

BEFORE THE FAST-TRACK EXPERT CONSENTING PANEL

IN THE MATTER

of an application for approvals under section 42 of
the Fast-track Approvals Act 2024

AND

IN THE MATTER

of Delmore, a project listed in Schedule 2 to the
Fast-track Approvals Act 2024

MEMORANDUM OF COUNSEL FOR THE APPLICANT REGARDING INFORMATION REQUEST

25 June 2026

MAY IT PLEASE THE PANEL

1. INTRODUCTION AND SUMMARY

- 1.1 On 12 June 2026 the Panel issued a request for further information from Vineway Limited (“**the applicant**”) and Auckland Council (“**the Council**”) in relation to the Delmore application (FTAA-2512-1164). This memorandum responds to information requests 2-4.

2. RESPONSE TO INFORMATION REQUESTS

2. In what way has the approach in Matvin been altered by later decisions of the Supreme Court in the East-West Link decision and the Court of Appeal decision in Glenpanel with respect of plan provisions interpretation?

- 2.1 The following analysis sequentially considers the decision of *Auckland Council v Matvin Group Limited*¹ (“**Matvin**”), *Royal Forest and Bird Protection Society of New Zealand Inc v Waka Kotahi New Zealand Transport Agency*² (“**East West Link**”) and *Glenpanel Development Limited v Expert Consenting Panel*³ (“**Glenpanel**”) decisions.

Matvin High Court decision

- 2.2 The 2023 High Court judgement *Matvin* was addressed at [5.48] to [5.49] of the memorandum of counsel provided in Appendix 1 to the applicant’s Response to Comments letter (“**legal response memorandum**”).
- 2.3 As explained in those paragraphs, the underlying reason why the approach to interpreting and applying policy statement and plan provisions in *Matvin* is altered in this case is because *Matvin* was decided in context of the Covid-19 Recovery (Fast-track Consenting) Act 2020 (“**Covid-19 fast-track Act**”), which had a fundamentally different decision-making framework to the Fast-track Approvals Act 2024 (“**FTAA**”).
- 2.4 These differences mean that the High Court decision in *Matvin* was not made against a statute like the FTAA that:⁴
- a. excludes s 104D Resource Management Act 1991 (“**RMA**”) and removes the concept of non-complying activity status;^{5 6}
 - b. requires assessment of an application against the RMA provisions directing decision-making on consent applications (including s 104 and s 5 RMA) to be taken into account alongside the FTAA’s purpose of facilitating projects

¹ *Auckland Council v Matvin Group Limited* [2023] NZHC 2481

² *Royal Forest and Bird Protection Society of New Zealand Inc v Waka Kotahi New Zealand Transport Agency* [2023] NZSC 26

³ *Glenpanel Development Limited v Expert Consenting Panel* [2025] NZCA 154

⁴ See statutory analysis at [4.4], [4.15]-[4.52] of the response to comments memorandum for broader discussion

⁵ FTAA, sch 5 cl 17(1)(b)

⁶ For completeness it is noted that s 104D did not apply to listed projects under the Covid-19 fast-track Act but it did apply to referred projects. This is also discussed by the Court of Appeal in *Glenpanel*. Both *Matvin* and *Glenpanel* related to referred projects where s 104D applied

significant regional or national benefits, but with the FTAA's purpose required to be given the greatest weight;

- c. hard bakes into the decision-making framework a degree of adverse impact;⁷
- d. enables a decision to decline an application only if adverse impacts meet the "high bar" or "very stiff test" of being sufficiently significant to be out of all proportion to significant regional or national benefits; and
- e. prevents declining an application purely based on policy inconsistency.⁸

