

BEFORE A PANEL OF INDEPENDENT HEARINGS COMMISSIONERS

FTA-2502-1019

UNDER The Fast Track Approvals Act 2024 ("**FTAA**")

IN THE MATTER of an application by Kiwi Property Holdings No.2 Limited ("**the Applicant**") under section 42 FTAA for approvals relating to the Drury Metropolitan Centre – Consolidated Stages 1 and 2 Project

MEMORANDUM OF COUNSEL FOR THE APPLICANT

28 AUGUST 2025

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MAY IT PLEASE THE PANEL:

Introduction

1. This memorandum is filed on behalf of Kiwi Property Holdings No.2 Limited (“**Kiwi Property**”), the applicant for the Drury Metropolitan Centre – Consolidated Stages 1 and 2 project (“**Project**”). It addresses legal issues arising in relation to comments provided to the Panel under section 53 of the Fast Track Approvals Act 2024 (“**FTAA**”), and forms part of Kiwi Property’s response to comments under section 55 of the FTAA.
2. Comments have been received from:
 - (a) **The Auckland Council “Family” (“Council”)** – These comments are wide ranging and extensive and are addressed in Kiwi Property’s planning response and this memorandum.
 - (b) **Chorus** – These comments only request the provision of fixed line open access fibre connections to each lot, which is a matter of detail relating to the implementation of the development.
 - (c) **Department of Conservation** – These comments raise issues regarding the potential need for Wildlife Act approvals and freshwater fisheries approvals outside of the Fast-Track process. This is addressed in Kiwi Property’s planning response. In short, Kiwi Property and its advisors do not consider that such consents are required but will liaise with DOC with the goal of reaching agreement on that matter, failing which applications will be made outside the fast-track process.
 - (d) **James Meager**, the Associate Minister of Transport (in support).
 - (e) **Ngāi Tai ki Tāmaki** – These comments raise a concern regarding consultation, which is addressed in Kiwi Property’s planning response.
 - (f) **Papakura Local Board** – These comments raise matters which are addressed in Kiwi Property’s planning response.

- (g) **Te Akitai Waiohua Settlement Trust** - These comments do not oppose the Project but seek changes to conditions that are addressed in Kiwi Property's planning response.
 - (h) **Waka Kotahi / NZTA** – these comments address traffic issues and are addressed through responses to similar comments from Council.
3. This memorandum addresses matters raised in the Council's legal memorandum of 11 August 2025 ("**Council Legal Memo**") and the Council's planning response dated 11 August 2025 ("**Council Planning Memo**"). The memorandum supplements the more comprehensive planning response for Kiwi Property and is not intended to be exhaustive. Instead, it endeavours to address key issues raised by the Council that may materially affect the Panel's decision.
4. The memorandum is structured as follows:
- (a) Legal Framework.
 - (b) Evidential Issues, with responses grouped by reference to the specialist reports that raise each issue.
 - (c) The Council's section 85 FTAA proportionality assessment

Legal Framework

General Comments

5. The statutory framework governing the Panel's decision is discussed in detail in the Council Legal Memo. Rather than repeat that material, this memorandum addresses key points of difference. Kiwi Property does, however, make the following high-level observations.
6. Pursuant to clause 17(1) of the Schedule 5 FTAA (emphasis added), "*for the purposes of section 81, when considering a consent application, including conditions in accordance with clauses 18 and 19, the panel must take into account, giving the greatest weight to paragraph (a) -:*
- (a) The purpose of this Act; and

