



Environment Court of]

Balmoral Community Group (Inc) v Auckland Council (formerly Auckland City Council) [2010] NZEnvC 436 (22 December 2010)

Last Updated: 30 January 2011

BEFORE THE ENVIRONMENT COURT

Decision No. [\[2010\] NZEnvC 436](#)

IN THE MATTER of an appeal under section 120 of the
Resource Management Act 1991

BETWEEN BALMORAL COMMUNITY GROUP

(INC) (ENV-2009-AKL-000378)

AND McDONALD'S RESTAURANTS (NEW

ZEALAND) LIMITED (ENV-2009-AKL-000379)

Appellants

AND AUCKLAND COUNCIL (formerly

AUCKLAND CITY COUNCIL)

Respondent

AND D. BROCKETT

Section 274 Party N. INKPEN

Section 274 Party

A. JOHNSTON Section 274 Party

B. OGILVIE Section 274 Party

I. TRINGHAM Section 274 Party

Hearing at: Auckland on 23 - 27 August 2010

Site visit 23 August 2010

Court: Environment Judge M Harland Commissioner M Oliver
Commissioner K Prime

Counsel: D Kirkpatrick for the Appellant (BCG)
R Brabant and J Brabant for the Appellant (McDonald's) W Lo
Carhachan for the Respondent

Appearances: D Brockett for herself

N Inkpen for himself

K Johnson for himself B Ogilvie for himself

L Tringham for herself

DECISION OF THE ENVIRONMENT COURT

A. The consent is granted subject to conditions.

B. The Appeal by BCG is dismissed.

C. The Appeal by McDonald's in relation to:

(i) Conditions 2 and 42 as amended by ACC and McDonalds is allowed;

(ii) Conditions 4 and 44 is determined in accordance with paragraph 87 of this decision.

D. The Council is to consult with the other parties and then lodge a revised set

of conditions with the Court by 25 February 2011

E. Costs are reserved

Introduction

[1] On 24 July 2009 the Auckland City Council ("**ACC**") granted McDonald's Restaurants (New Zealand) Limited ("**McDonald's**") resource consent to operate a purpose built McDonald's Restaurant and drive-through takeaway facility with a McCafe, associated parking and signage at the Balmoral village shopping centre, Auckland. The consent, granted by Commissioners, was subject to a number of conditions, including restricting the operating hours to between 6am to 10pm, apart from on Friday and Saturday when the closing time was extended to midnight.

[2] The Balmoral Community Group Incorporated ("**BCG**") represents a number of local residents and has appealed the decision in its entirety. McDonald's has also appealed in respect of four of the conditions of consent, the most significant of which relates to extending the opening hours to midnight, 7 days a week. The ACC agrees with McDonald's that two of the conditions and part of another are inappropriate. It however supports the decision under appeal in relation to the restricted hours of operation and the prohibition on erecting a 10 metre high sign at the Balmoral Road entrance to the site. Whilst having regard to the decision of the ACC, we must reconsider the proposal afresh and decide whether consent should be granted at all, and if so, what conditions should attach to it.

The proposal and the parties *The McDonald's proposal*

[3] McDonald's has identified a catchment near the site of approximately 40,000 people which it says, is not currently and conveniently serviced by a McDonald's outlet.^[1] McDonald's believes that this site, which is located in the Business 2 Zone under the Auckland City District Plan ("**the Plan**"), is conveniently and sensibly located near to the junction of two arterial roads.

[4] The restaurant proposed is a 545m² 'full experience' restaurant with 159 seats including the McCafe seating, a drive-through facility, a Playland, outdoor dining and on-site customer parking. The proposal uses the dual frontage and vehicle access to Balmoral Road and Wiremu Street. The restaurant building is a 5.4m high single storey building. Site landscaping includes a 4m wide planting bed along the common boundary with 7 Wiremu Street within which a 3 m high acoustic fence is to be constructed 2m inside the McDonald's site. The original application proposed a 24 hour operation 7 days per week, but during the course of the Council hearing, and now, McDonald's seek opening hours from 6am to midnight, 7 days per week.

[5] In terms of the potential adverse effects that need to be considered, McDonald's identified issues relating to traffic, noise, litter and urban design in relation to the pole sign. Overall, McDonald's accepted that these matters have the potential to affect the residential amenity of the people who live near to the site, but it submitted that these effects will be no more than minor and can be appropriately mitigated.

BCG's position

[6] BCG is a representative body of approximately 60 people from 52 households in the locality. McDonald's identified 11 of those 60 people, or 25% of the group, as living in Wiremu Street. It is fair to say that the main objection by BCG is to the drive-through part of the proposal and the effects that activity will generate. Ms J Tringham, Secretary for the BCG, presented evidence highlighting the group's concerns about the range of adverse effects, primarily caused by the drive-through.[\[2\]](#)

[7] The key issues for BCG were:

- [a] Increased traffic intensity and reduced safety in Wiremu Street and increased traffic conflicts on Balmoral Road;
- [b] A significant reduction in amenity values and the quality of the environment of the local neighbourhood, especially from increased litter, incidental noise and the

traffic effects;

[c] Inconsistency with the objectives and policies of the Plan relating to residential areas, the interface between business and residential areas, and transport;

[d] What it submits is "misplaced reliance" on conditions of consent (especially in relation to opening hours, delivery restrictions, management of off-site effects and urban design issues) which attempt, but it submitted are likely to fail to address fundamental inconsistencies and shortcomings with the proposal.

Section 274 parties' position

[8] There were a number of section 274 parties who attended the hearing: Ms L Tringham, Mr Inkpen and Dr Ogilvie, who reside in Wiremu Street. All supported the position taken by BCG and did not seek to make any other submissions to the Court. Dr Ogilvie cross-examined Mr Burgess (McDonald's traffic engineer), but apart from that, no other party cross-examined any of the parties. Ms L Tringham, Mr Inkpen and Dr Ogilvie all gave evidence and were cross-examined. Their evidence provided an important context to the submissions made by BCG and the very human face to the concerns they had about the potential effects of the proposal. It was clear to the Court that the residents are a strong and supportive group, who value and feel very strongly about the character of their residential area. Mrs Brockett, who holds the license for the childcare centre at the eastern end of Wiremu Street, presented her concerns about the potential change to the amenity of the street and the effect of the increased traffic subsequently making it more difficult for parents to drop off or collect children.