- 2.5 Rather, the *Matvin* decision related to an application for a non-complying activity⁹ that fell to be assessed against s 104D RMA, the equivalent of s 104 RMA,¹⁰ and a statutory purpose to urgently promote employment and supporting certainty of ongoing investment "while continuing to promote sustainable management of natural and physical resources."
- 2.6 Further, as the Panel's request identifies¹¹ *Matvin* was also decided prior to the Supreme Court judgement in *East West Link*.
- 2.7 This meant when considering whether *Matvin*'s application was contrary to the Auckland Unitary Plan's ("AUP") objectives and policies for the purposes of s 104D RMA, the High Court applied the approach that had emerged in response to the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*¹² ("*King Salmon*") which focused heavily on plan provisions using the term "avoid" and treated those provisions as setting hard requirements that consent applications had to comply with. This can be contrasted with what the Court of Appeal described in *Glenpanel* as the "more nuanced approach" specified by the Supreme Court in its later *East West Link* decision.
- 2.8 *Matvin* related to an appeal by the Council against a decision of an expert panel appointed under the Covid-19 fast-track Act granting non-complying activity land use and subdivision consents to establish a retirement village and associated facilities (including a childcare centre and a café) in the Future Urban Zone ("FUZ") in north-west Auckland.¹³
- 2.9 Woolford J found that the expert panel had erred in granting the application. In reaching this finding his Honour focused on specific objectives and policies in Chapter H18 of the AUP relating to the FUZ. In particular, his Honour focused on the FUZ description, objective H18.2(4) which states that "urbanisation on sites zoned Future Urban Zone is avoided until the sites have been rezoned for urban purposes", and the

⁷ See legal response memorandum at [4.52].

⁸ FTAA, s 85

⁹ With non-complying activity status retained under the Covid-19 Recovery (Fast-track Consenting) Act 2020 by Sch 6 cl 32 and because the project at issue was a referred project, see *Matvin* at [2]. See also *Glenpanel* at [20]-[26]

¹⁰ Covid-19 Recovery (Fast-track Consenting) Act 2020, sch 6 cls 29 and 31

¹¹ See also [5.48] of the legal response memorandum

¹² *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38

¹³ *Matvin* [3], [5]-[6]

related policies in H18.3.¹⁴ Based on those provisions, Woolford J concluded that development of the site as provided for by the application would be contrary to the AUP because it would result in urbanisation of the site prior to the site being rezoned.¹⁵

East West Link Supreme Court decision

- 2.10 After *Matvin* was issued, the Supreme Court issued the *East West Link* decision which, as noted above, the Court of Appeal explained in *Glenpanel* explained “identifies a more nuanced approach to the application of s 104D” and s 104 RMA,¹⁶ than *King Salmon* which underpinned Woolford J’s analysis in *Matvin*.¹⁷
- 2.11 *East West Link* concerned an appeal against a decision of a board of inquiry, upheld by the High Court, to grant non-complying activity resource consents and notices of requirement under the RMA to enable construction of the East West Link, a new four-lane arterial road in Auckland. Because the road traversed areas of significant indigenous biodiversity value in the coastal marine area policies in the New Zealand Coastal Policy Statement 2010 (“NZCPS”) and AUP requiring avoidance of adverse effects applied. On the other hand, Auckland’s growth pressures and the strategic importance of the road meant that policies recognising the importance of infrastructure and that infrastructure may sometimes need to be located in parts of the coastal marine area with significant environmental values were also applicable.¹⁸
- 2.12 The appellant alleged that the board of inquiry had (relevantly) erred in its assessment of the applicable policies in assessing whether the application was contrary to the provisions of the AUP under s 104D RMA and in how it had regard to provisions of the NZCPS and AUP under s 104 RMA.
- 2.13 Regarding the nature of the assessment required by both ss 104D and 104 RMA, the Supreme Court majority found that “the relevant policies must be read ‘as a whole’ in order to get the true intent of the drafter.”¹⁹ This requires “a fair appraisal of the objectives and policies read as a whole...isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided.”²⁰
- 2.14 The majority went to on explain that:²¹

[80] This does not mean that objectives and policies can simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies

¹⁴ *Matvin* at [29]-[35], [50]

¹⁵ *Matvin* at [38], [50]-[55]

¹⁶ Noting that both s 104D and s 104 RMA were at issue in *East West Link* and considered by the Court. The Court of Appeal’s comment in *Glenpanel* is focused on s 104D because s 104D was the provision at issue in that case

¹⁷ *Glenpanel* at [33]

¹⁸ See *East West Link* [1]-[20] for factual background and see [37]-[71] for overview of applicable policies

¹⁹ *East West Link* at [63]

²⁰ *East West Link* at [79]

²¹ Footnotes omitted

strengthened. Rather, attention must be paid to relevant objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan. As the Environment Court noted in *Akaroa Civic Trust v Christchurch City Council*, the interpretive exercise must acknowledge that some policies will, in context, be more important than others.⁷⁴ The way in which inevitable tensions between policies are identified and worked through in the documents must be grappled with. As *King Salmon* held, the mere presence of tension does not open up an unfettered discretion to choose between unequal policies. On the other hand, the presence of tension between stronger and weaker policies will not always be resolved in favour of the stronger. Ecosystems are complex and dynamic, as is the impact of human communities located within them. Fact and context will be important in determining how tensions between policies will be resolved.