- (b) *The provisions of Parts 2, 3, 6, and 8 to 10 of the Resource Management Act 1991 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 Resource Management Act 1991.”*
- 7. Clause 17(1) thus elevates the purpose of FTAA above all RMA provisions, including the purpose of that Act. That will substantively influence both:
 - (a) The assessment of the application (i.e.: whether it should be granted or declined); and
 - (b) The nature and content of conditions that might be imposed (as is explicitly identified in the clause).
- 8. The purpose of FTAA (set out in section 3) is (emphasis added) to “facilitate the delivery of infrastructure and development projects with significant regional or national benefits”. That is fundamentally different from the purpose of RMA (set out in section 5 RMA) which is to “*promote the sustainable management of natural and physical resources*”. The purpose of FTAA focuses on enabling the delivery of what in practice will be large scale private and public projects whereas the purpose of RMA (defined in section 5(2) RMA) is broader and explicitly balances environmental issues over time.
- 9. While clause 17 of Schedule 5 FTAA requires the Panel to have regard to the matters addressed in the RMA when assessing the application, the legal tests that apply to the Panel’s “*decision making*” are changed fundamentally by section 85 FTAA which provides that the Panel may decline the application if the Project’s adverse impacts “*are sufficiently significant to be out of proportion to the project’s regional or national benefits*”.
- 10. Further, section 83 FTAA imposes an obligation on the Panel when exercising its discretion regarding conditions of consent not to 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.*” That obligation is in addition to the principles that govern conditions pursuant to common law and RMA. It emphasises:

- (a) The need for a light touch when imposing conditions.
 - (b) The importance when imposing conditions of recognising the purpose of FTAA, being (emphasis added) to *“facilitate the delivery of infrastructure and development projects with significant regional or national benefits.”*
11. In those circumstances, the Panel needs to take a careful approach when referring to and relying on Resource Management Act (“**RMA**”) caselaw, particularly where it relates to: the exercise of the Panel’s discretion when determining whether to grant consent; and the range and scope of conditions that might be appropriate.

Relationship between RMA and FTAA / proportionality test (s 85 FTAA)

12. Para 12 of the Annexure to the Council Legal Memo states (emphasis added), *“Accordingly, under clause 17(1)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.”*
13. Notwithstanding that wording, while the FTAA incorporates RMA provisions into the fast-track *assessment* process, the legal framework for “*decision making*” is altered significantly:
- (a) As noted above, the decision maker must have regard to the matters identified in clause 17 of the Schedule 5 FTAA, which includes the elements of Parts 2, 3, 6, and 8 to 10 of the RMA that “*direct decision making on an application for a resource consent (but excluding section 104D of that Act)*” but in doing so must give “*greatest weight*” to the purpose of FTAA².
 - (b) Section 85 FTAA specifies the circumstances in which an application must or may be declined. It replaces the full or limited discretion for

¹ This reference is to clause 17(1) of Schedule 5, FTAA.

² Clause 17(1) Schedule 5, FTAA.

non-complying, discretionary and restricted discretionary consents in sections 104B and 104C RMA.³ Thus FTAA represents a fundamentally different decision-making regime from RMA and the outcome of applying the FTAA tests and framework (intentionally) will not necessarily produce the same decision or conditions as the RMA process.

- (c) The Council Planning Memo records that none of circumstances specified in section 85 FTAA in which consent must be declined arise in this case.
- (d) A discretion to decline consent only arises under FTAA if there are one or more adverse impacts in relation to the approval sought and those adverse impacts (emphasis added) “*are sufficiently significant to be out of proportion to the project’s regional or national benefits that the panel has considered*” (what is termed the “**proportionality test**” in the Council Legal Memo). That is a much more constrained discretion than arises when assessing a resource consent application under RMA. Kiwi Property submits that:
 - (i) Whereas consent may be declined under RMA for a discretionary or non-complying activity if the adverse effects of the proposal are considered, in isolation and regardless of the scale of any benefits generated, to be sufficiently severe to warrant that decision, the FTAA requires a weighting of those “*impacts*” against the benefits.
 - (ii) Further, the requirement that such adverse impacts be “*sufficiently significant to be out of proportion*” effectively directs that consent be granted where benefits and adverse impacts are finely balanced. That is, the phrase “*out of proportion*” implies that the adverse impacts must clearly outweigh the regional or national benefits before consent can

³ As noted in paragraph 11 of the Annexure to the Council Legal Memo, consideration of non-complying activities under FTAA excludes the gateway tests in section 104D RMA

be declined.

