

IN THE SUPREME COURT OF NEW ZEALAND

SC 14/2016  
[2017] NZSC 113

BETWEEN                      AUCKLAND COUNCIL  
   Appellant

AND                              WENDCO (NZ) LIMITED  
   First Respondent

   WIRI LICENSING TRUST  
   Second Respondent

Hearing:                      8 November 2016

Court:                          William Young, Glazebrook, Arnold, O'Regan and  
   Ellen France JJ

Counsel:                      W S Loutit and C J Brown for Appellant  
   R J Hollyman and T P Mullins for First Respondent  
   G J Kohler QC and K T Glover for Second Respondent

Judgment:                      17 July 2017

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**JUDGMENT OF THE COURT**

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- A      The appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of Peters J reinstated.**
- B      Costs in the High Court are to be fixed in that Court.**
- C      Costs in the Court of Appeal are to be fixed by that Court.**
- D      In this Court, the first respondent is to pay the appellant costs of \$10,000 and the second respondent costs of \$5,000 along with, in both instances, reasonable disbursements.**
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## REASONS

William Young, O'Regan and Ellen France JJ [1]  
Glazebrook and Arnold JJ [67]

### WILLIAM YOUNG, O'REGAN AND ELLEN FRANCE JJ

(Given by William Young J)

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#### The appeal

[1] The Wiri Licensing Trust (the Trust) owns land on the corner of Ronwood Avenue and Great South Road, Auckland. The site is occupied by a

number of tenants, including Wendco (NZ) Ltd (Wendy's) which operates a hamburger restaurant. To the south of the hamburger restaurant is a BNZ branch. Until 2013, the northernmost part of the site was occupied by a Mobil petrol station. Mobil's departure in that year was followed by a substantial redevelopment of the site, part of which involved the establishing of a Carl's Jr hamburger restaurant on the land formerly occupied by Mobil.

[2] The redevelopment required a resource consent under the Resource Management Act 1991 (RMA). One of the reasons for this – and the only one which is material for present purposes – is that the associated works included alterations to two vehicle access points between the site and Great South Road. No changes were proposed in relation to a third access way, from the BNZ site onto Great South Road. Under the Manukau Operative District Plan 2002 (the Plan) the alterations to the two access ways required consent as a restricted discretionary activity, for which the Trust duly applied. The Auckland Council (the Council) dealt with this application without notification and granted it. The consent was subject to a review condition in these terms:

Pursuant to Section 128 of the Resource Management Act 1991, the conditions of this consent may be reviewed by the Council at the consent holder's cost:

- (a) At any time after 12 months and thereafter annually up to 36 months following commencement of consent in order:
  - (i) To deal with any adverse effect on the environment which may arise or potentially arise from the exercise of this consent and which it is appropriate to deal with at a later stage, in particular adverse traffic effects ..., on site management.

...

[3] Wendy's sought judicial review of the non-notification decision and, on the basis that the application should have been notified, the resource consent. Wendy's was unsuccessful in the High Court before Peters J<sup>1</sup> but successful on appeal.<sup>2</sup>

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<sup>1</sup> *Wendco (NZ) Ltd v Auckland Council* [2014] NZHC 1481 [*Wendco* (HC)].

<sup>2</sup> *Wendco (NZ) Ltd v Auckland Council* [2015] NZCA 617, (2015) 19 ELRNZ 328 (Wild, Fogarty and Mallon JJ) [*Wendco* (CA)].

The Council was directed to reconsider the non-notification decision, in light of the Court of Appeal's approach.<sup>3</sup>

[4] The Council, with the support of the Trust, now appeals.<sup>4</sup>

[5] The redevelopment has been completed in accordance with the resource consent, meaning that the access points onto and off Great South Road are now as was proposed by the Trust. There have also been associated changes to on-site traffic circulation and parking which are of particular concern to Wendy's.

[6] In determining whether to grant a resource consent for the restricted discretionary activity, the Council was entitled to have regard only to those matters over which it had restricted its discretion in the Plan.<sup>5</sup> The Council was required to notify Wendy's of the application unless the adverse effects on Wendy's of the access alterations were less than minor.<sup>6</sup> In addressing whether that was so, the Council was required by s 95E(2)(b) of the RMA to ignore any effects which did not "relate to a matter for which a rule [in the Plan] ... reserves control or restricts discretion".

[7] Against the legal background just summarised, the case falls to be determined by reference to two questions:

- (a) Did the adverse effects on Wendy's of the alteration to access points and associated circulation and parking "relate to" matters in respect of which discretion had been reserved? And, if so:
- (b) In making the non-notification decision, did the Council ask itself the right question and have sufficient evidence to justify its conclusion?

[8] We will discuss the case by reference to those issues but, before we do so, we set out the key statutory provisions.

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<sup>3</sup> At [91].

<sup>4</sup> Leave was granted in *Auckland Council v Wendco (NZ) Ltd* [2016] NZSC 67.

<sup>5</sup> Resource Management Act 1991, s 104C(1)(b). Section 104C(1)(a) also allows the authority to have regard to those matters over which "a discretion is restricted in national environmental standards or other regulations".

<sup>6</sup> Sections 95B and 95E.

## The key statutory provisions

### *Restricted discretionary activity*

[9] Section 87A(3) of the RMA provides:

- (3) If an activity is described in ... a 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 which discretion is restricted ... in its plan ...; and
  - (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the ... plan ... .

[10] As to the criteria to be applied when considering an application for a restricted discretionary activity, s 104C(1) provides:

#### **104C Determination of applications for restricted discretionary activities**

- (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—
  - (b) it has restricted the exercise of its discretion in its 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—
  - (b) it has restricted the exercise of its discretion in its plan ... .

[11] Whether Wendy's ought to have been notified falls to be determined by reference to: ss 95B(1) and (2); 95D; and 95E(1) and (2)(b) of the RMA, which provide:

#### **95B Limited notification of consent application**

- (1) If a consent authority does not publicly notify an application for a resource consent for an activity, *it must decide* (under sections 95E

to 95G) *whether there is any affected person, ... in relation to the activity.*

- (2) The consent authority *must give limited notification of the application to any affected person* unless a rule ... precludes limited notification of the application.

...

**95D Consent authority decides if adverse effects likely to be more than minor**

A consent authority that is deciding, for the purpose of section 95A(2)(a), whether an activity will have or is likely to have adverse effects on the environment that are more than minor—

- (a) must disregard any effects on persons who own or occupy—
- (i) the land in, on, or over which the activity will occur; or
  - (ii) any land adjacent to that land; and
- (b) may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect; and
- (c) in the case of a controlled or restricted discretionary activity, must disregard an adverse effect of the activity that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion; and
- (d) must disregard trade competition and the effects of trade competition;

...

**95E Consent authority decides if person is affected person**

- (1) A consent authority *must decide* that a person is an affected person, in relation to an activity, if the activity's adverse effects on the person are *minor* or *more than minor* (but are not less than minor).
- (2) The consent authority, in making its decision,—

...

- (b) in the case of a controlled or restricted discretionary activity, *must disregard an adverse effect of the activity on the person that does not relate to a matter for which a rule ... reserves control or restricts discretion; ...*

(emphasis added)

**Did the adverse effects on Wendy’s of the alteration to the access points and associated circulation and parking “relate to” matters in respect of which discretion had been reserved?**

*Chapter 8 of the Manukau Operative District Plan 2002 – overview*

[12] This aspect of the case falls to be determined by reference to Chapter 8 of the Plan, which is titled “Transportation”. This chapter consists of two sections: section 1, headed “Transportation General”; and section 2, which is headed “Parking and Vehicle Circulation”. There is also an appendix headed “Primary Network Route Development and Assessment Criteria” which is not material for present purposes.

*Section 1, rules 8.10.3 and 8.12*

[13] The modification of the vehicle access points and associated parking areas required a “restricted discretionary activity” consent under r 8.10.3(b) (“Access and Traffic Generation”). The relevant activity under this rule is as follows:

Any non-residential activity that results in the construction or modification of vehicle access points (or parking areas serving these access points) onto the primary road network, or within 50 metres of the projected road boundary of intersections onto the urban primary road network.