- 2.15 The Supreme Court majority then under-scored the importance of remembering that although “a policy can evolve into something so precise that it might as well be a rule” the nature of policy means that authorities must “always be willing to listen to anyone with something new to say”.²² In terms of what this meant for interpretation of provisions in policy statements and plans it said:²³

[101] The interpretive approach required here must reconcile the fact that policies mean what they say with the fact that they are still policies. A residual discretion to prevent outcomes plainly inconsistent with the purpose of the RMA must be preserved in order to ensure that, when applied to difficult cases, the policies do not subvert that purpose. Seen this way, recognising a residual discretion will ensure the policy will not be implemented unlawfully...

- 2.16 In terms of considering genuine exceptions, the Court also said:²⁴

[109] ... a genuine, on-the-merits exception, by its nature, will not *subvert* a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes. There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in *RJ Davidson*), and permitting true exceptions that will not subvert them. Of course, the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified. Policies 19, 21–23 and 29 may be seen to fall into that kind of category. But Policy 11 does not.

[110] That is why the broad subject matter of Policy 11 admits of exceptions. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself.¹⁰⁵ To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making, but “avoid” does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.

²² *East West Link* at [100]

²³ Footnotes omitted

²⁴ Footnotes omitted

- 2.17 In making these findings, and reaching its conclusions the avoid policies in the NZCPS and AUP did not prevent projects like the East West Link from obtaining consent in all circumstances,²⁵ the Supreme Court majority looked in detail at all provisions at national, regional, and district level relating to enabling infrastructure and at all provisions relating to avoiding specified environmental effects. It did not stop at the avoid provisions or the provisions applying specifically to significant indigenous biodiversity.

Glenpanel Court of Appeal decision

- 2.18 The Court of Appeal's *Glenpanel* decision was released after *East West Link*. It involved an appeal against a decision of an expert panel under the Covid fast-track Act, upheld by the High Court, declining an application for consents to construct residential units and a primary school near Queenstown.²⁶
- 2.19 Similar to *Matvin*, the expert panel had reached its decision prior to *East West Link* being issued and had focused its assessment on provisions that referred to avoidance of urban development outside urban growth boundaries and the need to ensure that urban development was in defined growth boundaries. It concluded that these provisions dictated the result and did not permit the application to be granted.²⁷
- 2.20 The appellant contended that the panel's approach to interpreting the applicable plan provisions was overly rigid and inconsistent with the approach set out in *East West Link*. It did not involve a fair reading of the provisions as a whole, "with the facts and context important to that assessment" including the National Policy Statement for Urban Development ("**NPSUD**").²⁸
- 2.21 Relying on *East West Link*²⁹ the Court of Appeal allowed the appeal.
- 2.22 The Court of Appeal found that the expert panel should have taken the more nuanced approach to assessing the application specified by the Supreme Court majority. It should have looked beyond the provisions requiring avoidance of urbanisation to "whether the intentions in the wider instruments meant that the application could be granted as an exception that gave effect to the broader intentions", for example obligations in the NPSUD for more land supply for housing.³⁰
- 2.23 The Court also found that the Covid fast-track Act itself also influenced interpretation and application of policy statement and plan provisions in relation to applications for consent under its provisions.³¹ Expanding on this point the Court of Appeal said:

²⁵ *East West Link* at [63], [171]-[172]

²⁶ See *Glenpanel* at [1]-[15] for background

²⁷ *Glenpanel* at [28]-[29]

²⁸ *Glenpanel* at [27], [32]

²⁹ With the part of the *East West Link* decision critical to the Court of Appeal's decision reproduced at [34]-[36]

³⁰ *Glenpanel* at [38]-[42]

³¹ *Glenpanel* at [43]

[43]... The very purpose of the Act was to “fast track” projects that would otherwise take a longer time to be consented under a conventional RMA approach. We consider that the regime encompasses bringing forward projects that would otherwise likely be granted under the RMA in the future. The Act not only fast-tracked the grant of consents because of a more streamlined application procedure, but also contemplated bringing forward in time planned projects. At introduction and first reading, the Minister referred to the Act bringing forward significant investment in infrastructure. This is most clearly seen for listed projects, but also potentially arises for referred projects. This is also consistent with the s 4 purpose of urgently promoting employment to support New Zealand’s recovery whilst continuing to promote sustainable management of natural and physical resources.

