BEFORE AN EXPERT CONSENTING PANEL

IN THE MATTER	of the Fast-track Approvals Act 2024 (**FTAA**)
AND	
IN THE MATTER	of an application by Kiwi Property Holdings No.2 Limited under section 42 FTAA for approvals relating to the Drury Metropolitan Centre Project Consolidated Stages 1 and 2

MEMORANDUM OF COUNSEL FOR AUCKLAND COUNCIL

Dated: 11 August 2025

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BROOKFIELDS
LAWYERS

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 We act for the Auckland Council (**Council**) in relation to the substantive application for the Drury Metropolitan Centre Project Consolidated Stages 1 and 2 (**Application** / **Proposal**) by Kiwi Property Holdings No.2 Limited (**Applicant**) under the Fast-track Approvals Act 2024 (**FTAA**).

1.2 This memorandum is provided in response to Minute 1 inviting comments on the Application[1] and is structured as follows:

(a) **Section 2:** A summary of the outcome of the Council's assessment of the Application and recommendations.

(b) **Section 3**: The FTAA legal framework.

(c) **Section 4:** Commentary on specific legal issues arising from the Council's assessment to date.

2. SUMMARY OF ASSESSMENT

2.1 Council's assessment of the Application is set out in detail in Mr Nakamura's Planning Memorandum dated 11 August 2025 (**Planning Memo**). The Planning Memo identifies a number of significant areas of concern with the Proposal as lodged and recommends that – as matters stand – approval should be **approved in part / declined in part**, subject to a comprehensive suite of amended consent conditions / modifications.

2.2 In summary, the issues identified in the Planning Memo relate to:[2]

(a) Misalignment of the Proposal with infrastructure delivery: The Application seeks a level of development significantly exceeding what current infrastructure can support, relying on multi-billion-dollar transport projects (Mill Road and Drury South Interchange) that are unfunded and have no delivery timeline. While conditions precedent are proposed in this regard by the Applicant, as addressed below in this legal memorandum, such conditions are inappropriate where

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1 Issued by the Panel on 14 July 2025 pursuant to section 53 of the FTAA.

2 This represents a very brief summary – refer to the Planning Memo and supporting specialist memos for the full assessment.

there is substantial funding and timing uncertainty associated with infrastructure upgrades.

(b) Inconsistency with the planning framework: By effectively "banking" precinct-enabled development capacity for a 15-year period, the Application is at odds with a core precinct principle that resource consent applications, development and subdivision must be integrated with infrastructure delivery. This “banking” of capacity potentially undermines development feasibility for other landowners within the Drury Centre, Drury East and Waihoehoe Precincts.

(c) Potentially significant adverse transport impacts: Refer to the Planning Memo and the memoranda from Auckland Transport (**Annexure 3**) and Council’s traffic engineer (**Annexure 4**) for the detail, however concerns in this regard encompass:

(i) Concerns about the reliability of the Applicant’s modelling, including work-from-home adjustments and optimistic retail trip assumptions, which may underestimate traffic impacts concerns;

(ii) The deferral of the Direct Connection from SH1, which is likely to place significant pressure on the local network, particularly Great South Road and Waihoehoe Road, leading to increased congestion and reduced efficiency for public transport; and

(iii) Key bus routes (Roads 3, 6, 13) being proposed on private roads with no legal mechanism guaranteeing public access, risking service disruption to the new Drury Central train station.

Auckland Transport’s memorandum states at paragraph 8 that, *“Given the scale of development proposed and the current uncertainty regarding the timing and delivery of key transport upgrades, there is a possibility that the proposal’s adverse transport effects could be significant”*.

(d) Wastewater Service Delivery Constraints: Wastewater capacity is limited to 950 Dwelling Unit Equivalents (**DUEs**), while the proposal seeks 1,087 DUEs, requiring future network upgrades with uncertain timing (2029-2033+).

(e) Flooding: Healthy Waters has identified the Applicant's overland flow path assessment as deficient and has highlighted a significant, unmitigated flood risk to people and property. In particular, the potential for the Flanagan Road culvert to block could raise flood levels to 9.6mRL, well above the proposed 7.8mRL finished floor level for Building H2.

(f) Ecology: No offset is proposed for the permanent reclamation of 2,172m² natural inland wetland (Stream A Wetland), assessed as a "Moderate" adverse effect under EIANZ guidelines.

(g) Open Space: The Proposal fails to provide a flood-free, publicly vested neighbourhood park for structured community recreation. The primary civic space (Valley Park) is privately owned with no legal mechanism to secure public access in perpetuity, and the proposed public plaza is significantly undersized for a metropolitan centre.

(h) Urban Design: The Proposal contains several urban design flaws that undermine the integrity of the precinct. The lack of road connections to the east creates a major barrier to movement and integration. The risk of inactive street frontages and the uncoordinated subdivision of Stage 1 lots threaten the creation of a vibrant, high-quality public realm. These issues collectively represent a significant adverse effect on the intended character and function of the metropolitan centre.

2.3 In terms of regional or national benefits, the Council's Chief Economist Unit notes (**Annexure 2**) that the economic assessment provided by the Applicant relies on input-output modelling, which is described as having limitations that affect its suitability for calculating the benefits (gross or net) of the Proposal. It is noted that several of the claimed benefits are more accurately characterised as economic transfers rather than true net benefits.