Under this rule is the following:

**Explanation/Reasons**

The provision of access from roads to adjoining properties, road works and other activities which result in physical changes to land within the road zone have the potential to generate adverse effects in areas such as traffic safety, the operation of the road network and transportation system and the ability to develop land adjacent to roads. ...

[14] The relevant matters for discretion and the assessment criteria are set out under r 8.12.2. That rule is headed “Activity Requiring Restricted Discretionary Consent to Access the Primary Road Network”. Under that heading is r 8.12.2.1, “Matters for Discretion” and r 8.12.2.3, “Assessment Criteria”.

[15] Rule 8.12.2.1, “Matters for Discretion”, reads:

Council reserves discretion over the following matters for restricted discretionary activity resource consent applications for any activity defined within Table 8.10.3(b) involving access to a road within the primary road network or within 50 metres of an intersection with a primary road and may impose conditions in respect of each.

- (i) The location and design of access to a site, including pedestrian access.
- (ii) Any works within a road required to facilitate access to a site or mitigate the adverse effects of an activity and safety of the operation or the roading network or any utility service.
- (iii) The site layout as it relates to pedestrian and passenger transport access, carparking and loading areas and internal circulation.
- (iv) The scale, management and operation of an activity as it relates to its traffic generation.
- (v) The management or apportionment of internal parking and loading spaces.

[16] Assessment criteria are stipulated by r 8.12.2.3 which begins in this way:

**Assessment Criteria**

When assessing an application for a restricted discretionary activity to obtain or modify access to a primary road or to a road within 50 metres of an intersection with a primary road, the Council will have regard to the following assessment criteria. ...

The criteria which follow are, in most respects, material only to the impact of the proposed activity on the roading network. But they also include this reference to “Internal Conflicts on Site”:

Whether the internal circulation and carparking layout and exits and entries are designed to avoid traffic conflict that may result in congestion on the adjoining roads.

The following “Explanation/Reasons” are also provided:

The degree of Council intervention into the access associated with activities is at its highest on the primary road network. Inappropriate design at these points has the highest potential for adverse effects in terms of traffic safety and the efficient operation of the network.

In such cases the needs of through traffic and the overall roading network take priority over the quality of access to adjoining properties. The Council may restrict or prohibit access to certain activities if the adverse effects are unacceptable and can not be resolved through design solutions.

...

*Section 2, rules 8.23, 8.24 and 8.25*

[17] Section 2 starts with r 8.15 which is in these terms:

The provision and management of parking, loading and internal (on-site) circulation plays a significant role in the ability of people to access land use activities for work, recreation, shopping and business, and directly impacts on the use of the private motor vehicles as a primary mode of transport to these activities. Accessways, parking and on-site manoeuvring areas are not only resources which require appropriate management, but are also important components of the City's transportation system. The District Plan is the means by which the correct level and type of vehicle access and parking is provided to ensure people and communities are able to carry out their day-to-day activities as safely and efficiently as possible.

Parking and loading and associated access and circulation areas as a specific land use activity are not mentioned in the Resource Management Act. However, with the Act's emphasis on the management of the adverse effects of activities on the environment, and given the potential effects of parking areas, the Council has a clear role in addressing the role of parking and within the overall transportation network.

[18] The relevant policies, stated in r 8.18.1, are:

**Land use activities should be designed and laid out in a manner that:**

- (a) provision is made for parking and loading for present and future demands generated by the activity;
- (b) the parking and vehicle circulation provided is designed to ensure its safe and convenient use by the intended users.

[19] Parking and vehicle circulation rules are provided by r 8.23. Activities which do not accord with certain rules are restricted discretionary activities. Rule 8.24 provides "Development and Performance Standards", which cover the number of parking spaces, on-site circulation and loading. The associated rules do not deal in any detail with vehicle circulation save as to:

- (a) the avoidance of the need to reverse onto or off a site and the queuing of vehicles onto adjoining roads or so as to obstruct entry or exit to the site;
- (b) design and construction details (as to, for instance, formation, sealing, marking, avoidance of dust, stormwater drainage, illumination, and ramps);
- (c) avoiding the need for excessive reversing either into or out of parking spaces; and
- (d) the provision of internal vehicular access between separate parking areas on the same site.

Rule 8.24 also provides for the matters reserved for discretion and assessment criteria where there is non-compliance with the rules.

[20] Rule 8.25 is headed “General Assessment Criteria: Parking and Access”. Rule 8.25.1 is headed “Any non-residential activity requiring controlled, restricted discretionary or discretionary consent within the plan for which parking and access has been listed as a matter for control”.

[21] It is followed by 8.25.1.1 which is headed “Matters for Discretion” and provides:

Council reserves discretion over the following matters for the Plan for which parking and access has been listed as a matter for control for restricted discretionary activity resource consent applications for any non-residential activity and may impose conditions in respect of each:

- (i) The location and design of cycle, pedestrian and vehicular access to a site.
- (ii) The site layout as it relates to pedestrian paths, carparking and loading areas and internal circulation.
- (iii) The scale, management and operation of an activity as it relates to its traffic, loading and parking generation.
- (iv) The management and apportionment of use of parking and loading spaces within a site.

- (v) Any works agreements or contributions required to mitigate parking and access effects on adjoining properties or roads.

[22] Rule 8.25.1.2 provides for assessment criteria. Rather than set them out, it is sufficient for us to note that they address the merits of the parking and circulation arrangements in very general terms.

*The adverse effects asserted by Wendy's*

[23] Wendy's position is that the reconfiguration of site access and egress and associated changes to the circulation and parking arrangements have resulted in adverse effects which should have been apparent at the time of the notification decision. This is primarily because they result in traffic from Great South Road being directed across Wendy's front entrance and drive-through by way of a major new thoroughfare. There have also been substantial alterations to the car-parking areas, albeit not on the land which Wendy's rents. On the current parking and circulation arrangements Wendy's asserts that it is in breach of the conditions of the resource consent under which it operates. No complaint is now made in relation to disturbances associated with development of the site.

[24] A complicating feature of the case is that parking and traffic circulation arrangements on the site could be the subject of contract, either under the leases between the Trust and its tenants or separately. In other proceedings, Wendy's relied on the terms of its lease to challenge the new arrangements.<sup>7</sup> The proceedings having been discontinued, it might be thought to follow that Wendy's did not have a contractual entitlement to a continuance of the pre-redevelopment parking and traffic circulation arrangements. On the other hand, it is possible that circulation and parking arrangements could have been devised which were less unfavourable to Wendy's than those which were eventually adopted. The key question on this aspect of the case is whether effects on Wendy's of the *circulation and parking arrangements* associated with the development "relate to" matters in respect of which discretion was reserved. We will refer to such effects as "on-site effects".

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<sup>7</sup> See *Wendco (NZ) Ltd v Wiri Licensing Trust* [2014] NZHC 485; and *Wendco (NZ) Ltd v Wiri Licensing Trust* [2014] NZHC 820.

[25] As will be apparent by now, the primary purpose of the rule under which the redevelopment required consent was the avoidance of adverse effects on the road network, in this instance, on Great South Road. We will refer to such effects as “roading network effects”. Importantly, Wendy’s does not claim to have been adversely affected by reason of the impact of the redevelopment on the roading network. Instead, it relies solely on on-site effects.

*The approaches of Peters J and the Court of Appeal as to whether discretion was reserved in respect of on-site effects*

[26] In her judgment Peters J referred to rr 8.12.2.1 and 8.25.1.1 and concluded that the matters in respect of which discretion was reserved encompassed what we have described as on-site effects.<sup>8</sup>

[27] The Court of Appeal disagreed with this analysis. The primary difference between the approach it adopted and that of Peters J was that the Court of Appeal was of the view that r 8.25.1.1 was irrelevant:<sup>9</sup>

The purpose of these criteria [that is those provided for in r 8.12.2], and their application, is to ensure that the internal circulation of traffic does not adversely affect traffic on the primary road network. If there was no control over internal traffic circulation, there could be disruption to the primary road network, such as queues of vehicles on Great South Road trying to get on to the site. Consideration of the restricted discretionary activities on the site is restricted to the matters described in the rules.