[44] It is the combined effect of the approach in *East West Link* and the policy of the Act that is most significant in this case. The fact that this area had been identified as a likely location for future urbanisation in response to the NPS-UD, and the fact that the Act promotes the fast tracking of projects, means that the Panel should have considered whether granting the application facilitated the purposes of the Act, the objectives of the NPS-UD, and the objectives identified in the other instruments, whilst at the same time promoting sustainable management in the manner contemplated by the Proposed District Plan. That can be seen as the reason why the Minister had made the statutory decision to refer the question to the Panel. This is a line of analysis that the Panel did not undertake. Rather, the Panel concluded that the plain wording of the provisions of the Proposed District Plan prevented the application from being granted because urbanisation of this area was planned for a later time.

Analysis

- 2.24 Looking back to the Panel’s request, the analysis above demonstrates that the approach to interpreting and applying the provisions of applicable planning instruments when making decisions on applications for consent under the RMA and fast-track legislation as altered significantly since *Matvin*.
- 2.25 A narrow focus on avoidance provisions and treating those provisions as determinative of the outcome for an application, as the High Court did in *Matvin*, is incorrect. Decision-makers must look at all relevant provisions in national, regional, and district planning instruments as a whole. With the facts and context applying to the particular application important to that assessment.
- 2.26 Even if after undertaking that assessment the decision-maker concludes that an application does conflict with an avoid provision, they must still consider whether the circumstances justify a genuine, on-the-merits exception to “protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes.”
- 2.27 In context of applications under fast-track legislation, like the FTAA, decision-makers must also consider whether granting an application will facilitate the purpose of the statute, noting that their very purpose is to fast-track projects that would otherwise not be granted under the standard RMA process until sometime in the future.

- 2.28 For completeness, it is noted that the applicant's detailed analysis of the FTAA's statutory framework is set out in section 4 of the legal response memorandum and should be read alongside the analysis above.

3. The Applicant's approach in the AEE to the interpretation of the relevant objectives and policies in the FUZ is to look at the intent of the provisions, rather than the plain and ordinary meaning. To what extent is this approach to the interpretation of planning provisions open to the Panel?

- 2.29 The AEE is a synthesis of the extensive inputs provided in the reports prepared by a large number of consultants and experts. The intention when compiling that material was to ensure that it contained both a detailed analysis in terms of the multitude of relevant objectives and policies and a higher order analysis that addresses the AUP provisions collectively.
- 2.30 In that regard, the AEE provides a summary of the detailed assessment of the applicable objectives and policies in Appendix 43 to the applicant's Response to Comments letter. It is submitted that, when those documents are read together as was intended, the assessment is consistent with the direction provided by the Supreme Court majority in *East West Link*. In that regard, the following paragraphs discuss how the documents collectively address the AUP provisions and why the applicant considers them to be consistent with the legal tests as described in *East West Link*.
- 2.31 The AEE/Appendix 43 look across all relevant provisions in all relevant planning instruments and endeavours to undertake a fair appraisal of them as a whole "in order to get the true intent of the drafter".³² This is no small feat given the size and significance of the project, which is reflected in the 141 page analysis in Appendix 43 and the 18 page summary in the AEE itself.³³ The Council has not provided an equivalent analysis.
- 2.32 In undertaking this assessment, the AEE/Appendix 43 have paid careful attention to the word of the provisions in their "own terms and as they relate to one another in the overall policy statement or plan".³⁴ Where necessary, the AEE has relied on expert input to determine if plan provisions are met either through design or proposed conditions of consent.
- 2.33 The AEE and Appendix 43 directly engage with the provisions relating to the FUZ, including objective H18.2(4) referred to by the Panel in request 4, stating that urbanisation of sites in the FUZ is avoided until the sites are rezoned for urban purposes based on their plain and ordinary meaning. The AEE and Appendix 43 both recognise that the Delmore application urbanises the site without a plan change to change the underling FUZ to an urban zone.³⁵ However, consistent with the

³² Ibid para 2.13 fn 20

³³ AEE, section 12 pg 96

³⁴ Ibid para 2.14 fn 21

³⁵ AEE, pg 109 section 12.3.2 and Appendix 43 pg 122-123

approach of the Supreme Court majority in *East West Link*, the AEE goes on to assess all other policy statement and plan provisions relating to urbanisation to determine if, when read as a whole, they provide opportunity for urbanisation without a plan change in limited circumstances.