2.4 While acknowledging that the Application may generate economic benefits associated with commercial activity, the review states that a more robust evaluation would entail a cost–benefit analysis that compares the full range of incremental costs and benefits against a clearly defined counterfactual.

2.5 The Council review identifies that the Applicant’s assessment does not properly account for the material opportunity cost of allocating the limited

transport infrastructure capacity available under the shared trigger upgrades to this Application.

2.6 The Planning Memo recommends substantial modifications and comprehensive conditions, including to address:

(a) Scale of consented development: A reduction in the scale of consented development to a level that can be demonstrably serviced by existing, funded, and committed infrastructure. This responds to the critical risk of the Applicant "banking" precinct-enabled development capacity for at least a 15-year lapse period, which undermines the AUP's sequenced approach to growth and prejudices the development feasibility for other precinct landowners.

(b) Lapse period: To further mitigate the issues of infrastructure uncertainty and “banking” of development capacity, a shorter lapse period of 10 years is also recommended.

(c) Direct connection: A requirement to provide the direct connection to SH1 at an earlier stage of development, to be determined after further assessment which also takes into the account the commitments towards the ultimate upgrade of Great Road/Waihoehoe Road intersection and Waihoehoe Road, as well as Auckland Transport’s wider comments on appropriate transport modelling assumptions.

(d) Change to road ownership: Road 6 and the portion of Road 3 connecting to the Drury Train Station being vested as public roads rather than being held in private ownership.

(e) Flood Risk for Building H2: To safely manage flood hazards, further setback for Building H2 from the Flanagan Road culvert is required.

(f) Open Space: The primary civic space, Valley Park, must have public access secured in perpetuity via a legal mechanism such as a public access easement. A flood-free, publicly vested neighbourhood park of at least 3,000m² suitable for formal and active recreation should be incorporated into the Proposal.

(g) Ecological Offset: The Application must be amended to include a formal off-site offset or compensation package to address the

unmitigated residual adverse effects resulting from the permanent loss of the natural inland wetland and stream habitat.

(h) Design Manual / Guide: As it relates to the subdivision of the super lots for stage 1, it is recommended that, should a comprehensive proposal not be developed, a design manual or guideline is prepared that specifically applies to this aspect of the Proposal. The design manual and guideline would then be imposed on the titles as consent notices.

2.7 Under section 85(3) FTAA, the Council's assessment indicates that the identified adverse impacts would be sufficiently significant to be out of proportion to regional benefits unless the recommended modifications and conditions are implemented.

3. FTAA LEGAL FRAMEWORK

3.1 A summary of the relevant FTAA legal framework is included in the **Annexure** to this memorandum. This summary informs the commentary on specific legal issues below.

4. COMMENTARY ON SPECIFIC LEGAL ISSUES

4.1 The specific legal issues which arise from Council's assessment relate to:

(a) The Panel's ability to grant the Application in part.

(b) The appropriate lapse date for this Application (including the framework for conditions on Resource Management Act 1991 (**RMA**) approvals under the FTAA).

(c) The appropriate use of conditions precedent.

(d) Relevance of infrastructure funding and delivery.

Panel's ability to grant the application in part

4.2 It is well established that, when determining applications for resource consent, the decision-maker has *"the power to grant consent to something less than what is actually being sought"*. [3]

4.3 In the decision of the expert consenting panel concerning an application for a comprehensive care retirement village at Kohimarama, Auckland under the FTCA, the Panel considered the following comments from RMA case law: [4]

> The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. … In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions.

4.4 The Panel then said that it saw:

> … no reason why this approach should not be equally applicable to resource consenting under the FTA provided that the purpose of the FTA is not neglected in the process. For example, there may be instances where s 108 conditions of consent would be unavailable or inappropriate to restrict certain effects that can be remedied by a partial consent which still enables an effective project.

4.5 Therefore, under section 81(1) of the FTAA, the Panel has three options:

(a) grant the full approval (with conditions);

(b) approve only part of what is sought (with conditions), and decline the remaining parts; or

(c) decline it entirely.

4.6 However, any decision to decline an approval (whether in whole or in part) must be made in accordance with section 85 of the FTAA. Therefore, the Panel must work through the "proportionality" considerations relating to section 85 which are discussed below.

4.7 We acknowledge that there is potentially a further option, being to grant the approval subject to conditions which have the effect of curtailing the level of

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3 See *Director-General of Conservation v the New Zealand Transport Agency* [2020] NZEnvC 19 at [20].

4 Amended decision concerning the *Kohimarama Retirement Village*, at [53], citing *Collins v Northland RC* [2013] NZHC 3039 at [26] – [27] and *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634.

activity that may occur. There is a question as to whether this approach engages section 85's proportionality assessment, because section 85(3)(b) contemplates that the imposition of conditions by the Panel, or modifications that an applicant may agree to, is a step prior to consideration of declining a proposal. Logically and arguably, such conditions may include a restriction on the level of activity enabled in order to address adverse impacts, without those conditions amounting to a decline of consent as contemplated by section 85 FTAA.