...

Chapter 8 of the District Plan covers a range of other activities. Where these activities are classified as restricted discretionary activities, the rules follow the same format: rules set out the matters over which the Council has reserved discretion and rules that set out the assessment criteria in relation to that activity. Included amongst the other restricted activities are activities that change parking in ways that do not comply with other rules (r 8.23.1). In relation to such activities, matters for discretion are set out at r 8.25.1.1 and the assessment criteria [are] set out at r 8.25.1.2.

... We agree with the respondents that r 8.25.1 was not relevant because r 8.23.1 was not engaged by the resource consent application. Rule 8.10.3(b) (activity) was, and in turn r 8.12.2.1 (matters for discretion) and r 8.12.2.3 (assessment criteria) were.

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<sup>8</sup> *Wendco* (HC), above n 1, at [34]–[35].

<sup>9</sup> *Wendco* (CA), above n 2, at [16] and [20]–[21] (footnotes omitted).

*Our approach*

[28] The Plan is far from easy to construe in a coherent way and we see this aspect of the case as finely balanced.

[29] There are a number of factors which support the approach of the Court of Appeal:

- (a) If the redevelopment had not involved alterations to the access points to and from Great South Road, a resource consent would not have been necessary and the Trust would have been free to reconfigure on-site circulation and parking as it chose, subject to it meeting the standards specified in the Plan and whatever contractual restraints it may have agreed to.
- (b) On the Council's argument, the purpose of the relevant rules was solely to protect the roading network and there can be no doubt that this was at least the primary purpose.
- (c) Rule 8.12.2.1 can be read, as the Court of Appeal held, as reserving for discretion the various "matters" referred to, but only to the extent of their effect on the roading network.
- (d) The assessment criteria stipulated in r 8.12.2.3 can also be read in the same way.

[30] Although initially attracted to the interpretation favoured by the Court of Appeal, we have in the end decided against it.

[31] In the first place, the approach adopted by the Court of Appeal is not entirely literal. Under r 8.12.2.1(iii) discretion is reserved in respect of "site layout as it relates to ... carparking ... and internal circulation". The rule does not explicitly provide that discretion is reserved in respect of those matters only in relation to potential impact on the roading network. Similar considerations apply to the r 8.12.2.3 assessment criteria as to internal conflicts.

[32] Contrary to the opinion of the Court of Appeal, we are not able to read r 8.25.1 as confined to activities which are declared by r 8.23.1 to be restricted discretionary activities.<sup>10</sup> In reaching this view we are influenced by the general language of rr 8.15 and 8.18.1. Further, r 8.23 addresses parking and loading rules. Parking, loading and circulation rules are then stipulated by r 8.24. This rule also provides for the matters reserved for discretion and associated assessment criteria. The role in relation to r 8.23 which the Court of Appeal attributed to r 8.25 is in fact fulfilled by r 8.24. Rule 8.25 addresses restricted discretionary activities for which discretion has been reserved in respect of “parking and access”. This does not accord with r 8.23 which addresses parking, loading and circulation but is in accord with r 8.10.3 (although with the order of parking and access reversed).

[33] The matters in respect of which discretion is reserved in r 8.25 are expressed in general terms and could not sensibly be seen as subject to an implied condition that they are only relevant in respect of possible roading network effects. They therefore necessarily encompass on-site effects.

[34] While not particularly congruent with what we accept is the primary purpose of r 8.10.3, namely to protect the roading network, the interpretation we favour is consistent with the broadly expressed language of rr 8.15 and 8.18.1. As well, there may be at least some sense in the Council, once required to address access (as it undoubtedly was by r 8.10.3), taking into account not only adverse impact on the roading network (as it plainly had to under r 8.12.2) but also the intrinsic merits of the associated parking and circulation arrangements.

*Why the Court of Appeal considered that notification was required*

[35] As we have noted, the Court of Appeal was of the view that discretion had been reserved in respect of parking and circulation only to the extent of potential roading network effects. It nonetheless concluded that the Council was required to consider whether Wendy’s was required to be heard on what steps should be taken to avoid adverse roading network effects with a view to minimising adverse effects on Wendy’s associated with them.

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<sup>10</sup> Compare *Wendco (CA)*, above n 2, at [21].

[36] Its reasons for this conclusion were as follows:<sup>11</sup>

Site layouts ... are not usually inevitable. No one before us suggested that the site layout sought in the application was the only possible solution for meeting the criteria in r 8.12.2.3. Given it is possible that more than one site layout can satisfy these criteria, the consent authority has a discretion to approve one option over the other, consistent with discharging its duty under s 87A(3)(a) of the RMA .

Therefore, when assessing the particular application for consent to restricted discretionary activity, the Council can recognise that there may be occupiers and other users of the site who will be adversely affected by the proposal placed before them.

...

... . The relevant link is that the adverse effects on the person must relate to a matter for which a rule or national environment standard reserves control or restricts discretion. That is why there is an injunction in s 95E(2)(b) that requires the Council to disregard an adverse effect that does not so relate. This reasoning can be compared with the submission to this Court by the first respondent:

The Council should not be concerned with specific tenancy arrangements where the internal layout and car parking areas within the property can be accessed from any of the five access points into the land at 639 Great South Road. The key consideration was whether there would be acceptable impacts on the traffic or pedestrians in terms of the adjoining primary road network.

The latter part of that submission is correct as to the ultimate question but s 95E addresses the preliminary issue who should be heard on the question what steps should be taken to avoid congestion of the adjoining primary road network.

We consider that, if there are adverse effects to Wendy's by reason of the circulation of vehicular traffic over its land, and internal circulation and parking, which is designed "to avoid traffic conflict" that may result in congestion on the adjoining roads, those adverse effects on Wendy's will necessarily connect or, "relate to", matters addressed in r 8.10.3(b) and r 8.12.2.3(e).

The effect of this is that although discretion was not reserved in respect of on-site effects, such effects were nonetheless required to be taken into account because they were (or might be) caused by arrangements devised to minimise adverse roading network effects.

[37] This aspect of the Court of Appeal's decision is no longer relevant to the disposal of the case given our conclusion that discretion was reserved in respect of

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<sup>11</sup> At [18]–[19] and [41]–[43] (citations omitted).

on-site effects. We, nonetheless, think it right to note that we do not accept the analysis. Under s 104C a consent authority determining an application for a restricted discretionary activity may consider “only those matters over which ... it has restricted the exercise of its discretion”. Unless the effect in question can be said to be a matter over which discretion is reserved it must be disregarded. The approach of the Court of Appeal would introduce a disconnect between ss 95E(2) and 104C, which is not consistent with the overall legislative scheme, and we do not see it as correct.

**In making the non-notification decision, did the Council ask itself the right question and have sufficient evidence to justify its conclusion?**

*A preliminary comment*

[38] Issues as to adequacy of the material before the Council and whether it asked itself the right question did not loom large in the argument before us. This is because the primary contention of the Council and Trust was that on-site effects were not required to be considered. These issues were, however, touched on and by the end of the hearing they were on the table. We have considered whether it is nonetheless unfair to determine this aspect of the case on the basis of the material before us. We see the alternatives to us doing so as:

- (a) to convene a further hearing in this Court to address the issue;
- (b) to remit this issue for further consideration, presumably to the Court of Appeal (given that the issue was determined in favour of the Trust in the High Court and the judgment of the Court of Appeal did not squarely address what we consider to have been the correct question);<sup>12</sup> or

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<sup>12</sup> The basis on which the Court of Appeal addressed notification requirements was in terms of modification of steps required to avoid roading network effects rather than directly in terms of on-site effects, see the passage from the Court of Appeal judgment cited above at [35]. As well, as will become apparent, the Court of Appeal was influenced by its view of the effect of the development on Wendy’s resource consent, see below at [49]–[50] and [58]–[61].

- (c) to allow the appeal on the basis that too much water has now passed under the bridge to warrant the granting of relief (which is suggested by the minority as a possible – and perhaps preferred – outcome).<sup>13</sup>

[39] This aspect of the case is relatively straight-forward. As we will explain, the Council considered the appropriateness of the parking and circulation arrangements in general terms and thus, necessarily the possibility of associated adverse effects on the businesses on the site, including Wendy's. In this way the potential for adverse effects on Wendy's were addressed, albeit on a general basis. On the other hand, with the exception of the possible effect of the changes on Wendy's resource consent, the potential for adverse effects on Wendy's was not assessed on a stand-alone basis.