ACC's position

[9] The ACC submitted that consent should not be granted without the imposition of Condition 44 which restricts the hours of operation to 10pm from Sunday to Thursday and midnight on Fridays and Saturdays, and the part of Condition 4 which prevents the erection of the 10 metre high pole sign. Without these conditions, the ACC submitted that the residential amenity

of the area is adversely affected. On the basis that amended Conditions 4 and 44 are retained, the ACC submitted that the proposal represented a sustainable use of the existing land resource and would allow for an acceptable development of the site.

The site and its surrounding environment

[10] At the time of the Court hearing the site was occupied by the Living Edge Furniture showroom/office/warehouse using the two-level commercial building constructed in about 1978 and extended in 1986. It operated standard business hours.

[11] The site has an area of 3,456m² and is an L-shaped through-site on the western edge of the Balmoral village shopping centre. The site has a 61.6m frontage onto Balmoral Road, an arterial road, and 46.6m frontage to Wiremu Street, a local road. It is near the main intersection of Balmoral Road and Dominion Road, another arterial road. Wiremu Street joins Dominion Road at the Balmoral shops. A public service lane borders the site and the rear of the commercial properties fronting Dominion Road.

[12] The east end of Wiremu Street nearest the Balmoral shops contains limited residential housing, and in addition to the commercial activity on the appeal site and other Business 2 zoned land, also includes a childcare centre, a chapel/church, and the Seventh Day Adventist Primary School. Both sides of Wiremu Street at this eastern end are marked for angle on-street carparking. The greater part of Wiremu Street, to the west of the site, is separated from the eastern end of the street by a speed hump traffic calming device. The part of Wiremu Street west of the speed hump is residential in character and gives the appearance of a normal residential street, somewhat different in character and visual appearance to the part of Wiremu Street nearest the Balmoral shopping centre. Parallel on-street car parking is permitted on both sides of the residential part of the street. The unit in which Ms L Tringham lives, is one of a block of three units, and an immediate neighbour to the site ("the Tringham property"). The speed hump referred to above is just

west of the Tringham property.

[13] The neighbourhood near the site on Balmoral Road includes residences to the west. A commercial node including a KFC outlet, a Guthrie Bowron retail paint shop and a Thai restaurant are on the opposite side of Balmoral Road. Potters Park is a large reserve on the northeast corner of the Balmoral/Dominion Roads intersection. The site as it fronts onto Balmoral Road is within 90 metres of the Balmoral/Dominion Roads intersection and has a bus stop directly in front of it between the service lane and the proposed customer entrance and exit.

[14] The older core of the Balmoral village shopping area comprises character buildings (early 20th century) fronting Dominion Road (south of Balmoral Road), and "newer" commercial area extensions to the east and west. The eastern area includes The Warehouse, shops and a substantial parking area, a BP service station, and the Deaf Society headquarters site which also includes some commercial activities/restaurants.

Legal and Planning Framework *Activity Status*

[15] At the Balmoral centre, the Business 2 zone applies to the older character buildings on the Dominion Road frontage, to the newer 'Parklands' development (including The Warehouse) and the BP service station to the east, and extends westwards to include the appeal site. Land to the west of the site and on the opposite side of Wiremu Street is zoned Residential 6a and 6b. In the Business 2 zone permitted activities include restaurants, cafes and takeaway bars, and retail activities up to 1,000m². However this is tempered on this site because a restricted discretionary activity consent is required where any activity is within 30 metres of a Residential 6 zoned site. In the Business 2 zone, and elsewhere, drive-through facilities are a discretionary activity. A number of other more minor aspects of the proposal require consent. It was common ground between the three planning experts^[3] that overall the proposal was a discretionary activity primarily because it includes a drive-through facility.

[16] Section 104 of the RMA requires us, subject to Part 2, to

have regard to:

[a] Any actual and potential effects on the environment of allowing the

proposal (s104(1)(a)); and

[b] Any relevant provisions of any of the listed planning documents

(s104(1)(b)).

[17] The primary effects of the proposal, as identified by the parties, relate to positive effects, traffic, noise, the impact on character, privacy and amenity and cumulative effects.

[18] The relevant statutory district planning instrument is the Auckland City District Plan — Isthmus Section ("the Plan"). In an agreed statement on urban planning issues, the planning experts agreed that the Auckland Regional Planning Statement and sections 6 and 8 of the Act were not relevant to the consideration of the proposal. Although some reference was made to the Auckland Regional Policy Statement Proposed Change 6: *Giving effect to the regional growth concept and integrating land use and transport*[\[4\]](#), we are satisfied that the current zonings around the Balmoral/Dominion Roads area give effect to this.

District Plan

[19] Within the Isthmus Section of the Auckland City District Plan the most relevant provisions are contained within: Part 2.3 (strategic direction); Part 4.5 (signage); Part 7 (residential); Part 8 (business activity) and Part 12 (transportation).

[20] In considering the issues in this case, a relevant and recurring theme of the Plan is encapsulated by one of the principle objectives in the over-arching resource management strategy stating:

To provide for economic growth and development which does not unduly compromise environmental values. (2.3.4, first bullet point)

[21] This balancing exercise is followed through at the district-wide level in the objectives and policies in the Business Activity section (parts 8.3.1 — 8.3.4) which seek to foster business activity, recognise the valuable resources in existing commercial centres and provide for movement of people and goods within business zones, while ensuring that any adverse effects of business activity are avoided or reduced to an acceptable level.

[22] Part 8.6 includes additional objectives, policies and provisions addressing the Business Zones and relevantly in 8.6.2, the Business 2 Zone which recognises the City's traditional suburban retail centres including those like Balmoral located on the main arterial roads. It is acknowledged that such centres are experiencing increasing congestion during peak times and the subsequent loss of on-street parking. The Plan provides for a wide range of retail, office, commercial service, community and residential activities within the Business 2 zone. The zone provides for development at a medium intensity suburban level with controls, in particular, to maintain the amenity of adjacent residential and open space zones.