4.8 For example, case law in the context of reviews of conditions under sections 128 - 130 RMA confirms that there is no limit on how far a resource consent could be subtracted from or qualified by new conditions, provided that those conditions do not prevent the activity for which resource consent was granted. It has been held therefore that monitoring and review conditions could affect both the density and the area for development, and in the context of marine farming, a requirement to leave an area of the CMA fallow, even a large one, would be permissible.[5]

4.9 As noted above, section 85(3)(b) of the FTAA draws a distinction between a condition imposed by the Panel and a modification proposed or agreed to by the Applicant.

4.10 It will be a question of fact and degree based on the circumstances of the particular application as to whether restrictions on a project amount to:

(a) Something capable of being addressed through new or amended conditions imposed by the Panel; or

(b) A 'partial decline' engaging the requirements of section 85(3) and potentially the related requirement in section 69 FTAA to invite the Applicant to propose conditions or modifications if the Panel were to reach a draft decision to partially decline.

4.11 If the Panel considers that the restrictions which the Council seeks on the Application would amount to a partial decline, then under section 85(3) of the FTAA, the Panel ***may*** decline an approval where adverse impacts are

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5 *Golden Bay Marine Farms Limited v Tasman District Council,* W19/2003, Judge Kenderdine, citing *Feltex Carpets Ltd v Canterbury Regional Council* (2000) 6 ELRNZ 275 at [20].

sufficiently significant to be out of proportion to the project's regional or national benefits.

4.12 Specifically, subsection (3) provides that the Panel may decline an approval if, in complying with section 81(2), the Panel forms the view that:

> (a) There are 1 or more adverse impacts in relation to the approval sought; and
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> (b) Those adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the panel has considered under section 81(4), even after taking into account –
>
> (i) any conditions that the panel may set in relation to those adverse impacts; and
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> (ii) any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts.

4.13 Broadly, this 'proportionality test' requires the Panel to consider:

(a) The nature and significance of adverse impacts identified through the section 81(2) process;

(b) The project's regional / national benefits as assessed under section 81(4);

(c) Whether proposed conditions or applicant modifications could adequately address adverse impacts;

(d) Whether the proportionality threshold is met even after accounting for mitigation measures, compensation etc.

4.14 Should the Panel assess the adverse impacts as being sufficiently significant to be out of proportion to the project's regional benefits, having considered the above matters, the Panel may in its discretion decline the Application.

4.15 The term "adverse impact" is defined in section 85(5) as meaning *"any matter* considered *by the panel in complying with section 81(2) that weighs against granting the approval"*. The term is therefore broad, and could encompass (for example) adverse effects on the environment, matters arising from planning instruments, and section 104(1)(c) matters.

4.16 Section 85(4) requires brief comment. The subsection states that a panel *"may not form the view that an adverse impact meets the threshold in subsection (3)(b)* ***solely on the basis*** *that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document"* (emphasis added).

4.17 The provision does not prohibit consideration of inconsistency or contrariness with planning documents – it only prevents reliance on inconsistency alone as sufficient grounds for decline. This suggests Parliament intended that inconsistency remains a relevant consideration. It simply cannot be the only factor supporting a decline decision. Where inconsistency with planning provisions is, for instance, coupled with actual adverse impacts (environmental, social, or economic etc), both factors may legitimately contribute to a decision to decline.

4.18 While section 85(4) prevents reliance solely on planning inconsistency as grounds for decline, the underlying policy framework and the real-world issues it addresses remain highly relevant to the overall proportionality assessment.

Appropriate lapse period / FTAA provisions relating to setting conditions

4.19 Section 87(2)(b)(i) and clause 26 of schedule 5 of the FTAA provide the power for the Panel to specify a lapse date. Although provided for under these provisions, setting a lapse date also amounts to a condition. When setting a condition, the Panel must take into account, under clause 17 of Schedule 5, giving the greatest weight to paragraph (a):

(a) the purpose of this FTAA; and

(b) the provisions of Parts 2, 3, 6, and 8 to 10 of the Resource Management Act 1991 (**RMA**) that direct decision making on an application for a resource consent (but excluding section 104D of that Act); and

(c) the relevant provisions of any other legislation that directs decision making under the RMA.

4.20 Section 83 of the FTAA states an overarching obligation on the Panel when setting conditions, namely that:

> When exercising a discretion to set a condition under this Act, the panel must not set a condition that is more onerous than necessary to address the reason for which it is set in accordance with the provision of this Act that confers the discretion.

4.21 The decision-making process that the Panel must go through under the FTAA when setting conditions is to:

(a) take into account the various matters set out in clause 17(1) of Schedule 5 (which 'imports' *inter alia* RMA sections relating to conditions), giving the greatest weight to the purpose of the FTAA;

(b) identify the reason it considers a consent condition is needed; and

(c) ensure that it is no more onerous than necessary for addressing that issue.

4.22 In practice, we do not consider that the express direction in section 83 that conditions should be no more onerous than necessary substantially alters the existing position – the same proportionate approach is expected under standard RMA decision-making.

4.23 The Application seeks a lapse period of 15 years for land use and subdivision consents sought.[6] No particular justification for this significant lapse date is stated in the Application AEE, and it is assumed that the Applicant's justification for the 15 year lapse is the scale of the development and the time that it will take to commence the final stages of subdivision and development.

4.24 While such a rationale is understood, the Council does not agree that a 15-year lapse period is appropriate or justified in this instance. The economic assessment in support of the Application has assumed an 11-year construction period in its justification of the project's benefits.[7] In the Council's assessment a 10-year period would be the maximum potential lapse period, if the Applicant is approved, and there are good reasons to apply a lesser period.