[40] If the point had not been put squarely in issue in the course of argument – as it was – we would not be prepared to determine it now. And if there was more turning on the issue, we may, despite the issue having been raised during the hearing, have been inclined to pursue options (a) or (b) as just postulated in [38]. But as the minority suggests, very little now turns on the point. Proportionality considerations thus come into play. Against that background – and given particularly that the parties were put on notice that we might well decide the appeal on this point – we have decided that we should finalise the litigation.

*The way the case was advanced in the High Court*

[41] We should also note that the complaints by Wendy's about adverse effects have changed from those set out in the statement of claim. At that time the contention that adverse effects were not taken into account was confined to the effect of the changed layout on Wendy's resource consent and disturbances associated with development. There is no hint in the statement of claim of the broader considerations referred to by the minority.<sup>14</sup>

[42] The basis on which the case was argued in the High Court was broader. Paragraphs 14–22 of the affidavit of Nigel Williams, which was relied on by

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<sup>13</sup> Compare below at [96].

<sup>14</sup> See below at [76]–[77].

Wendy's in the High Court, listed a number of adverse effects.<sup>15</sup> This evidence was later relied on by the Court of Appeal and it forms the basis for the conclusions of the minority. In terms of the way in which Peters J dealt with the matter, we note that in Mr Williams' affidavit these adverse effects are listed under the heading, "Effect of the plans approved in the WLT Resource Consent on the Wendy's Resource Consent".

[43] Why Mr Williams structured his affidavit in this way is apparent from the last three paragraphs of his affidavit:

- 23 The Wendy's Resource Consent was granted on the basis of a specific traffic management system being in place, which provided for a safe and efficient traffic function.
- 24 The plans approved in the WLT Resource Consent create a number of difficulties, which have the potential to cause significant adverse traffic-related effects.
- 25 These adverse traffic effects are likely to degrade the safety and efficiency of [the] traffic management system that is required under Wendy's Resource Consent.

Effectively he proceeded on the basis that the Wendy's resource consent resulted in what he described as a "safe and efficient traffic function" which would be likely to be degraded by the changed access, parking and circulation arrangements. In substance this line of argument was addressed to the impact of the changes on the existing arrangements (and thus on Wendy's) rather than on the resource consent. As well, the submissions made by counsel for Wendy's extended to submissions that the Council did not have adequate information, had not considered Wendy's position and did not consider the extent of the effects on Wendy's. There were then particular complaints that the Council had not considered the effect on Wendy's own resource consent or disturbance effects associated with developments works.

[44] As we will indicate shortly, the only adverse effects to which Peters J adverted specifically when she came to reach her conclusions were the alleged conflict between the new traffic arrangements and the Wendy's resource consent and

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<sup>15</sup> Mr Williams is a traffic consultant.

disturbances associated with construction. The latter issue was not relied on before us and we will therefore not mention it again.

*The legal test*

[45] If the Council had focused solely upon roading network effects and therefore treated on-site adverse affects as irrelevant, it would have failed to ask itself the correct question in making its non-notification decision. As will become apparent, however, and in respectful disagreement with the Court of Appeal on this point, we are of the view that the Council did take into account the possibility of on-site adverse effects. It certainly did so specifically in relation to the particular on-site adverse effects relied on in the statement of claim and more generally in respect of the appropriateness of the changed access and parking arrangements. The associated question that then arises is whether there was an adequate evidential basis for its conclusion that such effects would be less than minor and thus that non-notification was appropriate.

[46] On the basis of *Discount Brands v Westfield (New Zealand) Ltd*, the validity of the non-notification decision does not depend on this Court agreeing with the view taken by the Council that the adverse effects of the activity on Wendy's would be less than minor.<sup>16</sup> On the other hand, the Court must review the adequacy of the information before the Council when making the non-notification decision. This assessment must reflect the reality that in making the decision not to notify the application, the Council was precluding any opportunity for Wendy's to have input into the decision. On this point it is sufficient to refer to the following passage from the judgment of Elias CJ in *Discount Brands*:

[25] ... The requirement that the consent authority must be "satisfied" that effects are minor before deciding not to notify a resource consent application to undertake a discretionary or non-complying activity is a requirement of caution. The consent authority must be clear that notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor.

[26] It was not sufficient for the consent authority to have before it "some material of probative value", ... . Nor do I consider that the Court of Appeal was correct in the view ... that the consent authority had to decide "on the

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<sup>16</sup> *Discount Brands v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

information then available to them, whether any impact on existing centres would be so substantial as to threaten their viability”. The consent authority had to decide whether it could be satisfied without notification that the adverse effects on the environment were minor. It could not confine its consideration to the material before it, because that would be to avoid the question.

(citations omitted)

[47] It is arguable that subsequent changes to the RMA mean that an approach to non-notification decisions which is less exacting than that required by *Discount Brands* should now be adopted. This is discussed in some detail in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*.<sup>17</sup> Given that the Court below proceeded on the basis of *Discount Brands* and we are satisfied that the *Discount Brands* standard was in fact met, we see the associated arguments as best left for another case.

#### *The High Court decision*

[48] Peters J expressed her opinion on this aspect of the case succinctly:<sup>18</sup>

This application, with detailed information supplied, was considered by experienced specialists at the Council. They did not take that information at face value but made enquiries on several occasions and required revisions to the proposal that they considered were necessary. It was only when they were satisfied with the information provided that the notification decision was made. Accordingly, I am satisfied that the Council had sufficient information before it to assess the adverse effects of the proposal and to decide that they were less than minor.

[49] As we have already indicated, Peters J then went on to discuss the effect of the layout on *Wendco*’s resource consent and development disturbances. On the former point she said:

[52] Wendy’s submits that the modifications proposed to access B are in conflict with provisions of Wendy’s resource consent, that the Council should have appreciated that and that, had it done so, it would have come to the view that notification was required. I accept the Council’s submission that the fact that the modification of access B and its surrounds alters the layout provided for in Wendy’s resource consent does not in itself constitute an adverse effect that is more than minor. I add that the modification works

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<sup>17</sup> *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73.

<sup>18</sup> *Wendco* (HC), above n 1, at [51].

themselves do not take place on Wendy's leased premises but beyond its boundary.

*The Court of Appeal decision*

[50] The Court of Appeal saw the Judge's assessment of the argument as being "limited" and, at least by implication, was critical of her consideration of particular adverse effects being confined to those relating to Wendy's resource consent and development disturbance.<sup>19</sup> The Court also said:

[52] The record of the Council demonstrates that no one asked the relevant question, which is whether the site circulation and parking detail might cause an adverse effect on the business of Wendy's. Plainly, the Council staff knew that the new two-way thoroughfare crossed in part Wendy's title: the boundary of Wendy's land is shown on the plan of the site, and the inbound traffic arrow is shown on the inside of the boundary.

[53] The staff also knew the new traffic plan was inconsistent with Wendy's current consent. But they did not examine whether these were adverse effects on Wendy's "related to" protecting the primary road network and avoiding congestion, as they considered their sole task was to examine any adverse effects on the road network.

[54] To reason this way was an error of law, failing to apply ss 95B and 95E, leading to a breach of s 95E(1). The Council did not inquire as to whether any person would suffer adverse effects, let alone whether those effects would be minor or more than minor, because the Council considered the only relevant effects could be those to Great South Road. It proceeded on the basis there could be no adversely "affected person" by the design of the internal circulation and parking, designed to protect the local road network.

(footnotes omitted)

[51] The judgment does not explain the respects in which the new traffic arrangements were "inconsistent" with the Wendy's resource consent.

