BEFORE THE FAST-TRACK PANEL

IN THE MATTER	An application for approvals under section 42 of the Fast-track Approvals Act 2024 ("Act" or "FTAA")
AND	
IN THE MATTER	Ashbourne **FTAA-2507-1087**, a referred project under s21 of the FTAA

MEMORANDUM OF LEGAL COUNSEL FOR THE APPLICANT IN RESPONSE TO COMMENTS OF INVITED PARTIES

Dated: 18 November 2025

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Introduction

1. This Memorandum is filed on behalf of the Applicant, partly in response to the Memorandum of Counsel for Matamata Piako District Council dated 11 November 2025 ("the MPDC Memorandum") and partly in response to legal issues raised in comments from other invited parties.

2. The MPDC Memorandum at paragraph 2.4 refers to information gaps and errors in the Applicant's proposal and by footnote refers to two omissions, but there is no single record in the MPDC Memorandum of perceived gaps or errors that the Applicant could now respond to. The Applicant's response has, wherever possible, responded to identified omissions or alleged errors, but there can be no guarantee of a complete response without having a comprehensive statement from MPDC about the full range of matters referred to in its paragraph 2.4.

3. Paragraph 2.7 of the MPDC Memorandum refers to the relevance of "real-world" adverse impacts being considered under s 85 of the FTAA. With respect, it would only ever be adverse impacts in the real world that could be taken into account, under s 85 or any other provision in the FTAA. It may be that the reference to "real-world" impacts is intended to distinguish between potential or minor impacts and those that are material in a practical sense.

4. The summary of adverse impacts identified by the Council, contained in paragraph 2.9 of the MPDC Memorandum is:

    a) Economic and infrastructure concerns;
    b) Impacts arising from inconsistencies with planning instruments;
    c) Environmental risks;
    d) Growth displacement; and
    e) Cumulative impacts.

5. These matters are addressed in the Applicant's expert responses that are made to the comments of MPDC and to the other comments provided to the Panel.

The requirement to "take into account" specified matters

6. The MPDC Memorandum, at paragraph 3.15 – 3.19, addresses the statutory obligation on the Panel to "take into account" the matters listed in clause 17(1) of Schedule 5 to the FTAA. Although the Panel retains the usual ability to determine the weight to be given to any relevant matter other than the purpose of the FTAA, there is at no stage the ability to give little or no weight to that purpose. That purpose is always to be given weight, and always greatest weight out of all the relevant matters considered.

7. As clause 17(1) requires the greatest weight to be given to the purpose of the FTAA when weighing competing considerations, there is a directive to give priority to the purpose of the FTAA whenever there is competition between that purpose and any of the other relevant considerations.

8. The MPDC Memorandum quite rightly draws assistance from the Court of Appeal decision in *Enterprise Mirimar Peninsula Inc.*[1] Clearly there must be a real and not cursory analysis of the relevant matters other than the purpose of the FTAA, before weighing them in accordance with the prescribed hierarchy. It could not be argued that the weight to be afforded to the purpose of the FTAA should effectively neutralize or minimize the other relevant decision-making criteria.

9. There is further special status created for the purpose of the FTAA by s85, which prescribes the circumstances in which the Panel "must" and "may" decline approval. At paragraph 3.46 of the MPDC Memorandum, it is confirmed that the Council has not identified any reasons why the application must be declined in terms of s 85(1) of the FTAA.

10. That leaves open to the Panel the option of approving the application or finding grounds on which an approval *may* be declined under s 85(3) of the FTAA. A decision to decline an approval is available where adverse impacts are identified in relation to the approval sought and those adverse impacts are sufficiently significant to be *out of proportion* to the project's regional or national benefits that are considered under s 81(4). (emphasis added) For

[1] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA541.

completeness, that significance decision is to be made after taking into account conditions that the Panel may set and conditions that the Applicant may propose or agree to.

11. The combination of provisions in clause 17(1) of Schedule 5 and s85(3) create a uniquely focused decision-making process that signals an intention to give high priority to enablement of projects that will create regional and/or national benefits.