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6 Proposed Land use condition 2 and subdivision condition 2.

7 Property Economics Report dated February 2025. Appendix 20 to the Application.

4.25 The purpose of the FTAA is to *"facilitate the delivery of infrastructure and development projects with significant regional or national benefits".* The longer the lapse period that is provided, the further off is the delivery of the development project. As such, there is a point at which a longer lapse period arguably does not implement the purpose of the FTAA as well as a shorter one.

4.26 Case law under the RMA explaining the rationale for lapse periods also remains relevant. The Court of Appeal held in *Body Corporate 970101 v Auckland City Council*[8] that section 125 RMA appears to have been enacted to give statutory confirmation of the philosophy found in the following passage from the decision in *Katz v Auckland City Council:*[9]

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in the light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. Likewise, changing circumstances may render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary. Sections 70 and 71 [now ss 125 and 127] of the Act give legislative recognition and form to these matters of policy, which in the end do but recognise that planning looks to the future from an ever-changing present.

4.27 This philosophy remains apposite in a fast-track context given the FTAA's clear purpose to facilitate the delivery of infrastructure and development projects with significant regional or national benefits.

4.28 Another reason that it is inappropriate and undesirable to leave consents unimplemented for long periods of time is that, once granted, they become part of the environment.[10] As explained in the Auckland Transport memorandum provided with the Council's comments, this has implications for the "Trigger Table" provisions in the Drury Centre, Waihoehoe and Drury East Precincts as several thresholds of development capacity would be

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8 *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 183

9 *Katz v Auckland City Council* (1987) 12 NZTPA 211 at p 213. Also cited with approval by the environment Court in *Re an Application by Selwyn District Council* (1995) 5 ELRNA 233 and *A V Hastings v The Auckland City Council* Decision A129/2000, Judge Sheppard, 6 November 2000.

10 *Queenstown Lakes District Council v Hawthorn Estates Ltd* [2006] NZRMA 424.

'consumed' by this consent, whether or not it is given effect to during the lapse period.

4.29 In *Akaroa Organics v Christchurch City Council*[11] the Environment Court held that the financial viability of a project is not a relevant consideration when setting a lapse period, citing *New Zealand Rail Limited v Marlborough District Council*.[12]

4.30 A shorter lapse period does not mean that a resource consent will necessarily lapse at that time, because an application to extend this period can be made under section 125 RMA. This enables the important planning and policy considerations in *Katz* to be assessed in determining whether it is appropriate for the unimplemented consent to subsist. Another relevant consideration at this stage is the extent to which substantial progress is being made to implement the consent.

4.31 The Applicant may argue that a long lapse period is needed due to the uncertainty around the funding and delivery of the transport infrastructure upgrades that are required to support the levels of development sought in the later stages of the project. As noted above, financial viability is not a basis for a longer lapse period. Rather, this issue calls into question whether the full extent of development sought should be granted, and the appropriateness of the use of conditions precedent for the later stages of development.

Conditions precedent

4.32 Should the Panel be minded to approve consent for the Application in full or in part, the use of conditions precedent will be essential to ensure that defined development / subdivision does not occur prior to certain works / upgrades being completed. Proposed condition 85 – while not the only condition of relevance – is central in this regard. It is therefore appropriate to address RMA case law on such conditions, which we submit would apply equally to the FTAA context.

4.33 A condition precedent is one *"that must be satisfied before a consent-holder can undertake activities authorised by a consent or a designation"*.[13] In

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11 *Akaroa Organics v Christchurch City Council* [2010] NZEnvC 37
12 *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 p. 88.
13 *Tram Lease Limited v Auckland Transport* [2015] NZEnvC 137 at [28].

Westfield (New Zealand) Ltd v Hamilton City Council, the High Court confirmed that a condition precedent which defers the opportunity for an applicant to embark upon the activity until a third party carries out some independent activity is not invalid.[14]

4.34 A condition precedent is lawful subject to the requirement that it does not:[15]

(a) purport to impose conditions prior to the substantive consent having legal effect;[16]

(b) require the consent holder to do something that it cannot lawfully do;[17]

(c) frustrate the grant of consent;[18]

(d) give rise to undue uncertainty as to the effects of the consented works and whether the mitigation measures proposed can be implemented, and if they are, whether they would be effective.[19]

4.35 In *Hildeman v Waitaki District Council*,[20] the Environment Court considered a land use consent application for a campground and found that increased traffic from the proposed campground would necessitate an intersection upgrade. The Court noted that, while there were existing issues at the intersection, the current low traffic volume did not warrant an upgrade. The Court therefore concluded that, notwithstanding the pre-existing nature of the problem, at least part of the responsibility must lie with the applicant. Although the Court accepted that there are situations where it is appropriate to impose a condition precedent on a resource consent, it ultimately declined the consent, as the Council had refused to commit to the intersection upgrade and the applicant was unable to fund the upgrade on an economically viable basis. The Court said that "*Such a condition would potentially render the grant of consent futile and ought not be imposed.*"[21]

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14 *Westfield (New Zealand) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254, at [56].
15 Ibid.
16 Ibid, citing *Director-General of Conservation v Marlborough District Council* HC Wellington CIV-2003-485-2228, 3 May 2004, HC, 2004 at [15].
17 Ibid, citing *Westfield (NZ) v Hamilton City Council* HC Hamilton, CIV-2003-485-000956, 17 March 2004.
18 Ibid, citing *Hildeman v Waitaki District Council* [2010] NZEnvC 51.
19 Ibid, citing *Laidlaw College Inc v Auckland City Council* [2011] NZEnvC 248.
20 *Hildeman v Waitaki District Council* [2010] NZEnvC 51 (*Hildeman* Interim Decision) and *Hildeman v Waitaki District Council* [2010] NZEnvC 194 (*Hildman* Final Decision).
21 *Hildman* Interim Decision at [83].