*Information before the Council*

[52] The information provided to the Council by the Trust included reports of 29 August 2013 by Traffic Solutions Ltd and 1 September 2013 by Barker & Associates. The Traffic Solutions report noted that with the redevelopment, the Plan's parking and loading space requirements would be satisfied and that the parking proposed would provide for "90-degree parking, with vehicle aisles that will

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<sup>19</sup> *Wendco (CA)*, above n 2, at [39].

provide good circulation for customers searching for parking”. The second report noted that: “The internal site layout affords safe and accessible vehicle circulation.” And, in addressing whether notification was required in relation to on-site effects, this report went on:

No persons on the subject site are considered to receive adverse effects from the proposed built form or land use activities due to the proposed use of the site for commercial activities that are compatible with the surrounding business area. The built form is in keeping with the typology and scale of other buildings on the site.

Traffic generation to the site and distribution of this at the vehicle access-ways, will be indiscernible, and no persons anticipated to receive adverse effects from the new land use activities on the site and associated vehicle movements to, from and within the site. Sufficient onsite car parking has been provided to accommodate the new activities, and internal circulation is afforded between car parking areas of different tenancies. Any trade competition effects have been disregarded.

...

As such, we consider that persons on the subject site will receive less than minor adverse construction effects, and that the building structure and ongoing operational effects of the proposal and land use activities will be negligible.

[53] The Council went back to Barker & Associates and asked for further information including “an assessment under Rule[s] 8.12.2.3 & 8.25.1.2 for modification to access and parking having access onto the primary road”.<sup>20</sup> This is an important point. It shows that, contrary to the position adopted in argument before us by Mr Loutit as to what was required of them, the Council decision makers did see r 8.25.1.2 as applicable. It follows that they must thus have considered that on-site effects on the change of access and parking arrangements were relevant to their task.

[54] The information requested was duly provided by Barker & Associates on 10 October 2013.<sup>21</sup> For present purposes the following comments are relevant:

Good circulation will be provided on the site. Aisle widths will be sufficient to cater for the traffic flows expected.

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<sup>20</sup> This was on 23 September 2013.

<sup>21</sup> The information was included in a report by Traffic Solutions Ltd for Barker & Associates dated 9 October 2013. This report was attached to a letter from Barker & Associates to Auckland Council dated 10 October 2013.

...

Parking spaces will be easily accessible and conveniently located to the activities.

...

Parking spaces will be located well clear of entry and access points.

...

Loading/servicing areas will be clearly identified, and will be located where conflict with others moving about on the site will be minimised.

...

Pedestrians will be well catered for. ...

[55] We note as well that one of the Council officers, Ms Kwan, visited the site and photographs she took were produced as exhibits. Peters J was satisfied that she, along with the other Council officers who dealt with the application, were familiar with the site.

*The basis upon which the Council made the non-notification decision*

[56] In an internal Council assessment of 21 October 2013, Mr Baladevan Thambiah, a traffic engineer employed by the Council, noted that the parking design and layout complied with r 8.24.5 (which specifies the requirements as to the design of parking areas and circulation) of the Plan. He also addressed on-site queuing. Although Mr Thambiah did not expressly refer to r 8.25.1, he recommended a condition as to the reasonable management of car parking to allow appropriate utilisation and also the review condition which we have set out.<sup>22</sup> These recommendations, along with his mention of on-site queuing, strongly indicate that he did have regard to on-site effects. In his affidavit he said that he did not have any concerns as to internal traffic flows on the site. He explained this in terms of the site being a “low speed traffic environment” and the multiple access points. He said that at the time he considered that the combined effect of these factors was that:

... traffic will be self-regulating in terms of finding the most convenient locations for entry and/or exit to and from the site including accessing the drive-through areas.

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<sup>22</sup> Above at [2].

[57] The 25 October 2013 report which formed the basis of the non-notification decision recorded:

The layout of the new buildings have taken account of natural features and utilised these in the site layout in conjunction with other existing business activities on the site. In particular, the site layout has considered the open spaces that will be created and relating these to the existing open space network to ensure that the buildings have a positive interaction with the open spaces.

The location and design of entry points, loading bays, parking areas, accessways and landscaping areas are designed and provided on a common and functional basis to ensure compatibility with the existing business activities and buildings on the subject site.

Furthermore, ..., the site layout has been amended to foster and highlight pedestrian-focus environment and to improve pedestrian interaction with the street and the surrounding businesses. In particular, pedestrian network is made clearer and provide better connectivity and integration of businesses within the site and to the businesses in the wider area.

*Inconsistency with the Wendy's resource consent*

[58] It will be recalled that amongst Wendy's complaints is the contention that the resource consent granted to the Trust had the effect of putting Wendy's in breach of its own resource consent. Although this contention was accepted by the Court of Appeal, this aspect of the case was not developed in argument before us.

[59] Wendy's resource consent is subject to a condition in the following terms:

The restaurant and takeaway facility shall not be occupied or the use commenced until the car park area and means of vehicular access (parking spaces, manoeuvring areas and driveways including access to the BNZ Bank site) shown on the approved plans have been formed, sealed, marked and drained to the satisfaction of the Council. The car parking area shall thereafter be maintained, kept free of obstruction and available for the parking of vehicles associated with the development.

[60] The plan attached to the resource consent depicts the then egress arrangement immediately to the north of Wendy's. This enabled cars to exit onto Great South Road but did not permit access. Under the current arrangements, cars can now come into the site at this point. The contention seems to be that the condition locked into place the vehicular access arrangements denoted on the plan with the result that the new arrangements put Wendy's in breach of the consent.

[61] This is a technical argument. The new arrangements have been approved by the Council which, accordingly, would not be well-placed to complain about them. In any event, however, we do not see it as sound. The current arrangements still permit cars to leave the site from the access point in issue. In light of this, we are far from persuaded that there is any substantial deviation between what is depicted on the original plan and what is now in place. In any event, the ongoing requirement is confined to car-parking and the new arrangement does not affect car-parking on the Wendy's site.

[62] Evidence given on behalf of the Council showed that specific attention was given to the resource consent issue.<sup>23</sup>

*Did the Council approach the notification decision on an erroneous legal basis?*

[63] Contrary to the view of the Court of Appeal that the Council confined itself to consideration of roading network effects, we think it clear that the Council also addressed on-site effects. Its request for information as to r 8.25.1.2 shows that it had that rule in mind. The risk of queuing, an on-site effect, was addressed in the report of Mr Thambiah and he also recommended conditions which addressed on-site effects. And, most significantly, the passage which we have cited from the final report shows that on-site effects were assessed at the decision-making stage.

*Was the material available as to on-site effects adequate to enable the non-notification decision to be made?*

[64] By requiring information as to the application of r 8.25.1.2, the Council engaged with the on-site effects of the new arrangement. In light of this and the report provided by Mr Thambiah, the Council took appropriate steps to ensure that the material before it was adequate for a non-notification decision. We regard its analysis of the material as rational and free from any obvious error.

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<sup>23</sup> The evidence given by Ms Kwan, an Auckland Council planner who considered the application, was to the effect that the 30 car parks required by the Wendy's resource consent were located on the Wendy's site. For this reason she did not see the terms of that resource consent as being material to the notification decision.

## **Disposition**

[65] For the reasons given, we allow the appeal, set aside the judgment of the Court of Appeal (including the orders as to costs) and reinstate the judgment of Peters J. We do not know whether an order for costs was made in that Court. In any event, any issue as to costs in relation to the High Court stage of the proceedings are to be fixed by the High Court in light of this judgment.

[66] Although the Council and Trust have succeeded on a point which they did not really press, the Council also succeed on what we imagine was, from its point of view, the primarily important point of principle (see [37] above). In those circumstances we consider that costs should follow the event. Accordingly, the Council and the Trust are awarded costs in the Court of Appeal and in this Court. Costs in the Court of Appeal are to be fixed by that Court. In this Court, Wendy's is to pay the Council costs of \$10,000 and the Trust costs of \$5,000 along with, in both instances, reasonable disbursements. These orders reflect our assessment of the success or otherwise achieved by the parties in this Court and the relative contributions to the burden of the arguments advanced on behalf of the Council and the Trust.