Factors to consider in determining whether effects are "out of proportion" to the project's regional or national benefits

12. The FTAA does not provide any explicit guidance on the meaning of "out of proportion" and meaningful guidance from existing FTAA decisions has not been found in relation to the meaning of "out of proportion" in s 85(3).

13. Given the reference to the "proportion" factor in s 85(3), scale and significance of physical or practical effects must logically be relevant and arguably of primary relevance in assessing both the positive regional and national effects and assessing any adverse effects of the project. It seems unlikely that an adverse effect that is a deviation from an objective or a policy would play a major role in making a decision under s 85(3), unless there is a substantial or particularly significant practical adverse effect as well.

14. Section 85(3) would have been differently worded if the test was intended to be just a balancing exercise, with a decline decision being available if the adverse effects were considered greater than the benefits, regardless of degree. The use of the words "out of proportion' indicates a substantial imbalance, not merely a preponderance or mere majority of effects. In other words, the wording indicates that the difference in scale and significance between identified adverse effects and relevant benefits must be more than marginal, arguably vit must be very substantial.

15. The elevated status of the relevant benefits of a project under clause 17(1) of Schedule 5 provides support for the interpretation of s 85(3) as requiring a clear and large margin between adverse effects and relevant beneficial

effects before a project application can be declined.

Infrastructure effects

16. The potential for effects on public infrastructure to be caused by granting the approvals sought by the Applicant is addressed in the MPDC Memorandum at paragraphs 5.2(a) and 6.1, referring to early infrastructure upgrades being needed, potential for delayed development in zoned areas and potential displacement of planned development. The primary response to the need for early infrastructure upgrades is that three Private Development Agreements ("PDA") are under negotiation between the Applicant and MPDC. The Applicant's representatives who have been involved that negotiation advise that negotiations are well advanced, with numerous discussions having taken place between the Applicant representatives and Council consultants and officers. Three PDA drafts have been prepared by the Applicant and responded to by MPDC and their lawyers. In the view of the Applicant's representatives the negotiation of the PDA negotiation is nearing completion, with agreement in principle regarding the Applicant's responsibilities for the costs of installing various infrastructure items that will be necessary to service the project, with some prospect of offsets by way of reduction in development contributions where infrastructure works undertaken by the developer benefit the wider community..

17. If that negotiation process results in confirmed PDAs, there will be no public cost of providing additional infrastructure to service the project.

18. The potential for the development of the project to divert residential and retirement village purchasers away from existing identified development areas, with consequential reductions in use of committed infrastructure, is a matter addressed by Insight Economics in their most recent Memorandum dated 18 November 2025 in response to the evidence of Mr T Heath for MPDC. In particular, the ability of the project to stimulate additional demand is addressed in Section 2 of that report, citing both economic theory and empirical evidence indicating that supply can create its own demand in housing markets, rather than just diverting existing demand from other locations. Section 5 of the Insight Economics Memorandum also addresses the "displacement" argument.

19. The Insight Economics Memorandum also addresses the question of infrastructure costs and funding risk in Section 6. The response identifies the tools that are available to MPDC, including private development agreements and various funding mechanisms.

National Policy Statement: Highly Productive Land

Solar Farms

20. The MPDC Memorandum at paragraphs 4.11 - 4.17 examines the extent to which the solar farm proposals fit within the NPS exemption in clause 3.9, which relates to functional and operational needs of particular types of activity. In general RMA consent applications, the exemptions in clauses 3.8, 3.9 and 3.10 of the NPS:HPL play a significant part, due to the directive objectives and policies that seek to protect HPL for land-based primary production and avoid land use and subdivision that may compromise that objective.

21. Consideration under the FTAA reduces the impact of the directive language of the objective and policies due to the operation of clause 17(1) of Schedule 5 FTAA, requiring that the greatest weight be given to the purpose of the FTAA, and due to s.85(3) of the FTAA, limiting the power to decline consent to situations where adverse effects are out of proportion to the project's regional or national benefits. The directive language of objectives and policies in the NPS:HPL will be less of a barrier to approval under the FTAA, though still a relevant matter to consider. The specific confirmed or likely effects of the project on productive capacity of HPL must be considered, particularly the questions of scale and significance of any impacts and mitigation of impacts, when considering how those effects compare with relevant benefits.