4.36 While conditions precedent are clearly a legally available mechanism, they are not always appropriate in practice. In *Laidlaw College Inc v Auckland City Council*, the Environment Court noted that the factual situation must support the imposition of such a condition, particularly where third party agreement or assessment is required.[22] The Court emphasised that there must be sufficient certainty that proposed mitigation measures would be effective before a condition precedent can appropriately be imposed. Similarly, as demonstrated in *Hildeman*, a condition precedent should not be imposed where it would potentially render the grant of consent futile due to practical impediments such as lack of funding or third party commitment to necessary works.

4.37 Accordingly, while conditions precedent may be a useful tool in appropriate circumstances, careful consideration must be given to whether the factual matrix supports their use, including whether there is sufficient certainty as to the effectiveness of proposed mitigation and the practical ability to fulfill the condition. As addressed in the Council's comments, there is a lack of funding and future timeline for transport upgrades necessary to unlock later stages of the proposed development: [23]

(a) The Drury South Interchange and Southern and Northern Connections of Mill Road are unprogrammed and unfunded with no delivery timeline;

(b) The Ultimate Opāheke Northern connection has an indicative delivery date out to 2049.

4.38 Given these facts, conditions precedent are not appropriate for the later stages of development sought by the Application, as such conditions would potentially render the grant of consent for these stages futile.

4.39 While District Plan trigger provisions have been recognised as a mechanism through which integration of infrastructure funding and delivery with land use may be achieved, the present application takes this mechanism into uncharted territory in a consenting context by seeking to 'bank' development

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22 *Laidlaw College Inc v Auckland City Council* [2011] NZEnvC 248 at [52].

23 Planning Memo - Annexure 1 – Funding and Finance Memo (Brigid Duffield)

for up to 15 years in circumstances where there is no certainty around the timing of necessary upgrades.

4.40 Council's assessment is that the consenting of development so far beyond the present and anticipated capacity of infrastructure to support it does not achieve the integration required by the AUP (discussed further below), and instead creates potentially perverse planning outcomes that undermine the carefully calibrated precinct framework established through the plan change process.

Relevance of infrastructure funding and delivery

4.41 It is trite that the adequacy of infrastructure to support development is a relevant consideration for the Panel. Higher order planning instruments and case law confirms that funding considerations are also relevant matters for the Panel in its deliberations.

4.42 The NPS-UD recognises the importance of the integration of infrastructure provision and funding decisions with urban development:

(a) Under Objective 6, which is that local authority decisions on urban development that affect urban environments are (*inter alia*) integrated with infrastructure planning and funding decisions.

(b) Under Policy 1 and the concept of well-functioning urban environments, which includes good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport.

4.43 Several AUP RPS objectives and policies in sections B2 and B3 are of particular relevance:

(a) Objective B2.2.1(1)(c):

> A well-functioning urban environment with a quality compact urban form that enables all of the following: …
>
> (c) better use of existing infrastructure and efficient provision of new infrastructure; …

(b) Objective B2.2.1(5):

> The development of land within the Rural Urban Boundary, towns, and rural and coastal towns and villages:

> (a) is integrated with the provision of appropriate infrastructure; …

(c) Policy B2.2.2(7)(c):

> Enable rezoning of land within the Rural Urban Boundary or other land zoned future urban to accommodate urban growth in ways that do all of the following:
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> …
>
> (c) integrate with the provision of infrastructure; and …

(d) Policy B2.4.2(6):

> Ensure development is adequately serviced by existing infrastructure or is provided with infrastructure prior to or at the same time as residential intensification. …

(e) Objective B3.3.1(1)(b):

> (1) Effective, efficient and safe transport that: ….
>
> (b) integrates with and supports a quality compact urban form; …

(f) Policy B3.3.2(5):

> Improve the integration of land use and transport by:
>
> (a) ensuring transport infrastructure is planned, funded and staged to integrate with urban growth; …

4.44 The explanatory text at B3.5 of the RPS confirms the intention that *"development, especially that associated with growth in greenfield areas, must be integrated and co-ordinated with the provision of infrastructure and the extension of networks"*. These provisions expressly require an 'integrated' approach and are directed at ensuring decision-making on growth and urbanisation is carefully coordinated with transport infrastructure and funding decisions. Regard must be had to these provisions under section 104(1)(b) RMA and clause 17 of Schedule 5 FTAA.