[23] The focus of Objective 8.6.2.1(e) ("to ensure that any adverse environmental or amenity impact of business activity on adjacent residential or open space zones is prevented or reduced to an acceptable level") essentially restates Objective 8.3.2, but the supporting policies go further in emphasising the focus on the neighbouring residential amenities.

[24] The rules giving effect to these objectives and policies include activity classification, performance standards and assessment criteria.

[25] The primary aspects of the proposal requiring consideration relate to the zone interface buffer and the drive-through facility. There are 12 *general criteria* for assessing activities within 30 metres of residential zoned land (the 'activity buffer') and a drive-through facility (8.7.3.2), and there are two *additional criteria* applying to a drive-through which relate to traffic and amenity (8.7.3.3.2).

[26] The general assessment matters relate to the capacity of the adjacent roading network, avoiding heavy traffic volumes on

access roads (particularly residential access roads). Proposals are generally expected to comply with the controls for the zone relating to noise, parking and access, building scale and development controls, landscaping, and the protection and maintenance of amenity values of adjacent residential zones along the zone interface.

[27] The additional assessment criteria for drive-through facilities (8.7.3.3.2) state:

i) Traffic generation, particularly:

- The concept of a drive through facility involves frequent vehicle movement entering and exiting the site. Proposals must demonstrate to the satisfaction of the Council that the entry and exit points are designed to suitably accommodate such movements. They must also be located so as to avoid disruption to traffic flows on the adjacent roadway.
- The site must be capable of absorbing queuing effects generated by the drive-through facility.

iii) Amenity considerations, particularly:

- Adequate screening in the form of landscaping, as well as a solid wall shall be provided along any residential zone boundary and the road boundary to provide amenity, privacy and to prevent glare from headlights. Alternative methods, which achieve this result, may be accepted.
 - To prevent disruptive noise from vehicles stopping and starting on site (due to the drive through process), where practical the drive through ordering and collection points should be located away from the residential zone boundaries.

Where this is impracticable an appropriate separation distance should be maintained between these points and the residential boundary.

[28] The provisions in the Transportation section of the Plan (Part 12) repeat the higher-order themes by recognising the

roading system as a significant urban resource and seeking to encourage efficient use of the existing infrastructure while taking account of the impact of road traffic on the surrounding environment and minimising adverse effects that might arise. The road classification hierarchy is the framework to which activities will be related to preserve the amenities of particular areas. Both Balmoral and Dominion Roads are classified as *Regional Arterial Roads* and Wiremu Street is a *local road*. On higher-order roads such as regional roads, priority is given to accommodating through-traffic and they are expected to cater for higher traffic flows. Local roads are to provide direct access to abutting properties and to collect and distribute traffic to and from other streets within, and in some cases beyond the local area. It is considered desirable to keep through or extraneous traffic flows on local roads to a minimum.

[29] The provisions of Part 7 (Residential) are of more limited relevance as it is acknowledged that the application site is zoned for business activity. However as land bordering the site and on the opposite side of Wiremu Street has Residential 6a and 6b zonings, then the residential provisions are relevant to the extent that they provide some guidance as to the general nature of the amenity anticipated by the Plan within these zones, in addition to that provided by existing development. The Residential 6 is a 'medium intensity' zone covering large parts of the City. However it is in the Business Zones that we find the provisions, particularly the assessment criteria, which comprehensively address the matters arising at such a zone interface area.

[30] The Plan predominantly deals with signage matters through the Council's Consolidated By-law (Part 27), except where it forms part of a resource consent application, as is the case here. The provisions in the Plan (Part 4.5) seek to ensure that the adverse effects of signs on amenity or on public safety are avoided or reduced to an acceptable level.

Section 104(1)(a) Effects on the Environment *The Existing Environment*

[31] We must first establish the nature of the existing

environment before we can assess the effects the proposal may have on it. We have previously described the existing activities. The existing environment also includes the future state of the environment taking into account any activities permitted under the Plan or existing resource consents.^[5] There are no existing unexercised resource consents for the site. We recognise that restaurant and take-away activities are provided for under the Plan, as indeed are a number of other possible business uses which may generate some similar effects.

[32] Because the adverse effects BCG are concerned about relate in the main to traffic, noise and litter, and the impact these may have on the residents' amenity, Ms Hudson, the planner for McDonald's, sought to place the relationship of the Balmoral shopping centre to the residential land nearby in Wiremu Street in context. Ms Hudson provided the results from a survey carried out by her of the businesses at the Balmoral shopping centre, mainly along Dominion Road, and their opening hours.^[6] The survey was undertaken on six dates between 31 October and 29 November 2009. Whilst caution must be taken in inferring too much from such a limited survey, it does provide a useful context and it was not significantly challenged by anyone.

[33] The evidence establishes that of the business in the Balmoral shopping centre approximately 27.7% comprise retail businesses, 27.7% comprise food and beverage businesses, 12.3% comprise personal services such as beauty, hairdressing and massage, and 10.8% comprise commercial services.^[7]

[34] The east end of Wiremu Street, nearest the Balmoral shopping centre, contains 36 angle parks which are used by people using the shopping centre because few of the businesses which front onto Dominion Road have onsite parking.^[8] The survey showed a significant level of activity in Wiremu Street associated with these carparks and business activities, with a steady stream of cars coming and going along both ends of the street. We also note that there are other activities in the

residential zone at this eastern end of the street, such as the childcare centre, church/chapel and the primary school, whose "patrons" would similarly use these carparks and both ends of Wiremu Street.