- 2.34 As the Supreme Court did, the AEE looks at the activity status for activities relating to urbanisation of land within the FUZ as a starting point and identifies that such activities are not prohibited.³⁶
- 2.35 The AEE/Appendix 43 then assess all provisions in the NPSUD and AUP regional policy statement and district plan chapters relevant to urbanisation, including policy H18.3(6) AUP referred to in request 4 addressed below. Policy H18.3(6) is:

- (6) Avoid subdivision, use and development of land that may result in one or more of the following:
- (a) structures and buildings of a scale and form that will hinder or prevent future urban development;
 - (b) compromise the efficient and effective operation of the local and wider transport network;
 - (c) require significant upgrades, provisions or extensions to the wastewater, water supply, or stormwater networks or other infrastructure;
 - (d) inhibit the efficient provision of infrastructure;
 - (e) give rise to reverse sensitivity effects when urban development occurs;
 - (f) give rise to reverse sensitivity effects in relation to existing rural activities or infrastructure; or
 - (g) undermine the form or nature of future urban development.

- 2.36 The AEE provides an assessment of this policy in Table 6 on page 110. It is also addressed on page 123 of Appendix 43. Both conclude that the Delmore development will not have the effects the policy says need to be avoided for the following reasons:
- a. In terms of (6)(a): It will not hinder or prevent future urban development because it represents masterplanned development of a large site, which has been designed alongside a structure planning exercise to ensure it integrates with urban development to the east and south. In short, far from hindering or preventing future urban development, the Delmore project embodies and gives effect to it.
 - b. In terms of (6)(b): It will not compromise the efficient and effective operation of the local and wider transport network. The traffic generated by the development has been determined by traffic engineers Commute Transportation Consultants. The internal road network has then been designed and external upgrades proposed to accommodate this. Since the AEE was drafted further refinements have been made and upgrades included to address matters raised by Auckland Transport and the Council. Refinements made to the internal network are most easily identified by looking at Appendix 8 A21 to the applicant's Response to Comments letter. The upgrades to the external road network are most clearly showing in Appendix 7.1 to the applicant's

³⁶ AEE, pg 126 section 14.4.3; *East West Link* at [70], [89]

Response to Comments letter. These include delivering a significant portion of the Designation 14108/NoR6 road as shown in Appendix 7.1 and 7.3 to the applicant's Response to Comments letter.

- c. In terms of (6)(c): It does not require significant upgrades, provision, or extension to the wastewater, water supply, or stormwater networks or other infrastructure. The stormwater infrastructure associated with the Delmore development is standard for a large-scale development. The Delmore development has also been designed to include on-site, private water and wastewater servicing which, if adopted, would require no upgrades to external infrastructure. The proposed conditions of consent provide for the opportunity to connect to the public network, and the applicant's view is that if this approach was adopted it would not require upgrades to the network over and above what is already planned for the reasons set out at [5.64] to [5.66] of the response to comments memorandum and in Appendix 8 A01 and A02 to the applicant's Response to Comments letter.
- d. In terms of (6)(d): It does not inhibit the effective provision of infrastructure for the reasons set out at subparagraphs b and c above.
- e. In terms of (6)(g): It does not undermine the form or nature of future urban development because it provides for comprehensive development of the site (from bulk earthworks, to infrastructure, to homes and site-wide planting), and because design of the site has been undertaken alongside a comprehensive structure planning exercise. The development will integrate with future development of surrounding land. In particular, it will connect to the Ara Hills development through the delivery of Designation 14108/NoR6 road, and there has been careful consideration of the residential interface as noted in the Urban Design Assessment as Appendix 13 to the AEE and in Appendix 8 A03 and A04 to the applicant's Response to Comments letter.