4.45 The relevance and importance of these considerations is also recognised in a long line of case law under the RMA.[24]

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[24] *Bell v Central Otago District Council EnvC Christchurch* C4/97, 24 January 1997
Coleman v Tasman District Council EnvC Wellington W67/97, 26 June 1997; upheld on appeal: *Coleman v Tasman District Council* [1999] NZRMA 39 (HC).
National Investment Trust v Christchurch City Council, C41/2005
Foreworld Developments Ltd v Napier City Council, W08/2005.
Norsho Bulc v Auckland Council (2017) 19 ELRNZ 774.

5. CONCLUSION AND RECOMMENDATIONS

5.1 As the Council's Planning Memo records:

(a) While the Application proposes land use activities generally anticipated by the Drury Centre Precinct, it conflicts with key aspects of the higher-order planning framework and recently established precinct framework, particularly the principle that resource consent applications, development and subdivision must be integrated with timely provision of enabling infrastructure.

(b) The Council's assessment has identified significant adverse effects relating to transport, wastewater servicing, open space provision, ecology, and urban form. These impacts are of such scale and nature that they would be disproportionate to the project's claimed regional and national benefits.

(c) However, the identified adverse impacts are assessed as not being insurmountable. The Application can potentially achieve an acceptable standard through substantial modifications and a comprehensive suite of amended conditions.

(d) Given the identified adverse impacts, approval is recommended only to the extent it can be adequately serviced by existing, funded, and committed infrastructure, while declining aspects that rely on unfunded and unprogrammed infrastructure.

(e) To resolve outstanding issues and refine consent conditions, expert conferencing is recommended on the following matters: transport, stormwater/flooding/erosion, urban design, open space provision, ecology, wastewater capacity, and economics.

DATED the 11th day of August 2025

Matt Allan / Rowan Ashton
Counsel for the Auckland Council

ANNEXURE

FTAA Legal Framework

1. This annexure to our memorandum addresses the FTAA decision-making framework, relevant to this Application, and does not address pre-lodgement provisions of the FTAA. It should be read alongside the main body of the memorandum, which also addresses aspects of the legal framework (e.g. in relation to setting conditions under the FTAA).

FTAA legal framework

2. The purpose of the FTAA *"is to facilitate the delivery of infrastructure and* development *projects with significant regional or national benefits"*.[25]

3. The FTAA sets out the legal framework for obtaining approval of both listed and referred projects.

4. Subpart 3 of Part 2 of the FTAA deals with a Panel's consideration of a substantive application for an approval.

5. Section 40 states that the process for obtaining the approval under the FTAA *"applies instead of the process for obtaining any corresponding approval under a specified Act"*.

6. The specified Act, relevant to this Application, is the RMA.

Decisions on approvals sought in substantive application

7. The provisions in the main body of the FTAA concerned with "Panel decisions" and "Decision documents" are located in sections 79 to 89.

8. Section 81(1) of the FTAA requires the Panel to decide whether, for each approval sought in a substantive application, to:

   (f) grant the approval and set any conditions to be imposed on the approval; or

   (g) decline the approval.

[25] FTAA, s 3.

9. For the purpose of making the decision, the Panel:

(h) Must consider the substantive application and any advice, report, comment, or other information received by the Panel under sections 51, 52, 53, 55, 58, 67, 68, 69, 70, 72, or 90;[26]

(i) Must apply the applicable clauses set out in section 81(3) as applicable to the relevant authorisations sought, which in the case of the Application is sections 81(3)(a) (resource consent).[27] We address the provisions relevant to resource consents below under the heading "**Assessment of Resource Consent Application**";

(j) Must comply with section 82 (relating to treaty settlements, the Marine and Coastal Area (Takutai Moana) Act 2011, or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019) if applicable;[28]

(k) In terms of conditions:

(i) Must comply with section 83 in setting conditions. [29]

(ii) May impose conditions under section 84 if applicable, to recognise or protect a relevant Treaty settlement and any obligations arising under the Marine and Coastal Area (Takutai Moana) Act 2011 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019:[30]

(l) May decline the approval only in accordance with section 85 of the FTAA.[31] We have addressed this aspect in the body of the memorandum above.

Assessment of Resource Consent Application

10. As noted, a resource consent is an approval described in section 42(4)(a) of the FTAA. When considering the Applicant's resource consent application

[26] FTAA, s 81(2)(a).
[27] FTAA, s 81(2)(b).
[28] FTAA, s 81(2)(c).
[29] FTAA, s 81(2)(d).
[30] FTAA, s 81(2)(e).
[31] FTAA, s 81(2)(f).

under section 42(4)(a), the Panel is required by sections 81(2)(b) and 81(3)(a) to apply clauses 17 to 22 of Schedule 5 of the FTAA.

Clause 17 – Criteria and other matters for assessment of consent application

11. Clause 17(1) of Schedule 5 requires the Panel, for the purposes of section 81, when considering the resource consent application and setting any conditions in accordance with clause 18,[32] to "*take into account*" the following, giving the greatest weight to (a):

    (a) the purpose of the FTAA; and

    (b) the provisions of Parts 2, 3, 6 and 8 to 10 of the RMA that direct decision-making on an application for a resource consent – this includes sections 104 and 104B of the RMA, but section 104D of the RMA (i.e. the 'gateway test' for non-complying activities) is specifically excluded; and

    (c) the relevant provisions of any other legislation that directs decision-making under the RMA.