- (e) In summary, all the matters listed in FTAA and RMA are to be considered but the weighting in section 85 favours the FTAA purpose and a decision to decline needs to reflect that FTAA section 85 test. Thus, consent may be granted under FTAA where it would have been declined under RMA. Even if consent is granted under both regimes, the conditions of consent under FTAA may be less stringent than those under RMA (having regard to section 83 FTAA, discussed below).

- 14. Thus, it is not simply a “*fast track approvals process*” that is introduced through the FTAA. Rather, the FTAA fundamentally changes the legal tests that apply to the Panel’s “*decision making*” and favours the grant of consent unless the proportionality test requires otherwise.

Whether “benefits” are to be measured on a gross or net basis

- 15. The Annexure to the Council Legal Memo states⁴ (emphasis added):

“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”).”

- 16. Kiwi Property disagrees:

- (a) The FTAA simply refers to “*benefits*”. It does not refer to:
 - (i) Costs, in the sense of adverse impacts that reduce or offset benefits (as opposed to processing costs incurred by EPA or others which are to be paid by the applicant);
 - (ii) A need for a cost / benefit analysis; or

⁴ Council Legal Memo at para 31.

- (iii) “Net economic benefits”.
- (b) Gross benefits have been at the forefront of the Parliamentary and community debate leading up to the passage of the Act and the government’s wish to enable development that would catalyse the economy.
- (c) The assessment required by section 85 FTAA is whether “*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)*”. If adverse impacts are taken into account when calculating the (net) “*regional or national benefits*” against which those adverse impacts are to be assessed under section 85, then they will be double counted. That is, the Council is effectively proposing that the Panel undertake a two-stage process whereby:
 - (i) **Stage 1** involves calculating “*net benefits*” by subtracting adverse impacts from gross benefits; and
 - (ii) **Stage 2** involves the section 85 proportionality assessment whereby the adverse impacts are compared with the “*net benefits*” (which, by virtue of Stage 1, will already incorporate those impacts).
- (d) The consequence of the Council’s “*net benefit*” approach is that its economic advisors have weighed up theoretical matters such as counterfactuals including whether development should occur at all, should occur on the proposed site, or should occur at a later date. This is despite the fact that the FTAA is intended to enable delivery of regionally and nationally significant projects, provided their adverse impacts are not out of proportion with the benefits.
- (e) The Drury Metropolitan Centre zone was confirmed through PC48 which itself involved an extensive cost benefit analysis in accordance

with the explicit requirement in section 32 RMA⁵. That process confirmed that the rezoning and subsequent development would have a net benefit.

- (f) The proposed activity is a metropolitan centre at Drury, for which there is no other appropriate location.
 - (g) The Council's proposal that only net benefits be considered would impose a tougher regime than applies to resource consent applications under RMA (which do not need to include a cost-benefit analysis) and would stifle and delay development rather than promote and enable it.
17. Kiwi Property says that Council's submission that "*Parliament cannot have intended that result, absent express language (such as a specific reference to "gross economic benefits")*" is mistaken. To the contrary, in the absence of any reference in FTAA to a cost-benefit analysis or "*net benefits*" the only reasonable conclusion is that Parliament intended applicants to address gross benefits.

The Panel's ability to grant consent in part

18. The Council Legal Memo states⁶ that, "*the decision-maker has 'the power to grant consent to something less than what is actually being sought'.*"
19. Kiwi Property accepts that, in addition to granting or declining the application in its entirety, the Panel could grant it in part. For the reasons set out in the material lodged in support of the application, however, it is submitted that it is appropriate to grant consent for the full activity sought and subject to the schedule of conditions submitted with this memorandum.
20. The Project is closely aligned with the form and extent of metropolitan centre envisaged in and enabled by the AUP provisions. Granting consent will be

⁵ Section 32(1) RMA requires an "*evaluation report*" which in terms of section 32(2) must, "*identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including ...*"

⁶ Council Legal Memo paragraph 4.2.

wholly consistent with the national, regional and local planning framework and context.

The appropriate Lapse Period (5 v 10 v 15 years)

21. Kiwi Property has sought a 15-year lapse period for the consent, in terms of section 125 RMA.
22. The Council's opposition to that request is summarised as follows in the Council Legal Memo⁷:

"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. 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."