[35] As a comparison, in Table 2 Ms Hudson provided examples of other Business 2 zoned strip-shopping areas on the Isthmus that had late-night business activities. Ms Hudson observed that each of these areas was surrounded by a network of residential streets, with on-street parking being provided at the "commercial" end of them.^[9] Typically parking restrictions applied during the daytime only, the inference being that they were able to be used in an unrestricted manner for patrons of any evening business activities. In Wiremu St, parking was restricted to 60 minutes between 8.00am — 6.00pm Monday — Saturday, but .not at other times.^[10] Wiremu Street was used for parking not only during the day, but late into the evening; up to midnight and later.^[11]

[36] We accept Ms Hudson's summary that the Balmoral shopping centre near to Wiremu St has a lively and busy late night character which is focussed on cafes, restaurants, and entertainment activities (including the Capitol Cinema). Further, we accept Ms Hudson's evidence that Wiremu St provides a parking area at its eastern end which is well used by the public in the later evening hours. This too forms part of the existing environment into which the McDonald's proposal seeks to be included.

Positive Effects

[37] The District Plan provides for restaurants, cafes and take-away bars in the Business 2 Zone without distinguishing between the different forms of food outlets. The Court's role is not to evaluate the appropriateness or otherwise of the products and services offered to the public by either McDonald's or any other food outlet, but is to evaluate the effects of the application for land use consent on the environment.

[38] Positive effects of the proposal if granted would be the improved on-site amenity and building design, and the

contribution to the centre's services and employment opportunities for a fulltime staff equivalent of 60 people, accepting that there could be up to 150 people on the payroll because of the number of part-time staff.[\[12\]](#)

Adverse Effects Traffic

[39] The traffic engineers, Mr Burgess for McDonald's and Mr Parlane for BCG, traversed matters of traffic generation and safety in their evidence. Much of the traffic evidence, as one might expect, focussed on traffic generation predictions based on actual traffic counts and modelling of likely increases, using other McDonald's outlets as comparisons. Parking and maneuvering of vehicles on the site was not an issue. The areas of disagreement[\[13\]](#) between the experts were:

- The amount of McDonald's traffic that would use the WiremuStreet/Dominion Road intersection during different periods of the day;
- The effects of using the service lane for deliveries and in particular trucks entering the service lane from Balmoral Road;
- While there was agreement that the intersection of Wiremu Street/Dominion Road is at or beyond capacity in busy periods, there was disagreement on the significance of that in determining the appropriateness of the site for the proposed development;
- The acceptability of the site for the proposed development in terms of traffic effects.

[40] While these matters require determination by us, the real issue was the likely effect of any increase in traffic from the proposal on the residential amenity of those who live nearby. Determining some of the areas of disagreement between the traffic engineers provides a background to this key issue which we address later in this decision.

Traffic Generation

[41] To predict traffic flows Mr Burgess provided an assessment based on actual traffic counts generated by two larger

McDonald's sites in Auckland [14] and modelling results obtained this data. The larger sites at Lincoln and Manukau were used to provide data that Mr Burgess considered to be conservative. Mr Parlane, for BCG, also undertook traffic counts and reviewed Mr Burgess' evidence.

[42] Both traffic engineers agreed that Mr Burgess' Table 1 could be used for planning purposes so far as traffic generation was concerned[15] and both agreed that in terms of traffic distribution from the site, 25% of the traffic to and from each direction for the two access points was an appropriate assumption.[16]

[43] Table 1 included the predicted traffic flows over the entire week from 6am to midnight to enable an appreciation of the way in which the level of activity might vary. The main traffic characteristics of the proposal were predicted by Mr Burgess, and accepted by Mr Parlane, to be that:

- On the busiest day, total daily generation in the order of 1,650 vehicles visiting the site, resulting in 3,300 vehicle movements per day ("vpd") to and from the site;
- Activity at the site will build up during the morning period, reaching a lunch time peak of about 260 vehicle movements per hour ("vph") over the lunch time period;
- Activity will fall through the afternoon to a low of some 170vph, rising again through the dinner time period, reaching about 220 vph on Friday;
- Peak activity at the restaurant generally does not occur during the afternoon peak commuter period on the road network, but generated flows could be in the region of 170-180 vph during the period;
- Activity at the site reduces significantly in the later evening periods, particularly early in the week. For example the Monday flow falls from a predicted 46 customer vehicles visiting the site in the 2100-2200 period to 18 vehicles in the 2300-2400 period;
- Activity tends to build up through the week to reach peak on Friday, with Monday being as low as 70% of the Friday or Saturday total;

- The drive-through accounts for some 50% of the total transactions recorded, and 62.5% of the total vehicle flows (based on one car/transaction in the drive-through and 0.6 cars/transaction in the restaurant).[17]

[44] Mr Burgess also predicted the likely changes in traffic flow on the residential section of Wiremu Street to the west.[18] The biggest predicted increase is likely during the lunch time period on week days and Saturdays. Whilst finding that the increases represented around 40%, Mr Burgess was of the view that the flows would remain low and would not have any significant impact on the safe and efficient operation of Wiremu Street.[19] Mr Burgess' estimates were that the predicted increase in traffic over dinner time peak would be less: 15% during 1700-1800 hours and 25% increase in 1800-1900 hours. His opinion was that during the late evening and night time periods the increases would be very low.[20]

[45] Dr Ogilvie, who lives at 35 Wiremu Street, challenged Mr Burgess's assessment of the McDonald's traffic likely to use Wiremu Street. Because of the congestion on the arterial roads Dr Ogilvie considered that a higher volume of traffic would use alternate routes and in particular Wiremu Street — a practice currently adopted by people with local knowledge.

[46] Whilst acknowledging that there would be some variations in the traffic directional-split during different times of the day, overall Mr Burgess' opinion remained that while some traffic associated with the proposed McDonald's would undoubtedly seek to use Wiremu Street and other residential roads as a route to or from the site, the volumes of additional traffic would be relatively small and would have no significant impact on the safe and efficient operation of the street.