## **GLAZEBROOK AND ARNOLD JJ**

(Given by Arnold J)

[67] We agree with the majority that rr 8.12.2.1 and 8.25.1.1 of the Manukau Operative District Plan 2002 (the Plan) were engaged by the Wiri Licensing Trust's (the Trust) proposal to redevelop part of its site at Great South Road, Manukau, by replacing a Mobil service station with a new building containing several retail outlets and a further building for a Carl's Jr drive-through restaurant. We also agree that those rules required consideration of the on-site effects of the proposal independently of any roading network effects.<sup>24</sup> However, we disagree with the majority that Auckland Council (the Council) did take account of on-site effects appropriately in reaching its decision that no one was adversely affected by the proposal in a way that was more than minor, so that limited notification was not required.

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<sup>24</sup> See above at [31]–[34].

[68] It is important to make a number of points at the outset.

[69] First, the Council was required to make two decisions as to notification – was public notification required? If not, was limited notification required? The argument in this case concerned whether limited notification was required.

[70] Second, notification, whether public or limited, not only recognises the interests of those who are adversely affected by a proposal by giving them an opportunity to participate in the process but also facilitates better-quality decision-making.<sup>25</sup> Although there is no longer any presumption in favour of notification, the decision to notify or not remains an important one.<sup>26</sup>

[71] Third, while public notification and limited notification both involve consideration of adverse effects, in particular whether any adverse effects are more than minor, the focus of the consideration is different. Although a consent authority has a general discretion to decide to publicly notify an application for a resource consent for an activity,<sup>27</sup> it must publicly notify the application if (among other things) it decides that the activity “will have or is likely to have adverse effects on the environment that are more than minor”.<sup>28</sup> In considering whether an activity will or may have such an effect, a consent authority must disregard (among other things) any effects on persons who own or occupy the land, in, on or over which the activity will occur or any land adjacent to that land.<sup>29</sup> In relation to limited notification, the issue is whether any person is affected.<sup>30</sup> A consent authority must decide that a

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<sup>25</sup> See *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, at [46] per Keith J for example. *Discount Brands* was decided under an earlier statutory regime and so may need to be treated with some caution given the new regime: see *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 at [32]–[41]. See above at [47].

<sup>26</sup> The presumption in favour of notification was removed by s 76 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, which repealed ss 93–95 of the Resource Management Act 1991 and inserted ss 95–95F.

<sup>27</sup> Resource Management Act, s 95A(1).

<sup>28</sup> Section 95A(2).

<sup>29</sup> Section 95D(a). Among the other matters that the consent authority must disregard when considering public notification is “trade competition and the effects of trade competition”: s 95D(d).

<sup>30</sup> Section 95B(1).

person is affected “if the activity’s adverse effects on the person are minor or more than minor (but are not less than minor)”.<sup>31</sup> The exclusion in relation to effects on persons on the land or adjacent land does not apply, so that a person on the relevant site or an adjacent site may be an affected person for the purposes of limited notification. The provision for limited notification is a recognition by Parliament that “an activity which has only a minor effect on the environment generally may have a special significance for persons who may be directly affected by it”.<sup>32</sup>

[72] Fourth, the concept of “adverse effects” is not open-ended, as s 95E of the Resource Management Act 1991 makes clear. Adverse effects arising from a permitted activity may be ignored.<sup>33</sup> In relation to a controlled or restricted discretionary activity, to be material an adverse effect must relate to a matter for which discretion is reserved.<sup>34</sup>

[73] Fifth, the consideration of on-site effects and the assessment of whether anyone, specifically Wendco (NZ) Ltd (Wendy’s), was adversely affected by the proposal are not necessarily the same thing. Independently of any impact on the roading network, the Council had to ensure under its applicable rules that there were the required number of parking spaces, suitable loading facilities and viable access arrangements for the new retail facilities and restaurant in the proposed redevelopment. Internal circulation was obviously relevant in that context. But that is not the same as assessing whether any particular existing tenant was adversely affected by what was proposed.

[74] Sixth, the interpretation of rr 8.12.2.1 and 8.25.1.1 which the Court has adopted was not an interpretation argued for by the Council. Rather, the Council’s argument was that r 8.12.2.1 dealt only with roading network effects and r 8.25.1.1 was not engaged at all. It is therefore dangerous to assume that references to those rules in the documents generated by the Council and its officers had the same meaning, or the same significance, as this Court has given them.<sup>35</sup>

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<sup>31</sup> Section 95E(1). Presumably the adverse effects must be environmental in nature: see *Discount Brands*, above n 25, at [109] per Blanchard J.

<sup>32</sup> *Discount Brands*, above n 25, at [110] per Blanchard J.

<sup>33</sup> Resource Management Act, s 95E(2)(a).

<sup>34</sup> Section 95E(2)(b).

<sup>35</sup> Compare the majority, above at [53] and [63].

[75] Finally, the Council did not argue in its written submissions that, if it was wrong as to the interpretation of rr 8.12.2.1 and 8.25.1.1, it had nevertheless considered on-site effects in the context of determining whether any particular tenant was adversely affected and, if so, to what extent. This aspect was taken up with Mr Loutit for the Council by members of the Bench in the course of his reply submissions.<sup>36</sup> Mr Loutit's submission was that, if the Court determined that on-site effects had to be considered independently of their impact on the roading network, the matter would likely have to go back to the Council for reconsideration. As a consequence of the way this matter developed, we are concerned that Wendco did not have a proper opportunity in this Court to advance all of its arguments on this issue.<sup>37</sup>

[76] Before we go on to address the Council's decision-making, we should briefly explain what the Trust's now-implemented proposal involved in terms of its potential effect on Wendy's. Before the proposal was implemented, there was an entrance onto the Trust's site from Great South Road between the Mobil service station and Wendy's which provided access both to the Mobil service station and to Wendy's (that is, midway along the side of the Trust's site). It was one of three entrances onto the site from Great South Road. Alongside this entranceway was a raised berm, through which there was a vehicle entrance/exit for Wendy's facilities, that is, the restaurant, its drive-through facilities and car parking areas. The berm was on land within the Mobil tenancy, and had parking spaces on the side closest to Wendy's. But most of the parking for Wendy's was on land within Wendy's tenancy. The raised berm meant that Wendy's car parking area was demarcated and protected from cars using this entrance way to the site from Great South Road. Under the proposal as implemented, the berm (and its associated entrance/exit for access to Wendy's) was removed and the parking abutting the berm was moved elsewhere. In its place, a two-way entrance/exit road onto Great South Road was established, which runs immediately in front of the entrance into Wendy's restaurant and the entrance and exit from its drive-through operation. The inward lane of the new entrance/exit roadway onto Great South Road runs across Wendy's leased land.

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<sup>36</sup> Mr Hollyman for Wendy's had noted in his submissions that the Council sought further information in terms of rr 8.12.2.3 and 8.25.1.2: see below at [93].

<sup>37</sup> See above at [38]–[40].

The replaced parking is on the far side of the new entrance/exit road, although the majority of Wendy's parking remains on its leased land.

[77] The Court of Appeal summarised the impact of the proposed redevelopment on Wendy's as follows:<sup>38</sup>

- (a) Wendy's land ... changed from an area of limited vehicular access, used principally by Wendy's' customers, to a main thoroughfare for all vehicles entering or exiting the site through the middle access from Great South Road;
- (b) this significantly changed thoroughfare-directed traffic through Wendy's' leasehold premises; and
- (c) customers exiting Wendy's' drive-through were now required to exit directly into this flow of traffic entering from Great South Road.

The Court went on to say that:<sup>39</sup>

... Wendy's is the closest business to the central access point and the resource consent application, and now the consent, places the lane for inbound traffic that is to be a thoroughfare on and across the front part of the leasehold title of Wendy's, bringing passing traffic much closer to the Wendy's Restaurant.

[78] Turning now to the Council's decision-making process, we begin with the document which records the basis on which the Council made its decisions as to public and limited notification. The decisions were made initially by Ms Sheena Kwan, Intermediate Planner, and were signed off by another Council staff member on behalf of Ms Kwan's Team Leader, Ms Alice Iuli-Tay.