2.37 A benefit of the Delmore project directly relevant to these considerations is that the applicant is willing and able to implement urban development of the land now whereas there is no such assurance that other landowners who may have priority in terms of the sequencing of Future Development Strategy as currently drafted³⁷ may lack the ability and will to develop in accordance with the Council's preferred timeframe.

2.38 Based on a comprehensive assessment of all relevant provisions in the AEE/Appendix 43, the AEE concludes:³⁸

Based on that analysis the assessment concludes that the resource consent and change to condition approvals sought are consistent with all of the planning instruments to which regard must be had when read as a whole, and paying careful attention to the way in which the different provisions are expressed. The design and management

³⁷ Noting the frequency of, impending undertaking, and developer input in review of the Future Development Strategy as set out at [5.56] of the legal response memorandum

³⁸ AEE, pg 126 section 14.4.3

measures proposed mean that environmental effects are addressed in the way those instruments contemplate. There is apparent tension with the policy direction in H18 that urbanisation of FUZ land is avoided until the land is rezoned for urban use. However, when the national, regional, and district plan provisions are read as a whole, those instruments, on our assessment, provide a pathway for urban development on FUZ land in circumstances where there is demand and further supply is needed to ensure sufficient housing capacity; the development can be serviced through private on-site infrastructure; the development has been comprehensively planned to ensure it integrates with the surrounding, wider urban environment and responds to and respects the environmental qualities and characteristics of the site.

2.39 Put another way, the AEE concludes that rezoning can in practice occur through the consenting process and that is what is proposed in this case. As noted, at [5.45] of the legal response memorandum, this same interpretative approach was adopted by the Council in respect of the Ara Hills development next door.

2.40 However, notwithstanding this conclusion, the AEE also addresses whether the Delmore application constitutes a “genuine on-the-merits exception” to cover the event the provisions in Chapter H18 AUP were considered by the Panel to be bottom lines.³⁹

2.41 As part of that assessment the AEE looks s 5 RMA stating that:⁴⁰

It is considered that the proposed development is consistent with sustainable management as defined by the RMA. It will provide for the social and economic well-being of people and communities by increasing expenditure, employment and income within the local economy and up to 1,213 new homes to assist with Auckland’s housing shortage. The preceding assessments demonstrate that the design adopted and the methods proposed for managing construction effects will ensure that the site’s native flora and fauna, and its extensive network of waterways will be sustained and enhanced for future generations to ensure, and their life-supporting capacity protected. Adverse effects are avoided, remedied, or mitigated.

2.42 It then considers the nature of the design process, and its equivalency with steps of a plan change process:⁴¹

It is noted that although this application is not for a plan change, the design process has essentially included the steps that would be undertaken if a plan change was prepared with development of an indicative structure plan, and design in accordance with an established urban zoning.

2.43 This point was also noted several times in the detailed objective and policy assessment in Appendix 43⁴² and further information demonstrating this has been provided to the Panel by the applicant in its response Appendix 8 A03 and A04 to the applicant’s Response to Comments letter.

2.44 Against the backdrop of that analysis the AEE concludes that the Delmore application does constitute a genuine on-the-merits exception:⁴³

³⁹ AEE, pg 127 section 14.4.3

⁴⁰ AEE, pg 124 section 14.4.1

⁴¹ AEE, pg 127 section 14.4.3, pg 131 section 14.6

⁴² E.g. pg 122

⁴³ AEE, pg 127 section 14.4.3

Even if the direction in the AUP that urbanisation of FUZ land ahead of rezoning was considered to be a bottom line that must be met, and that no pathway existed, we consider that assessment against clause 17(1)(b) would still support grant of the approvals sought. This is because, of the reasons set out above, and in our Part 2 assessment, Delmore constitutes a “genuine on-the-merits exception” to that policy direction. It is a master-planned residential development providing a comprehensive urban-outcome for the site that is integrated with the natural environment and surrounding development. It has been designed so that it is self-sufficient with regards to water and wastewater servicing, and the roading upgrades that have been identified in the ITA as being needed to support Delmore have been required as conditions of consent.