[47] Mr Parlane's assessment focused on the difficulty of traffic turning from Wiremu Street into Dominion Road because of high traffic volumes there, and therefore in his opinion more customers would seek to use the residential end of Wiremu Street because of its easier access eventually onto either Dominion or Balmoral Roads. Mr Burgess did not disagree with

this but highlighted that this was only likely to occur during busy periods on the road network and in his opinion there would be little need or incentive for customers to do so during quieter periods of the day, particularly during the evenings.[\[21\]](#)

[48] We did not understand the traffic engineers to be greatly at odds with one another on this aspect. There is no doubt that there will be increased traffic generated from the proposal but it would seem, from the unchallenged evidence provided by Mr Burgess, that the busiest periods for McDonald's are the lunch time periods which are not the busiest times for the traffic network. The main area of possible impact is during the dinner time period when there may be a disincentive to customers to use the Dominion Road end of Wiremu Street which may increase the traffic using the residential end of Wiremu Street. Given the time of day however it cannot be said that this would adversely affect residential amenity.

Traffic Safety

[49] The focus of this part of the case centred on the existing problems with the congested intersections particularly at Wiremu Street and Dominion Road. The main concern was at peak times when cars exiting Wiremu Street onto Dominion Road cannot easily turn either left or right due to traffic congestion. Mr Parlane said the intersection was a traffic accident "*black spot*".[\[22\]](#) Mr Burgess did not accept this and was of the opinion that the statistical evidence established that the crash rate at this intersection was decreasing. Whilst accepting that the statistics showed fewer crashes at the intersection recently, Mr Parlane did not accept the conclusion that crashes at the intersection are decreasing. In his opinion, this conclusion could only be drawn if a similar pattern was established after a larger number of observations over a longer period of time.

[50] There is a potential for increased safety concerns arising at the Wiremu Street/Dominion Road intersection at the dinner time period. The level to which this may occur is unable to be accurately predicted. We accept that McDonald's traffic may

choose to avoid the intersection during these periods and to use the west end of Wiremu Street rather than to encounter congestion and difficulties at the Dominion Road end of Wiremu Street. Given the degree of disagreement between the traffic engineers on this point we are unable to form a view on the likelihood of increased crashes at this intersection. However we do not think that this is a significant issue in the context of this proposal.

[51] Mr Brabant submitted that the Environment Court in *Landco* [23] recognised that it is inappropriate to decline consent when new traffic flows will inevitably be affected by existing congestion.[24] Mr Brabant submitted that the existing traffic congestion problems around the site could not be solved by turning down the proposal and this was not a basis to decline it, otherwise no new development could ever be permitted in an already congested environment. Mr Kirkpatrick sought to distinguish the *Landco* decision by reference to Objectives 12.3.1 and 12.6.1 of the Plan which he submitted gave a clear direction that the effects of traffic on the surrounding environment were to be kept in check.

[52] The nature of the proposed development in the *Landco* decision was very different in terms of scale and subject matter when compared with the proposal in this case. It concerned a proposed plan change to enable 6000 people to be housed in a new residential development on the former Mt Wellington quarry site. The real question here is the effect of the proposal on residential amenity which was not a feature of the *Landco* case.

Service Vehicles

[53] The proposal includes using the existing public access on the eastern side of the site for service delivery and collection of goods and rubbish. Mr Parlane was concerned at the traffic safety implications of service vehicles obstructing traffic if entering from the Balmoral Road end. Whilst Mr Burgess did not agree with Mr Parlane, he reviewed the design in consultation with McDonald's personnel, and advised that he

was satisfied that the proposal could be operated satisfactorily by vehicles entering from Wiremu Street and exiting onto Balmoral Road. We agree with Mr Burgess that the service route is public and that vehicles currently have flexibility to travel along it in either direction to service the back of premises fronting Dominion Road. Whilst the access lane remains publicly available as a two-way route we do not consider it realistic to try to limit the travel direction of only the vehicles servicing the McDonald's site. The Council has other remedies available to it should the wider use of this service access be a problem and it would seem that McDonald's has the flexibility to design its service area to be used by vehicles from either direction.

Noise

[54] The only expert evidence on noise was given by Mr Hegley for the applicant. Mr Hegley monitored the existing noise environment at four sites in the area.^[25] The monitoring was undertaken at 6, 7 and 34 Wiremu Street and 198 Balmoral Road. 6 Wiremu Street is directly opposite the proposed site, 7 Wiremu Street is the Tringham property, 34 Wiremu Street is a residential address further away from the site to the west, and 198 Balmoral Road is a residential unit next to the site on Balmoral Road. Mr Hegley's evidence sets out the data which he obtained over a number of days. He found that the existing noise environment was similar for the full length of Wiremu Street, when clear of any intersections, and was typically similar or higher to the level set in the District Plan for any night time activity. He therefore concluded that as the proposed activity would comply with the District Plan noise criteria, there would be minimal noise intrusion for the residents in Wiremu Street.^[26] He also concluded that whilst the L10 measurement was higher at 198 Balmoral Road, the background noise L95 was only slightly higher and at a steadier level.^[27]

[55] Mr Hegley also measured the existing noise environment along the business zone interface boundary during a number of different occasions. On all of these occasions he attended up

until midnight. The levels here were controlled by traffic on Dominion Road.

[56] From the data he obtained Mr Hegley concluded that the noise from the vehicles using Wiremu Street for car parking, which he described as "a constant arrival and departure of vehicles" [28], and associated people movements, generated more noise than any McDonald's restaurant he had visited. From the measurements he obtained and the site visits he conducted, his opinion was that the existing environment is relatively noisy and that compliance with the District Plan provisions would mean any noise from the McDonald's site would have little effect for the residential neighbours. [29] Mr Hegley's opinion was not supported by Mr Inkpen who lives at 14 Wiremu Street, and advised us that on the whole, there is light through traffic and little noise particularly at night time and weekend mornings, and that his family currently have no issues sleeping because of noise from the street. [30]

[57] Mr Hegley also identified design features which would minimise the impact of possible noise sources from the proposed McDonald's. These included mitigation measures for the placement and provision of canopies over the speaker box order points for the drive-through, fully enclosing the playland area in the restaurant building with the conservatory comprising a full height wall to the western side to provide screening from the residential boundary, with a glass screen and aluminium louvers on the Balmoral Road frontage. In addition it is proposed that a 2 metre high solid fence along the northern half of the residential boundary on the western side of the site be constructed to control any noise from the carpark to the residential site. This is then increased to a height of 3 metres along 7 Wiremu Street, the Tringham property.