22. It is relevant and important that combined agricultural and electricity generation activities can both take place within the solar farms, reducing the impacts on that particular HPL while fostering an activity that enjoys a special status under clause 3.9 of the NPS.

23. In relation to clause 3.9, the MPDC Memorandum acknowledges at paragraph 4.11 that the solar farms could align with clause 3.9 if a functional or operational need is confirmed and a shared agricultural land electricity generation function is implemented.

24. In considering the operational need for a rural location in *Hopkins v Waikato District Council* [2] and in *Crafar v Taupo District Council*[3] the Environment Court considered operational needs in terms of the relevant District Plan policy provisions, in the RMA consenting context. In the present case, the operational needs of the solar farm component of the project can be assessed in terms of its own practical operational needs, without reliance on District Plan policy content.

25. Although full alignment of the solar farms with the exemption under clause 3.9 of the NPS is not necessary, for the reasons outlined in paragraph 21 above, the northern and southern solar farms are consistent with and meet the requirements of Clause 3.9. The Ashbourne solar farms meet the operational need test for reasons of orientation, consistent solar irradiance, minimal shading, flat topography and proximity to grid infrastructure. Importantly, the agrivoltaic design allows continued grazing beneath the panels, meaning the land retains productive capacity during the life of the solar farm. This is addressed in more detail in the 'Barker and Associates NPS HPL Response' in section 4.3 of the response table.

26. The regional and national benefits of the project, for the purpose of a proportionality assessment under s 85(3), are addressed later in these submissions.

27. The scale of the reduction in fully available HPL is not major in this case, as there will be shared agricultural and electricity generation use of the solar farms land. Given the special status of electricity generation activities under clause 3.9 and the limited reduction in the productive capability of the HPL, the HPL effects caused by the solar farm activities should not be considered out of proportion to the regional and national benefits of the project.

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[2] *Hopkins v Waikato District Council* [2025] NZEnv C 34.
[3] *Crafar v Taupo District Council* [2024] NZEnv C 091.

28. The most recent technical Memorandum from Insight Economics, 18 November 2025, also addresses the question of loss and efficient use of HPL in section 4 commencing at page 4. The issue of availability of alternative non-HPL land elsewhere is addressed at page 5.

29. The Insight Memorandum acknowledges the permanent loss of some land from purely agricultural use, but notes that economic efficiency demands consideration of the opportunity cost of the land and the net benefits of its alternate use: "in this case, our analysis found that the Total Economic Value of the Ashbourne development's various uses – housing, retirement living, solar farm, and supporting commercial activities – far exceeds the long term agricultural output of the same land".[4]

30. The Insight Memorandum notes that other greenfield areas are generally smaller, fragmented, slower to develop, all lack the ability to combine housing, retirement living, commercial amenities and an energy precinct in one master plan.

> "In short there is no realistic "somewhere else" scenario in which this project (or a development of equal benefit) materializes on purely non-HPL land. The choice is between doing it here (with appropriate mitigation and management of HPL loss) or likely not achieving these benefits at all."[5]

Rural-Residential Zoned land

31. The parts of the site that are zoned for rural residential activity do not fall under the NPS:HPL interim provisions that apply prior to development of regional plan identification of HPL.[6]

Rural zone retirement living HPL

32. This component of the project covers a little over 20 hectares of Rural zone (Class 2) land. The estimated approximate yield is 218 living units.

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[4] Insight Memorandum 18 November 2025, page 4.
[5] Insight Economics Memorandum 18 November 2025, page 5 second paragraph.
[6] Transitional definition of HPL clause 3.5(7) of NPS:HPL.

33. This part of the project will not contain any co-siting with productive rural activities but will result in development of a substantial number of living units, located against the proposed residential area and at the edge of the existing residential development within Matamata.