- 2.45 In addition, as explained at [5.47] of the legal response memorandum, the masterplanned nature of the application also resolves potential issues relating to incompatibility of the underlying zoning with the consented use. The application seeks the approvals required for all aspects of development the site, down to the details of the homes and the vegetation being planted. The likelihood of a need for further consents in the near future is low, and if it does arise, applications will be assessed against that existing environment. Looking further forward, PC120 provides an opportunity to change the underlying zone to catch up.
- 2.46 Finally, as the Court of Appeal explained in *Glenpanel*, when assessing an application lodged under fast-track legislation against the provisions of the applicable planning instruments decision-makers must keep in mind that the underlying purpose of that legislation is to see development enabled ahead of it when it would be under the standard RMA process.
- 2.47 That proposition holds even more true under the FTAA than it did under the Covid fast-track legislation. The FTAA’s framework looks beyond policy inconsistency to actual adverse impacts. It sets aside the concept of non-complying activities and the policy analysis that requires,⁴⁴ it prohibits declining an approval solely on the basis that the adverse impact is inconsistent with or contrary to a provision in a planning document, and it puts RMA considerations second.⁴⁵ The upshot is that the FTAA removes the distinction between FUZ and ‘live zoned land’ and provides an alternative pathway for urban development of FUZ land to a plan change. This is reflected in previous decisions under the FTAA to grant approvals for residential development on land not currently zoned for that purpose.⁴⁶ In this case, the site is ultimately earmarked for urban use. This is not a case where there is a fundamental misalignment between proposed use and the use envisaged by the AUP.

4. How should the Panel interpret the word ‘avoid’ in Objective H18.2(4) and associated Policy H18.3(6), particularly in relation to 6(b), (c), (d) and (g)?

- 2.48 The terms “avoided” and “avoid” in Chapter H18 should be given their ordinary meaning which, as stated by the Supreme Court in *King Salmon*, and relied on by the

⁴⁴ FTAA, cl 17(1)(b) Schedule 5

⁴⁵ FTAA, s 85(4).

⁴⁶ See FTAA panel Arataki decision and Homestead Bay decision

Supreme Court in *Port Otago Limited v Environmental Defence Society Inc*⁴⁷ and *East West Link*, is “not allowing” or “preventing the occurrence of”.^{48 49}

2.49 However, the provisions in Chapter H18 that use the term (including objective H18.2(4) and policy 18.3(6) referred to in the Panel’s request) avoid should be taken into account and applied:

- a. In accordance with the provisions of the FTAA and the approach set out in response to request 2 above; and
- b. With reference to the Delmore context discussed in response to request 3 above.

3. CONCLUSION

3.1 In summary, even in the RMA context the approach to interpreting and applying the provisions in applicable planning instruments when assessing an application for resource consent under s 104 RMA has fundamentally changed from that applied by the High Court in *Matvin* and adopted by the Council in its comments to the Panel.

3.2 Further, the FTAA framework for assessing resource consent applications is fundamentally different to that of the RMA, and the outcome of an assessment against s 104 RMA is only one matter the Panel must take into account alongside others, including the Delmore projects regionally significant benefits. The FTAA framework looks beyond policy inconsistency, to actual impacts and actual benefits; an application cannot be considered to have adverse impacts sufficiently significant to be out of proportion to a project’s benefits “solely on the basis that the adverse impact is inconsistent with or contrary to a provision in a specified Act or any other document” like the AUP.⁵⁰

3.3 The applicant’s position remains as set out in the AEE and in its response to comments: The Delmore project’s benefits are real and will have a material and significant positive effect on the Auckland region. The masterplanned nature of the project and the thorough, evidence-based approach taken to design and managing effects from construction and urbanisation of the site mean that any remaining

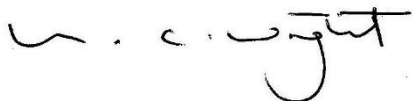
⁴⁷ *Port Otago Limited v Environmental Defence Society Inc* [2023] NZSC 112

⁴⁸ *King Salmon* at [24(b)], [93], [96], [97] majority judgment. With the same meaning adopted by the Supreme Court in its analysis in *Port Otago* at [64] and by the Supreme Court in its analysis in *East West Link* at [75] and [105] majority judgment

⁴⁹ And as applied by the High Court in *Matvin* at [31]

⁵⁰ FTAA, s 85

adverse impacts are minimal, and nowhere near the level required to pass the high test of being sufficiently significant to be out of proportion to the Delmore project's regionally significant benefits.



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