[58] Ms L Tringham who lives in the front unit at 7 Wiremu Street, expressed concerns about the fence parallel to her boundary, including that it would block out morning sun. However Ms Absolum's evidence outlined that the fence, which is set back inside the McDonald's site, complied with the development controls along that boundary and therefore could

be built as part of a permitted building in any event.

[59] In order to assess the noise from vehicles arriving at the site and departing, Mr Hegley used field measurements undertaken at various parking lots, service stations and takeaway facilities. From these measurements and assuming the existence of the two to three metre high solid fence on the western boundary, he predicted that the single event noise level (Lmax) from vehicles on site would not exceed 63 dBA. That was well within the level of 70 dBA set out as the limit in the District Plan.

[60] He also considered the drive-through facility and monitored the noise from a similar existing McDonald's drive-through. He calculated the predicted noise from during a busy daytime period at the closest residential boundary would be well within the 50 dBA L10 design requirement and 55dBA business design requirement of the Plan. He also considered this to be well below the existing noise environment.[\[31\]](#)

[61] Although acknowledging that the noise from vehicles on the roads is not subject to the District Plan controls, Mr Hegley also assessed the traffic noise for Wiremu Street based on traffic that would exit the site and travel west along Wiremu Street. He based his predictions on the existing and forecast traffic flow on Wiremu Street set out in Mr Burgess' evidence and assumed the period of maximum traffic flows to be Friday lunch time, Friday dinner time and Saturday lunch time. He assessed the increase in traffic noise over these periods to be 3-4 dBA. If the existing noise environment is considered, the worst case scenario would be to increase the level to typically 56dBA (1 hour Leq). This is approximately 4dBA below the existing traffic noise during the morning peak period. Noting that the 1 hour Leq is the best descriptor to assess traffic noise, it was his opinion that a level of 56 dBA as a one hour Leq level is considered "a low level of traffic noise".[\[32\]](#) Whilst acknowledging that individual vehicles would be heard, Mr Hegley's concluded that there would be zero to minimal traffic noise effects for all residents in the area.[\[33\]](#)

[62] BCG and the residents sought to differentiate the measurement of noise, in terms of maximum limits under the

District Plan, with the ability of the ear to differentiate between the usual background noise and the noise created by single incidents repeated at random intervals. This proposition was accepted by Mr Hegley, Ms Hudson and Mr Beattie in cross examination. The submission made by BCG was that intermittent unpredictable loud noise events on a regular basis are more disruptive, including causing sleep disturbance, than constant regular noise even if it is at a reasonably high level. The concern here was the noise from not only "hoon" cars (to use Mr Loutit's term), but also cars simply revving their engines intermittently as they leave the site.

[63] The expert evidence established that the noise on the site and from traffic leaving the site will be within the District Plan levels. The evidence also established that the noise created by single incidents which are intermittent could provide an element of disruption despite the reasonably high level of regular noise in the existing environment. One cannot escape the fact that the proposed restaurant and drive-through will inevitably mean an increase in activity around the area. The question is whether the increase will result in acceptable levels of noise.

[64] We are not satisfied that the effects of the noise on its own would be problematic. It is the effect of noise combined with traffic that has the likelihood to affect the amenity value in the residential area, and particularly later in the evening.

Amenity Values, Quality of the Environment and Cumulative Effects

[65] For BCG Mr Kirkpatrick submitted that the grant of consent will result in a significant loss of amenity in the surrounding residential area through the separate and cumulative impact of:

[a] litter both onsite and in the surrounding area; and

Litter

[66] BCG and the residents were concerned about the litter which might emanate from the site particularly from the drive-through facility. The evidence from Mr Wilson, Director of

Operations of McDonald's, confirmed that litter will follow after the traffic from the site.

[67] This issue was addressed by the Commissioners in their decision[34] through two conditions to "ensure a responsible attitude to litter in engendered into the operation from day one, and to ensure there is a clear line of communication with McDonald's on-site management." [35] Condition 55 required daily litter collection within 200 metres of the McDonald's site or as agreed through the residents' liaison committee. The committee was to be established at the request of "the Wiremu Street residents" and provides for a contact person at the restaurant to be identified and arrangements for monitoring of a range of matters including litter, and all complaints.[36]

[68] These conditions have been accepted by McDonald's and Mr Wilson's evidence described the steps that have been taken since the Commissioners' decision to prepare a Litter Management Plan to meet the requirements of Condition 55. Accordingly, McDonald's submitted that any adverse effects arising from litter are able to be mitigated by these conditions.

[69] We find that the proposal has the potential to generate litter, particularly in the surrounding area, which would have an adverse effect on the residents' amenity. We are however satisfied that the litter management condition 55 imposed by the Commissioners is an appropriate strategy to mitigate these adverse effects. However we are not satisfied that condition 56, relating to the residents' liaison committee, is workable and we address this later in the decision.

Hours of operation and activity

[70] BCG submits that one cannot ignore the fact that if the proposal is granted Wiremu Street would potentially be used by McDonald's patrons for access to and from the site 18 hours per day on the weekend and 16 hours per day during the week. Mr Kirkpatrick submits that the evidence demonstrates that McDonald's has not adequately considered the whole of those periods, and has had little regard for the likely effects on the residents of the activity on the site in the early morning.

[71] ACC support closing at 10pm on Sunday to Thursday and midnight on Friday and Saturday, rather than midnight 7 days per week as McDonald's seek. To do otherwise, the Council submits, would be to impact too adversely on the residential amenity of the neighbourhood. It was ACC's submission that the hours of operation were central to determining the adverse effects on amenity and that traffic and noise were "sub-issues". Experts for ACC and McDonald's described the whole of the proposed operating period, being 6am to midnight, but their assessments did not focus on the effects of early morning operations. This may be understandable given the Hearing Commissioners' decision which found that the effects on residential amenity in the daytime and early evening would not be significant. Their concerns were with the late evening effects.