Rural zoned HPL to be used for residential and rural-residential activity

34. For completeness, the Rural zoned land to be used for residential and rural-residential activities will occupy approximately 2.55 hectares, a very small component of the overall project site, just over 3% of total area, of which the rural-residential part is able to contain some degree of productive activity.

Productivity limitations of the site

35. It is clear from the most recent expert reporting by Landsystems[7] that there are limitations on intensive cropping and horticulture options due to the soil and hydrological characteristics across a large portion of the site, combining with fragmentation of the more versatile soils, collectively reducing the site's actual productive potential. While this may or may not be considered a constraint that meets all the requirements of clause 3.10 of the NPS:HPL, it is a relevant matter to take into account when assessing the actual effect on future availability of HPL and consideration of those effects against the regional and national benefits of the project.

<u>Supply/ Demand, diversion of development and other economic factors</u>

36. Although these matters are addressed in relation to infrastructure effects above, they are addressed in considerable detail in the Insight Economics 18 November 2025 Memorandum. In section 5 of the Memorandum "displacement of economic activity", page 6, the conclusion is drawn that, even if there is a minor degree of substitution of location of development, the regional net effects remain strongly positive, highlighting several additional regional benefits that Ashbourne will provide. These are addressed later in this Memorandum in

[7] Landsystems report 28 October 2025 at page 28.

connection with regional and national benefits of the project. In terms of overall economic efficiency[8] a series of substantial net positive economic and social outcomes are identified, leading to the conclusion that there is no significant unmitigated negative impact imposed on the community; rather, on balance, the community stands to gain considerably[9].

37. The effects of all the project components are addressed in terms of overall economic efficiency in section 7 of the Insight Economics Memorandum 18 November 2025. Optimisation of land use for higher value outputs, supply choice and affordability of housing supply, the benefits of the solar energy farms are assessed in the context of reduction of HPL, and potential infrastructure costs.

38. The strong conclusion drawn, with assistance from consideration of the NPS – Urban Development, is that the project assists implementation of the FTAA provisions for accelerated delivery of public benefits, notwithstanding the loss of areas of HPL and combined use of the solar farm land for productive and electricity generating activities.[10]

39. Assessing the project overall in terms of the FTAA, NPS-UD and Medium Density Residential Standards, the following conclusion is drawn:

> *"*Importantly, the FTAA is specifically designed for situations where accelerated delivery of public benefits – such as housing and infrastructure – is warranted. Central government's policy intent, through instruments like the NPS-UD and the medium density residential standards, is clearly to enable more housing supply and accelerate development in appropriate locations. Ashbourne aligns with these directives by unlocking a large supply of housing in a growth corridor, contributing to the government's broader housing affordability and urban growth objectives."[11]

[8] Insight Economics Memorandum dated 18 November 2025, pages 9 and 10.
[9] Insight Economics Memorandum dated 18 November 2025, page 10, last two paragraphs.
[10] Insight Economics Memorandum dated 18 November 2025, pages 10 and 11.
[11] Insight Economics Memorandum dated 18 November 2025, page 11, first two paragraphs.

Regional and national benefits of the project

40. The relevant benefits of the project are identified particularly clearly in the Insight Economics Memorandum:

    a) page 3, third paragraph;

    b) page 5 final paragraph;

    c) page 6 third to last and second to last paragraphs;

    d) page 7 second, fourth and sixth paragraphs;

    e) page 8 second to last paragraph;

    f) page 10 final paragraph and page 11 first paragraph;

    g) page 12 first paragraph

    Additional demonstration of the nature and extent of regional benefits is emphasized in the Barker and Associates 'Applicant's Response to Planning Comments Received'.

Response to Eldonwood Residents' Association comments on the Applicant's proposal regarding Deed of Assignment of Founding Member's rights

41. The submission on behalf of Eldonwood Residents' Association dated 11 November 2025 refers to the Deed of Assignment of rights of the Founding Member of the Association to Matamata Development Limited dated 31 October 2024[12].

42. The relief sought is Section 7 of the comments document includes a request for a condition to be imposed requiring surrender of the rights assigned by the Deed of Assignment.