[79] In her report on the Trust's application dated 25 October 2013, Ms Kwan described the proposed development and set out the reasons for the application for a resource consent before dealing with notification. Ms Kwan first addressed the question of public notification. She noted r 8.12.2.1 as being relevant to the assessment. Ms Kwan then went through a number of considerations. Among them was site layout, which she addressed in the extract cited by the majority.<sup>40</sup> Under a further heading "Traffic and Transportation", Ms Kwan cited from a report prepared

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<sup>38</sup> *Wendco (NZ) Ltd v Auckland Council* [2015] NZCA 617, (2015) 19 ELRNZ 328 (Wild, Fogarty and Mallon JJ) [*Wendco* (CA)] at [34].

<sup>39</sup> At [36].

<sup>40</sup> Above at [57].

by a Council traffic engineer, Mr Devan Thambiah. The extract cited contained two passages of possible relevance, as follows:

- Any effects on traffic or pedestrian safety or the operation of the adjoining local road network will be less than minor as the turning movements will not compromise safe and efficient movements for pedestrians and/or vehicles. The traffic-generating characteristics of the proposed activity including any need to accommodate large vehicles, and the existing and likely future traffic patterns within the adjoining roads was considered and the adverse effects will be less than minor.
- The modification made to mid-block vehicle crossing and northern-most vehicles crossing is minor and will not result in significant change to traffic flow pattern. There will be no impact on sight distances. The northern most vehicle crossing is located at the signalised intersection of Great South Road with the access to the Countdown Supermarket to the east. The mid-block vehicle crossing will be left in and left out only. The turning traffic could safely enter and exit the site without obstructing other traffic on the road due to the prohibition of right turns from this access point. The on road queuing and on site queuing is sufficient to accommodate traffic waiting to enter the site without adversely impacting on traffic or pedestrians on the adjoining road network.

Ms Kwan then concluded:

Overall, I concur with the findings of the Traffic Engineer in that the proposed traffic and transportation in association with the application is functional and appropriately designed for the proposed activity and any adverse effects relating to the safety and efficiency of the existing surrounding transportation network will be less than minor. The increased traffic from the increased business activity is considered to be minor is adequately catered for within the existing transportation network in the area.

Having considered several other matters, Ms Kwan determined that the application could be processed without public notification.

[80] We pause at this point to note that the extracts from Ms Kwan's report under the heading "Site Layout" do not address traffic movements on-site specifically but rather seem to be addressed to site design issues more generally<sup>41</sup> and the passages from Mr Thambiah's report focus on roading network effects, not on-site effects. Further, in her affidavit, Ms Kwan deposed in relation to the public notification decision:

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<sup>41</sup> See above at [57].

As required by section 95D(a), I disregarded effects on persons who are owners and occupiers of the land in, on or over which the application relates, and of land adjacent to that land. Owners and occupiers of the land over which the application relates includes the existing businesses on [the Trust] property at 639 Great South Road.

Obviously, then, she did not consider at this stage whether any of the existing tenancies on the Trust's site was affected by the proposed changes.

[81] Having dealt with public notification, Ms Kwan turned to consider whether limited notification was required. She concluded that no one was adversely affected so as to require limited notification. Given its importance, we set out this aspect of Ms Kwan's reasoning in full:

No person is considered adversely affected by the activity because:

- The proposed restaurant building and retail block building complies with all relevant bulk and location development and performance standards of the District Plan.
- The proposed buildings are complementary with the existing buildings on the subject site and have been designed to be in keeping with the urban environment of the wider business area.
- The modification of the vehicle crossings will not result in significant change to traffic flow pattern along a primary road network (Great South Road).
- *Any adverse effects on traffic or pedestrian safety or the operation of the adjoining local road network will be less than minor as modification to the turning movements will not compromise safe and efficient movements for pedestrians and/or vehicles.*
- The capacity of the existing roading network in the area is sufficient to accommodate traffic generated by the activity to ensure that any adverse effects relating to the safety and efficiency of the existing surrounding transportation network will be less than minor.
- The signs have been strategically located to ensure that driver's vision is not obstructed and to avoid creating hazardous situations to the safe movement and direction of traffic.
- The scale, use of colour, content displayed, construction materials and illumination of the proposed signs are not visually prominent that detracts from the visual amenities of the street scene.
- The corner nature of the subject site provides sufficient road frontage to avoid cumulative visual effects or create an effect of clutter from the additional signs.

- Possible earthwork traffic crossing the surrounding roading network would be limited due to the nature of the work, and limited in duration and frequency, due to the likely time periods for works.
- Appropriate erosion and sediment control measures will be put in place to ensure that the adjoining properties are protected and that all sediment runoff remains within the development site. It is anticipated that there may be some dust, noise during earthworks phase. However, given the short duration of the earthworks construction, no persons are deemed to be adversely affected.
- Any potential site stability issues associated with the development on adjoining properties are also considered to be less than minor.
- No areas of concern in terms of soil contamination are found as test results show conformance with NES guidelines and that any adverse effects of the proposed activity on human health will be less than minor.

(emphasis added)

[82] It seems clear from their wording that only one of these reasons (the fourth, italicised) possibly relates to on-site circulation, and none address any possible adverse effect on access to, or egress from, any individual tenancy such as Wendy's. This despite Wendy's proximity to the reconfigured entrance/exit roadway. Moreover, Ms Kwan seems not to have appreciated the full impact of what was proposed on Wendy's. In her affidavit she said:

Following my review of the site history, I was aware of the resource consent granted in 1999 for the establishment and operation of Wendy's restaurant. In the Wendy's resource consent, I noted that a total of 30 carparking spaces were to be provided to comply with the parking requirements of the District Plan. The required carparking spaces are located within Wendy's lease area. While [the Trust] had applied to relocate approximately 20 carparking spaces, none of these will affect Wendy's carparking spaces within their lease area. Therefore, I did not give further consideration to this resource consent because I was able to determine that the works area did not encroach into Wendy's site.

However, the reconfigured entrance/exit roadway did encroach onto Wendy's site – part of it ran across Wendy's leased land.<sup>42</sup>

[83] We consider that this material shows that the Council did not turn its mind to the possible adverse effects of the new layout on Wendy's when making its decision that no limited notification was required or, at least, did not have before it sufficient

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<sup>42</sup> Presumably this was consistent with the terms of the lease between Wendy's and the Trust.

information to do so adequately. In *Discount Brands Ltd v Westfield (New Zealand) Ltd* Blanchard J noted the then statutory requirement (in s 93 of the Resource Management Act) that the information before a consent authority must be “adequate”. This did not mean, the Judge said, that the information must be “all-embracing”, simply that it must be “sufficiently comprehensive” to enable the consent authority to consider (inter alia) the issue of adverse effects on an informed basis.<sup>43</sup>

[84] Section 93 was substituted in 2003.<sup>44</sup> Prior to its substitution, it required that once a consent authority was satisfied that it had received “adequate information”, it was to ensure that notice of the application was given as prescribed by s 93 unless the application did not need to be notified in terms of s 94. Despite the substitution and subsequent repeal of s 93, it remains the case that a consent authority making determinations as to notification must have sufficiently comprehensive information before it.<sup>45</sup> Sound public administration permits nothing less.

[85] Blanchard J went on to say in *Discount Brands*:<sup>46</sup>

[116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority’s non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

To this must be added the observation that an affected person may not seek to oppose an application for an activity, but rather may wish to influence how the activity is implemented. As the Court of Appeal pointed out in the present case, “[s]ite layouts ... are not usually inevitable”.<sup>47</sup> Had Wendy’s been notified, it may have been able to suggest changes to what was proposed that would have met its

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<sup>43</sup> *Discount Brands*, above n 25, at [114]. See also Tipping J at [146].

<sup>44</sup> Section 93 of the Resource Management Act was substituted in 2003 by s 41 of the Resource Management Amendment Act 2003. It was then repealed in 2009 by s 76 of the Resource Management (Simplifying and Streamlining) Amendment Act.

<sup>45</sup> See *Ferrymead Retail Ltd v Christchurch City Council* [2012] NZHC 358 at [78]–[80]; and *Green v Auckland Council* [2013] NZHC 2364, [2014] NZRMA 1 at [92]–[97].

<sup>46</sup> *Discount Brands*, above n 25.

<sup>47</sup> *Wendco (CA)*, above n 38, at [18].

legitimate concerns while at the same time meeting all other requirements, both of the Trust and the Plan.