[72] McDonald's continued to seek a midnight closing, seven days a week and relied on what it submitted would be the minimal actual effects of the proposal overall in terms of traffic generation and therefore noise. McDonald's highlighted its desire for consistency in operating hours, by referring to the fact that in Auckland, apart from Pt Chevalier, all of its restaurants with drive-through facilities are open 24/7. The Pt Chevalier restaurant and drive-through closes at 11pm (Sunday to Thursday) and midnight on Friday and Saturday. The remaining restaurants which do not have drive-through facilities are open 24/7 and are situated in Food Courts and Queen Street.^[37] We do not think that McDonald's should have any expectation that consistency in hours of operation will be an important factor in resource management decisions. It is the effect of the activity on a particular site and its surroundings that we must consider.

[73] We are satisfied that the existing environment and activity at the Balmoral shopping centre is such that the amenity of the residents in Wiremu Street is already affected by late night activity of people, traffic and associated noise among other things. In addition to the businesses, other activities located in the residential zoned land at the eastern end also contribute to the activity levels, such as the childcare facility and the primary school. Mr Inkpen advised that much of the traffic using

Wiremu Street during the weekday mornings was for the Seventh Day Adventist primary school.^[38]

[74] The question is whether this proposal will generate an increase in that activity that is so adverse that it is unacceptable. On balance, we are satisfied that if the hours of operation are restricted at night, then adverse effects on residential amenity from the proposal can be reduced to an acceptable level. Put another way, our view is that the residential amenity in this area should be protected by avoiding rather than mitigating the impacts on the residents after 10pm during the school/working week (Sunday to Thursday) and after midnight Friday and Saturday. A key factor influencing our opinion is that in the late evenings the majority of the trade is through the drive-through facility rather than the restaurant, compared to a more balanced trading-split during the morning and afternoon/early evening. It is the effects associated with the drive-through operations that are of most concern. We are satisfied that the low traffic volumes and activity level in the early morning and the effects from them are acceptable.

Pole Sign

[75] McDonald's seek to have a 10 metre high pole sign with the "golden arches" erected at the main vehicle entry point on Balmoral Road. It is to be illuminated at night. The concern, raised primarily by the Council, is whether the effect on residential amenity will be acceptable.

[76] Ms Absolum, a landscape architect, gave evidence for McDonald's and Mr Beattie, a planner, for the Council. The difference of opinion centred around Mr Beattie's view that the sign would visually dominate the local environment and have significant adverse effects on the long views along Balmoral Road. However it was apparent that Mr Beattie's focus was primarily on the effect on residential amenity for the adjacent residences at 198 Balmoral Road and potentially 7 Wiremu Street. We note that the residence at 198 Balmoral Road was not represented in these proceedings.

[77] McDonald's wish to have the sign at 10 metres because that

is consistent with other such signs on its sites and it is keen to ensure from a traffic safety perspective that potential customers travelling along Balmoral Road are able to see in sufficient time the signage to identify the site and in particular the vehicle entry point. The 10m height was also to take account of the street trees which would screen the view of a shorter sign to approaching motorists. Mr Burgess acknowledged that after what was referred to as the "three month honeymoon period" after the initial opening, only about 5% of people accessing the site from Balmoral Road will be assisted by the sign for traffic safety reasons. Mr Loutit submitted that the sign had limited safety justification and instead was all about advertising.

[78] McDonald's proposed the pole sign be placed in the middle of the entrance/exit island off Balmoral Road. The Court raised the possibility of alternative locations including the sign being on the main building either near to the main entrance or near the service entrance. A location near to the service lane was not supported as it could cause confusion with motorists thinking that was an entry to the restaurant. Mr Beattie considered that the further away the sign was from the residential dwellings, the less it would impact on the residential amenity and therefore favoured the sign being placed closer to the building.

[79] Whilst we have noticed that pole signs at other McDonald's sites are of varying heights we are satisfied here that a 10 metre high pole sign will serve a useful purpose and not have an adverse effect on residential amenity if it is placed on, or close to, the proposed building near the Balmoral Road main vehicle entrance (but not the service lane).

Section 104(1)(b) — Plan provisions

[80] The Plan seeks to encourage business growth. The Plan recognises that the existing commercial centres on the Isthmus, such as at Balmoral, are the locations where traditionally the most intensive commercial activities have congregated and as such they represent considerable investment and a valuable physical resource. The Plan also recognises the City's transportation resources, including roading, as representing a

considerable public investment and seeks to manage them by encouraging the efficient use of existing roading infrastructure.

[81] The Plan also acknowledges that business activity and increased traffic can have adverse environmental or amenity effects on adjacent residential zones and it seeks to have such effects prevented or reduced to an acceptable level. [39]

Guidance in assessing this balance is provided through comprehensive assessment criteria which identify a range of matters for business/residential interface areas and for drive-through facilities. These assessment criteria largely address on-site matters. The proposal has addressed these matters and includes appropriate methods to achieve zone standards or mitigate effects, such as through the design of vehicle access points, the location and design of the drive-through, landscaping and screening.

[82] The Plan expects that business centres such as Balmoral will be subjected to considerable change. The provisions for the Business zones aim to allow for evolution and change while avoiding excesses and the loss of amenity and convenience for the community. Determining that balance is a matter of judgement having regard to the context of the existing environment and the future environment provided for by the Plan. The tension between these aspirations is usually most evident at, and close to, the interface between business and residential activities, as is the case here. Allowing this proposal will result in further changes to the surrounding environment closest to the site, but given the context and proximity to the Balmoral shopping centre, we are satisfied that subject to restrictions imposed through conditions of consent, it will not exceed what can reasonably be regarded as an acceptable level.

Overall Evaluation

[83] Inevitably there will be an increase in traffic and activity associated with the proposed redevelopment of this relatively large Business 2 zoned site. The medium level intensity provided for in the Business 2 zone is reflected in the permitted activities which include retail, restaurant and takeaway premises

of up to 1000m². Given this, we agree with Mr Demler, planner for BCG, that the drive-through facility rather than the restaurant should be the focus of the assessment of effects and the Plan provisions.^[40] It is clear that residents moving about the local area and customers using the Balmoral shopping centre already choose a range of travel routes depending on the traffic conditions at particular times of the day and night. Wiremu Street is one of those alternate routes for some traffic.

