in line with good practice. In particular, we find that there are insufficient stand-alone conditions that set out requirements that must be achieved, with many such requirements buried in the list of items to be covered in a yet to be prepared management plan such as the Construction Traffic Management Plan or in the Construction Noise and Vibration Management Plan.

[390] We are not prepared to sign off on the conditions as drafted. A full and considered review of those conditions is required to:

- (a) Ensure requirements are set out in stand-alone conditions;
- (b) Recognise that the proper function and purpose of management plans, to be certified by named Council officers, is to set out how the requirements of those conditions are to be met;
- (c) Redraft the Construction Noise and Vibration Management Plan referred to in the conditions to align with the above approach.

Conclusion

[391] Earlier in this decision we set out the main issues we needed to determine. We answer them as follows:



Issue 1

[392] Does the height, bulk and form of the buildings create adverse effects on the s 274 parties' properties that are to be considered as restricted discretionary activity matters for the Local Centre Zone and THAB Zone, and are these consistent with the relevant objectives, policies and assessment criteria in the AUP?

Yes.

Issue 2

[393] Should the Universal Building be demolished, and if so do the proposed conditions mitigate any adverse effects caused by its loss including in relation to the timing of its demolition and the construction of the proposed development?

Yes.

Issue 3

[394] Are any adverse construction noise and vibration effects on s 274 parties' properties able to be adequately avoided, remedied or mitigated in terms of the relevant objectives, policies and assessment criteria in the AUP?

No.

Issue 4

[395] Are any other potentially adverse effects relating to flooding and stormwater and those relating to ground contamination and earthworks able to be avoided, remedied or appropriately mitigated in line with the matters discretion is restricted to and considering the relevant objectives, policies and assessment criteria in the AUP?

Yes.

Issue 5

[396] Are the parking provision and traffic effects adequately dealt with and consistent with the relevant objectives, policies and assessment criteria in the AUP?

Yes.



Interim Decision

[397] We have decided to issue this decision on an interim basis. As will be evident from our decision, except in relation to construction noise and vibration, we conclude that the appeal could be granted subject to revised conditions.

[398] We have decided that the parties should be given an opportunity to reconsider what is proposed to avoid, remedy or mitigate adverse construction noise and vibration effects in line with what we have identified as problematic in the section on this topic in this decision to see if they can reach agreement about them. If it is thought to be of assistance and the parties agree to it, we will consider making an Environment Commissioner, (not either of the Commissioners involved in this case), available to facilitate and/or mediate a session on the topic.

[399] If the parties are unable to agree, they are to provide memoranda to the Court **no later than Friday 24 April 2020** setting out their respective positions, following which we will consider whether a final decision can issue on the papers or whether the hearing should be reconvened to deal with the remaining issues.

For the Court



M Harland
Environment Court Judge