[86] The majority conclude that the Council did take into account the possibility of adverse on-site effects and that there was an adequate evidential base for its conclusion that such effects would be less than minor. They reach this conclusion substantially on the basis of three categories of material, namely: (a) the material submitted with the Trust's original application; (b) the Trust's response to the Council's request for further information; and (c) an internal assessment made by the Council's traffic engineer, Mr Thambiah.

[87] There is little point in going through each of these elements in detail. Rather, we confine ourselves to some general observations about them.

[88] First, as we have already noted, issues relating to parking for the new tenancies, unloading of goods and access had to be, and were, considered in the consenting process under various rules addressing those topics. But nowhere in the record is there any indication that Council officers considered the particular position of Wendy's despite the obvious changes that were to be made to the road layout and parking arrangements immediately in front of the entrance to its restaurant and drive-through facilities and which intruded onto its leased land. At best, there may have been some general, generic consideration of effects on existing tenants.

[89] Second, the importance of a more particular consideration is illustrated by reference to a report dated 25 March 2014 prepared by the traffic expert retained by Wendy's, Mr Nigel Williams. In that report, he assessed first the existing site layout and access arrangements on the Wendy's site and concluded that there was little opportunity for conflict between Wendy's traffic and other traffic circulating on the Trust's site. Mr Williams then considered the arrangements that would apply once the proposed redevelopment had taken place in accordance with the Trust's resource consent. In this context, Mr Williams identified a number of concerns. For example, he noted that the new exit/entry road would become the means of egress for the majority of the combined traffic flow generated by Wendy's and the new Carl's Jr restaurant. He said:

26. No analysis has been carried out of the impact of the expected traffic volumes on this exit route, particularly under peak hour conditions when (already) the frequent gridlock conditions on Great South Road's northbound lanes obstruct egress from this crossing.

He then went on to illustrate the point with a number of diagrams identifying potential conflicts. Having explained a number of other concerns, Mr Williams concluded:

43. I note that the Council consented to the plans of the [Trust] in 2013. However, when I review the Traffic Impact Assessment and supplementary information provided, and the comments on the application by the Council I am unable to find any sensible analysis of the potential issues I have discussed above.
44. I am satisfied that the works authorised by the [Trust] consent will seriously degrade the convenience, safety and efficiency of the access and on-site circulation provisions in relation to the Wendy's site, and of the wider [Trust] site generally.

[90] Third, the Trust's application for resource consent was supported by a report from Barker & Associates (a planning consultancy firm), which attached a traffic impact assessment by Mr Ian Constable of Traffic Solutions Ltd, to which the majority refers.<sup>48</sup> The Baker & Associates report identified a number of relevant rules from the Plan, although it did not refer to either r 8.12 or r 8.25. To the extent that the report addressed traffic generation, access, parking and loading, it summarised what it described as the key points from the Traffic Solutions Ltd report. These related to road network effects, parking for the new businesses and signage. Later in their report, Barker & Associates considered whether any of the existing tenancies on the Trust's site were affected persons requiring limited notification. In relation to traffic, the report contained the extract quoted by the majority.<sup>49</sup> That extract simply expresses a conclusion and, in any event, there is nothing in it to indicate that Barker & Associates had turned their minds to the particular position of Wendy's and concerns of the type identified by Mr Williams.

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<sup>48</sup> Above at [52].  
<sup>49</sup> Above at [52].

[91] At this point, it is as well to repeat a caution expressed by Blanchard J in *Discount Brands* in the italicised portion of the following extract from his judgment:<sup>50</sup>

[114] So, in summary to this point, the information in the possession of the consent authority must be adequate for it: (a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected. The statutory requirement is that the information before the consent authority be adequate. It is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.

[115] The statutory requirement addresses more than the scope of the information. *The consent authority must necessarily be satisfied as well that the information is reliable, especially so where an expert opinion is tendered. The authority will need to consider whether the author of the opinion is both appropriately qualified to speak on the subject and sufficiently independent of the applicant so as to be seen as giving expert advice rather than acting as an advocate for the applicant.*

[92] We mention this for two reasons. First, as Tipping J emphasised in *Discount Brands*, the need for a consent authority to have a sufficient informational base for its notification assessment requires that it distinguish between information and assertion.<sup>51</sup> An assertion by an applicant (or its expert) that no one is affected by the application which is not supported by adequate explanatory material is not sufficient. Second, from time to time it is inevitable that experts will come to different conclusions on matters such as those at issue here, as, indeed, they have in this case. There is nothing untoward in that. But consenting authorities need to be mindful of this when considering material submitted by applicants (and, of course, objectors).

[93] As the majority emphasise,<sup>52</sup> following receipt of the application, Council officers did seek additional information from Barker & Associates. As part of that process, Barker & Associates was asked to “provide an assessment under Rule 8.12.2.3 & 8.25.1.2 for modification to access and parking having access onto the primary road”. Barker & Associates provided a report from Traffic Solutions Ltd, from which the majority quote.<sup>53</sup> However, the quotations referred to need to be read in the context of the questions to which they respond; moreover, they are

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<sup>50</sup> *Discount Brands*, above n 25 (emphasis added).

<sup>51</sup> At [146].

<sup>52</sup> Above at [53].

<sup>53</sup> Above at [54].

generic rather than particular and are, in any event, essentially assertions. To illustrate, the answer: “Loading/servicing areas will be clearly identified, and will be located where conflict with others moving about on the site will be minimised”, quoted by the majority, was a response to the following assessment criterion: “[t]here is likely to be conflict between any loading, drive-through or pick up facilities provided on site and traffic using entries, exits or the main circulation areas”. It is not clear from this material that Mr Constable (of Traffic Solutions Ltd) understood how the new entrance/exit road would impact on Wendy’s operations, or how the Council could draw properly any conclusion about that from his response.

[94] In relation to Mr Thambiah’s report, parts of which were cited by Ms Kwan in her report on the resource consent application, it contains nothing explicit about possible adverse effects on any specific tenants, Wendy’s in particular. The report does show that Mr Thambiah understood that r 8.12.2.3 was engaged, but the report makes no reference to r 8.25.1.2. On-site traffic effects are discussed, but principally in the context of their impact on the roading network, as is reflected in the language of the condition attached to the consent.<sup>54</sup> Mr Thambiah explained in his affidavit that he “did not have any concerns about internal traffic flows” because he considered that these would “automatically adjust” when the project was completed. But even if that is correct, it does not mean that Wendy’s was not adversely affected by the proposed changes. Mr Thambiah also said that, having considered the concerns raised by Wendy’s in the context of the litigation, he thought that the changes to the access way would benefit Wendy’s when compared to the previous layout (echoing an allegation in the Council’s statement of defence). But that, of course, is not an assessment he is in a position to make – it is that of the affected business.

[95] To conclude, in our view, the most reliable evidence as to why the Council decided not to give limited notification is in the reasons that the responsible officer, Ms Kwan, gave at the time in the notification section of her report. There is no indication that the Council gave any specific consideration to the existing tenant most obviously affected by what was proposed, namely Wendy’s, or understood the full impact of the proposed new entrance/exit road on its operations in terms of the

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<sup>54</sup> See above at [2].

issues identified by Mr Williams. Accordingly, we consider that its decision not to give limited notification was not properly based and is susceptible to review.

[96] A court will normally grant relief where it finds reviewable error.<sup>55</sup> Given that we are in the minority in the present case, it is unnecessary that we address relief in any detail. It is sufficient to say that, in the particular circumstances of this case, it may well be too late to grant relief in the form of quashing or setting aside the Council's resource consent decision or any component of it. The Trust's proposal has been implemented and the new entrance/exit road has been in operation since December 2014. The new roadway may well have created some difficulties for Wendy's, which could have been avoided had it been given limited notification and so been able to participate in the process; but, given the scope of what is involved, that may not be sufficient to justify intervention at this stage. This is especially so if the review condition remains operative as that would provide a mechanism for taking Wendy's legitimate interests into account even now. In any event, it is unnecessary that we say anything further about remedy.

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<sup>55</sup> See *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] per Arnold J (delivering the reasons of Elias CJ and himself).