[84] We are satisfied that the proposal, particularly with the restrictions relating to opening hours, will not create adverse effects on the environment that are unable to be mitigated to an acceptable level. We are also satisfied that the proposal overall, with the conditions, is consistent with the objectives, policies and provisions of the Plan. Accordingly we are satisfied that the proposal meets the provisions of section 104(1) of the Act.

[85] It remains for us to consider whether it meets the purpose of the Act under Part 2. Mr Kirkpatrick referred us to sections 7(c) (*the maintenance and enhancement of amenity values*) and 7(f) (*maintenance and enhancement of the quality of the environment*). To this list Mr Brabant added, s 7(b) (*the efficient use and development of natural and physical resources*). We agree that all of these sections are relevant to our consideration. These matters are reflected in the operative provisions of the Plan and we have addressed them earlier in this decision.

[86] By way of completeness we record that we have considered the proposal against the provisions under Part 2 and we are satisfied that the purpose of the Act will be achieved by granting consent to the proposal subject to conditions.

Conditions

[87] We agree with the Council and McDonald's that the suite of conditions included in the Commissioners' decision are generally appropriate, subject to the amendments to conditions 2 and 42 upon which they had agreed. We identify below some further changes to give effect to our decision, but we accept that there may be some others:

[a] Condition 4 requires amending to permit the pole sign in an

amended location.

[b] Condition 44 (operating hours) requires amending to reflect the hours of 6am - 10pm Sunday to Thursday and 6am - midnight Friday and Saturday, but with the reference to public holidays being deleted (the third bullet point). The part of the condition referring to closing off the entrances will also need to be amended to more accurately reflect the evidence which clarified the procedure and time period needed to allow patrons' and staff cars to leave the site.

[c] We have indicated our concerns about condition 56 (Residents' Liaison Committee). We consider that this condition is too uncertain and unworkable. Much of what is included in this condition is the responsibility of the Council and/or the consent holder. Our preference is that the condition be deleted and if necessary alternate conditions be drafted to clarify contact details, complaints procedures, and the performance standards or outcomes sought in relation to the list of matters contained in condition 56(c). In the event of non-compliance or complaints then any party (not just "Wiremu Street residents") should be able to contact the Council and/or the consent holder. A consequential change to condition 55 may be required.

[88] We direct the Council to consult with the other parties and prepare a revised set of conditions.

Result and Directions

[89] The consent is granted subject to conditions. The Appeal by BCG is dismissed. The Appeal by McDonald's in relation to

[a] Conditions 2 and 42 as amended by ACC and McDonalds is allowed;

[b] Conditions 4 and 44 is determined in accordance with paragraph 87 above.

[90] The Council is to consult with the other parties and then lodge a revised set of conditions with the Court by 25 February 2011. To that extent only, this decision should be regarded as interim.

Costs

[91] We indicate that it is our tentative view that the parties should each bear their own costs. For the moment, costs are reserved.

DATED at AUCKLAND this 221'd day of December 2010 *For the Court*:

M Harland M P Oliver

Environment Court Judge Environment Commissioner

[1] Mr Wilson, Evidence-in-Chief, paragraphs 16-17[2] Mr Tringham, Evidence-in-Chief, paragraph 172[3] Ms J Hudson, Mr L Beattie and Mr R Demler.[4] July 2010 Appeals Version Exhibit 2[5] *Queenstown Lakes District Council v Hawthorne Estate Limited* [2006] NZRMA424 at [34] — [57] [6] Ms Hudson, Evidence-in-Chief, Table 1

[7] The remainder of the businesses are of insignificant percentage to be individually listed. [8] Ms Hudson, Evidence-in-Chief, paragraphs 22-23.

[9] MSHudson, Evidence-in-Chief, paragraph 21[10] Ms Hudson, Evidence-in-Chief, paragraph 23.[11] Ms Hudson, Evidence-in-Chief, paragraphs 24-25[12] Ms Wilson, Evidence-in-Chief, paragraph 8

[13] Paragraphs [8] — [11], Transport & Traffic witness prehearing caucus document dated 21 May 2010. [14] Mr Burgess, Evidence-in-Chief, paragraph 54.[15] Paragraph [4] Transport & Traffic witness prehearing caucus doc dated 21

May 2010[16] Paragraph [5] Transport & Traffic witness prehearing caucus doc dated 21 May 2010[17] Mr Burgess, Evidence-in-Chief, [paragraph 59][18] Mr Burgess, Evidence-in-Chief, [paragraph 167 and table 11][19] Mr Burgess, Evidence-in-Chief, [paragraph 138][20] Mr Burgess, Evidence-in-Chief, [paragraph 139][21] Mr Burgess, rebuttal [paragraph 14-15]

[22] Mr Parlane, Evidence-in-Chief

[23] [2009] NZRMA 132[24] [2009] NZRMA 132 at [9] — [12] & [18][25] Mr Hegley, Evidence-in-Chief, [paragraph 4.1][26] Mr Hegley, Evidence-in-Chief, [paragraph 4.11][27] Mr Hegley, Evidence-in-Chief, [paragraph 4.12][28] Mr Hegley, Evidence-in-Chief, [paragraph 4.16][29] Mr Hegley, Evidence-in-Chief, [paragraph 4.17 and 4.18][30] Mr Inkpen, paragraphs 3 and 18.

[31] Mr Hegley, Evidence-in-Chief,[paragraph 5.10 & 5.11] [32] Mr Hegley, Evidence-in-Chief,[paragraph 5.14][33] Mr Hegley, Evidence-in-Chief,[paragraph 5.18][34] ACC decision at paragraphs [18] — [19][35] ACC decision page 19[36] Condition 56[37] Mr Wilson, Evidence-in-Chief, paragraph 22[38] Mr Inkpen, Evidence-in-Chief, paragraph 21.[39] Objectives 8.3.2 and 8.6.2.1(e).[40] Mr Demler, Evidence-in-Chief, paragraph 15