43. The Deed of Assignment is a contractual arrangement that has been concluded

[12] Section 5 accessways and connectivity at page 3.

between Eldonwood Limited and the Applicant, consistent with the transfer of the future development land to the Applicant. The holding of the Founding Member's rights in accordance with the constitution, by the owner of the future development area, is an entirely appropriate situation.

44. The Association notes in its submission that legal advice has been obtained on ways in which the Association may seek to overturn the assignment of the Founding Member's rights. That is consistent with the rights and obligations of members of the Association being matters outside the jurisdiction of the Panel and matters to be addressed in another jurisdiction if any legal issue is to be raised in connection with that assignment.

45. The request for conditions interfering with the contractual arrangements made between Eldonwood Limited and the Applicant is outside the scope of matters to be considered under the FTAA, the RMA or any other relevant planning instruments.

46. The comments by the Association do not set out any foundation for the Panel to impose a condition interfering with the contractual legal arrangement that is made by the Deed of Assignment. Nor does the Association specify the requested condition, but rather refers in general to a condition addressing surrender of the rights assigned under the Deed of Assignment.

Reverse sensitivity – "no complaints" covenants offered.

47. Submission document 7 by Ronald Vosper, 74A Hinuera Road, Matamata raises issues of potential interactions between farming activities and residential activities, with potential for reverse sensitivity issues. Submission document 22 by M and B Vosper, J Kranenburg and C Vosper raise similar issues regarding potential reverse sensitivity effects.

48. One option that is commonly used to address the potential for reverse sensitivity effects from residential activity establishing near to farming activity is to register "no complaints" covenants against land titles for nearby residential sites, limiting or prohibiting the making of complaints and taking restrictive action in respect of the effects of farming activities. Generally, that option will be available when it is offered by or on behalf of the owner of the residential site.

49. In this case the Applicant is willing to have no complaints covenants registered against the land titles that are adjacent to the Vosper farming properties that are referred to in comments documents 7 and 22. Discussion between the Applicant's representatives and the commenting parties' representatives can be arranged to resolve the wording of those covenants as soon as practically possible.

Response to comments document 21 by Robyn Ma and Steven Li

50. Comments document 21 by Robyn Ma and Steven Li raises a concern about stormwater management and specifically seeks confirmation of who will be held liable if flooding or water damage occurs on their property as a result of the Applicant's proposed development.

51. The Applicant's position, supported by its expert reporting, is that the proposed development will not cause flooding or water damage to other properties. However, if the information available to the Panel is accepted, but for some reason proves to be incorrect and flooding or water damage does occur on another property, liability in tort is not eliminated by the granting of resource consents.

52. The existence of a resource consent or consents for a development or activity will not provide a defence to a claim in nuisance if there is some unpredicted future flooding or damage[13].

53. There is no reason why the same preservation of rights would not apply to a claim in trespass to land.

54. The Panel will obviously consider whether the evidence before it discloses the likelihood of flooding or water-related damage being caused to neighbouring properties. That decision will be made in reliance on the information that is available to the Panel, but if any harm to neighbouring property does eventuate, then the occupiers of that property will not be deprived of common law rights of action for any damage that does arise.

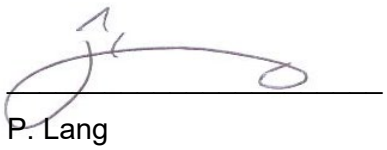
[13] Ports of Auckland v Auckland City Council [199] 1NZLR 600, 612 (HC) Baragwanath J.

55. The likely defendants in such a claim would be the owner of the land that causes flooding or water damage, potentially also the developer. Responsibility for such harm is not eliminated if the owner at the time of a claim was not the person who originally developed the land or caused the situation to arise, but "inherited" the situation.[14]

Conditions

56. The conditions proposed by the Applicant have been updated and provided to the Panel as the current proposed set. However, it is anticipated that there will need to be an ongoing iterative process in relation to conditions and the Applicant is happy to continue to liaise with MPDC and Waikato Regional Council about conditions.

Dated: 18 November 2025



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[14] Young v Attorney- General [2023] NZSC 142