12. Accordingly, under clause 17(1), while the fast-track approvals process prescribed in the FTAA applies to the Application instead of the usual RMA consenting process, the FTAA expressly incorporates (or imports) the RMA provisions relevant to the assessment that direct decision making on resource consent applications, with all necessary modifications.[33]

Meaning of "take into account"

13. In *Bleakley v Environmental Risk Management Authority* the High Court held that a statutory obligation in the Hazardous Substances and New Organisms Act 1996 to "take into account" a relevant matter indicated an obligation to: [34]

> … consider the factor concerned in the course of making a decision-to weigh it up along with other factors-with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate

[32] Clause 17(1) also refers to clause 19 in relation to conditions. That clause concerns freshwater fisheries activities and is not relevant.
[33] FTAA, clause 17(6) of Schedule 5.
[34] *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at [72].

14. In an RMA context, *New Zealand Transport Agency v Architectural Centre Inc*, the High Court discussed earlier cases and expressed the view that the phrases "shall have regard to" and "take into account" could be regarded as synonymous.[35] The Court said:[36]

> In my view, the expression 'to take into account' is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase 'to take into account' is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Marylebone* of paying attention to a matter in the course of an intellectual process'. The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

15. This reasoning was accepted and adopted by the High Court in *Taranaki-Whanganui Conservation Board v Environmental Protection Authority*.[37]

16. Based on the above case law, the statutory obligation to "take into account" requires the Panel to consider and weigh the specified matter alongside other relevant factors during the decision-making process, while retaining discretion to assign it considerable, moderate, little, or no weight as circumstances warrant.

17. In the case of the FTAA, this case law is of course subject to the statutory direction that the most weight be given to the FTAA's purpose, discussed further below.

Relevant purpose provisions – FTAA and RMA purposes

18. Two statutory purpose provisions apply to resource consent decision-making under the FTAA:

    (a) As already noted, the purpose of the FTAA *"is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits."*[38]

    (b) The Panel will be familiar with the sustainable management purpose of RMA, which also applies in light of clause 17(1)(b), albeit with the 'greatest weight' given to the FTAA's purpose.

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[35] *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375.
[36] At [63], citations omitted.
[37] *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, at [159].
[38] FTAA, s 3.

19. We observe that clause 17(2) clarifies how the RMA provisions in clause 17(1) should be applied, specifying that references to "Part 2" of the RMA mean only sections 5, 6, and 7 (i.e. not section 8).[39]

Interpretation of requirement to give "greatest weight" to purpose of FTAA

20. Clause 17(1) of Schedule 5 of the FTAA expressly requires that the greatest weight be given to the purpose of the FTAA.

21. Some guidance as to the application of a decision-making provision that expressly require greater weight to be given to certain matters can be gleaned from case law concerning section 34(1) of the now-repealed Housing Accords and Special Housing Areas Act 2013 (**HASHAA**).

22. Section 34(1) of HASHAA framed the hierarchy of matters as follows:

> An authorised agency, when considering an application for resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater or lesser) in the order listed:
>
> (a) the purpose of this Act:
>
> (b) the matters in Part 2 of the Resource Management Act 1991:
>
> (c) any relevant proposed plan:
>
> (d) the other matters that would arise for consideration under –
>
> (i) sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
>
> (ii) any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):
>
> (e) the key urban design qualities expressed in the Ministry for the Environment's *New Zealand Urban Design Protocol (2005)* and any subsequent editions of that document.

23. In *Enterprise Miramar Peninsula Incorporated v Wellington City Council*,[40] the Court of Appeal examined the interaction between the consenting frameworks under the HASHAA and the RMA. The *Enterprise Miramar* case arose from Enterprise Miramar Peninsula Incorporated's application for

[39] Clause 17(2) also ensures that effects on Māori land and interests are treated as matters of national importance under section 6(e) where the activity has been determined under section 23, and confirms that relevant Mana Whakahono ā Rohe and joint management agreements must be considered as relevant matters under section 104(1)(c) of the RMA.
[40] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541.

judicial review of Wellington City Council's decision under the HASHAA to grant consent for a significant development in Shelly Bay, Wellington.

24. The Court of Appeal held that the plain wording of section 34(1) indicated "*that greatest weight is to be placed on the purpose of HASHAA*…". The Court of Appeal also found that the inclusion of additional considerations in subsections (b)-(e) reflected a deliberate intention by Parliament for decision-makers "*not to rely solely on the purpose of the HASHAA at the expense of due consideration of the matters listed in (b)-(e).*"[41]

25. The Court of Appeal said:[42]

> The scheme and plain text of s 34(1) requires individual assessment of the listed matters prior to the exercise of weighing them in accordance with the prescribed hierarchy. The matters listed in subs 1(b)-(e) cannot properly be weighed alongside the purpose of HASHAA under subs (1)(a) if that purpose has first been used to effectively neutralise the matters listed in subs (1)(b)-(e).

26. The principles established in *Enterprise Miramar* should inform the interpretation of clause 17(1) of Schedule 5 of the FTAA, mandating separate consideration of each factor before being weighed in accordance with the prescribed hierarchy. Moreover, weight to be afforded to the purpose of the FTAA should not be such as to neutralise or minimise the other relevant decision-making criteria which stem from the RMA. Specifically, the Court of Appeal commented: [43]

> The Council's adoption of this conclusion and its reference to "housing stock", and its cursory analysis of the matters arising under pt 2 of the RMA, are a further example of the Council having allowed the purpose of HASHAA to neutralise or minimise the other matters that arise for consideration under s 34(1)(b)–(e). As in relation to s 34(1)(d)(i) discussed above, the consequence is that the matters arising under s 34(1)(b) were not given due consideration and weight. Rather than just treating the purpose of HASHAA as the most important and influential matter to be weighed, the Council used the purpose of HASHAA to eliminate or greatly reduce its consideration and weighing of the other s 34(1) factors. For the reasons we have set out, this was a significant error of law resulting in a failure to take into account relevant considerations. We allow the appeal on that basis.

Extent of the project's regional or national benefits

27. Section 81(4) of the FTAA requires the Panel to consider the extent of the project's regional or national benefits when taking the purpose of the FTAA

[41] Ibid at [41].
[42] Ibid at [53].
[43] Ibid at [59].

into account under clause 17(1)(a) of Schedule 5. The project's regional or national benefits are also relevant to any decision by a panel to decline an approval under section 85(3).

28. The project's listing does not preclude the Panel's independent assessment of whether the contended benefits are "significant", or otherwise, in light of the full evidence.

29. Some analogy can be drawn with COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**), where several expert consenting panels appointed under that legislation found that they were not bound by Ministerial determinations that projects would help achieve the purpose of the FTCA, and were required to make their own independent assessments of applications against the statutory purpose (section 4, FTCA).[44]

30. It therefore remains essential that a Panel interrogate and test the alleged benefits of a project, consistent with its duties under sections 81(4) and 85(3) of the FTAA. In practice, the Panel's testing should be evidence-based. For example, the Panel can and should rely on objective evidence to test whether the adverse impacts on infrastructure are out of proportion to the claimed regional economic benefits.

31. The FTAA is silent on whether regional or national economic benefits are to be assessed on a gross or net basis. The Council submits that the only reasonable approach is that economic benefits should be considered on a net basis. A gross-benefit approach risks perverse outcomes, where projects that may deliver significant gross economic outputs but impose economic costs that outweigh those outputs could nonetheless be elevated under the FTAA's purpose. Parliament cannot have intended that result, absent express language (such as a specific reference to "gross economic benefits").

Clause 17(1)(b) – RMA provisions

32. As noted, clause 17(1)(b) of Schedule 5 requires the Panel to take into account the provisions of Parts 2, 3, 6, and 8 to 10 of the RMA that direct

[44] E.g. the FTCA decisions on the following projects: *Tasman Aquaculture Trials*, at [45], *Kohimarama Retirement Village*, at [32], *Hananui Aquaculture Project*, at [53].

decision making on an application for a resource consent (but excluding section 104D of the RMA).

33. We draw the Panel's attention to clause 17(3) and (4) of Schedule 5 to the FTAA, which applies to any RMA provisions which would **require** the refusal of consent. In relation to such provisions, the Panel must take into account that the provision would normally require an application to be declined, but must not treat the provision as requiring the Panel to decline the application the Panel is considering. Section 107(1) would appear to be an example of such a provision. By contrast, section 106(1) would not (as it uses the language "may refuse" rather than "must refuse").

34. The provisions in Parts 2, 6 and 10 of the RMA relevant to this Application encompass:

Part 2, RMA provisions

(c) The provisions of Part 2 of the RMA. As noted above, applying clause 17(2)(a), sections 5, 6 and 7 (but not section 8) are applicable. Part 6, RMA provisions

(d) A number of provisions in Part 6 of the RMA relating to resource consents apply, as outlined briefly below.

(e) First, the usual decision-making considerations under **section 104(1)(a) to (c)** of the RMA, namely:

(i) Any actual and potential effects on the environment of allowing the activity.

(ii) Any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity.

(iii) Any relevant provisions of—

(A) a national environmental standard:

(B) other regulations:

(C) a national policy statement:

(D) a New Zealand coastal policy statement:

(E) a regional policy statement or proposed regional policy statement:

(F) a plan or proposed plan; and

(iv) Any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(f) **Section 104B**, which relates to decision-making for discretionary and non-complying activity consent applications (the Application is for a non-complying activity overall[45]).

(g) Under **section 105**, the Panel must, in addition to the matters in section 104(1), have regard to:

(i) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and

(ii) the Applicant's reasons for the proposed choice; and

(iii) any possible alternative methods of discharge, including discharge into any other receiving environment.

(h) Under **section 106**, the Panel may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that there is a significant risk from natural hazards (section 106(1)(a)).

(i) Under **section 107**, the Panel cannot grant a discharge permit to authorise the discharge of a contaminant or water into water if after reasonable mixing, the water discharged is likely to give rise to all or any of a number of listed effects in the receiving water.

(j) **Sections 108, 108AA, 108A and 109** relating to conditions and bonds / covenants.

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45 Drury Metropolitan Centre Stage 1 and 2 AEE, dated 27 March 2025, at page 9.

Part 10, RMA provisions

(k) The provisions of Part 10 of the RMA relating to subdivisions also apply.

(l) Of relevance to this Application, we highlight section 220, which identifies specific conditions that may be imposed on subdivision consents (without limiting section 108), as well as section 221 (consent notices) and section 224 (restrictions upon deposit of survey plan), which are likely to be relevant in the event that the Panel decides to approve the Application.