The anticipated 11-year construction period referred to is realistic and, ideally, construction will be completed within it. The world of private investment and development is neither simple nor predictable, however, and setbacks can and do occur (e.g.: Covid; GFC). That unpredictability may not worry Council overly (given its income comes largely from rates) but it is critical to a commercial entity such as Kiwi Property. The consent needs to have some flexibility built in and the 15-year lapse period sought will give Kiwi Property confidence that the consent includes a time buffer that may be needed to respond to economic or other disruption.

23. The Council Legal Memo⁸ further states:

"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."

In that context Kiwi Property says:

⁷ Council Legal Memo paragraph 4.24.

⁸ Council Legal Memo paragraph 4.25.

- (a) The “*infrastructure and development projects with significant regional or national benefits*” that are addressed in FTAA are typically of large scale and great complexity. It is an inevitable consequence that implementation of them will take time.
- (b) The “*fast track*” embodied by FTAA relates to the consenting process not the duration of the time frame within which the projects will be implemented. That is, FTAA “*facilitate[s] the delivery*” of these projects by easing and simplifying the consenting processes involved (e.g.: by removing submission rights and merits appeal processes).
- (c) In that regard, FTAA can be contrasted with the COVID-19 Recovery (Fast-track Consenting) Act 2020, the purpose of which included urgently promoting employment. The difference is exemplified by the contrast between:
 - (i) The maximum lapse period of two years under the COVID 19 legislation; and
 - (ii) The minimum lapse period under FTAA of two years.
- (d) In any event, Council’s concern that a longer lapse period might not implement the purpose of the FTAA does not arise in this case given that the Drury Centre will necessarily be developed in stages and incrementally. As is obvious from a site visit, extensive preparatory works are already underway. Regional benefits are already accruing as a consequence of Kiwi Property’s investment in those works and will increase over time as individual shops and development blocks are completed and start serving the public.
- (e) The 15-year lapse period sought is now far from uncommon. Most notably, Auckland Transport and Waka Kotahi / NZTA have, with support from Council sought and obtained a number of extended lapse periods for construction of new or upgraded roads in the region⁹.

⁹ For example, a 20-year lapse period is proposed by Supporting Growth (NZTA and Auckland Transport) for NOR’s S1, S3 HS and KS in Auckland’s north-west.

Taken as a whole, the Drury Centre is a larger and more complex project than those roads.

- (f) It is important to recognise the difference between the consent sought and the regional infrastructure (most notably roading) projects that the Council family has recently been promoting and obtaining designations for. The long lapse periods applying to those infrastructure projects have been accepted despite the fact that the works are not currently funded, may never be funded, and will not commence construction for well over a decade. While the concerns expressed in the Council Legal Memo may be valid in the context of those infrastructure projects, that is not true of the Drury Centre application which is for a project on a site that is already being developed, will result in the ongoing incremental construction and operation of an increasingly large centre, and will be coordinated with both the development of its residential catchment and the supporting infrastructure.

24. The Council Legal Memo¹⁰ refers to and quotes passages from *Katz v ACC* (1987)¹¹ (“**the Katz Extract**”). Kiwi Property acknowledges the issues addressed in that extract but reiterates the factors that apply to this application and that support an extended lapse date in this case:

- (a) The application will enable the ongoing staged and incremental construction over many years of the Metropolitan Centre that is enabled by the zoning and precinct provision that apply to the land. The scale of that centre and its relationship to the surrounding catchment requires a lengthy lapse date. It is neither feasible nor economically viable to construct the centre in a single phase given that its residential catchment will itself develop incrementally over time.
- (b) Thus, in this case both the Drury Centre and its supporting residential

¹⁰ Council Legal Memo paragraph 4.26.

¹¹ *Katz v Auckland City Council* (1987) 12 NZTPA 211 at p 213.

catchment will themselves comprise the dominant changes to “*physical and social environments*” referred to in the *Katz* Extract. These are changes that are planned for in and anticipated by the AUP zone and precinct provisions. The consent should thus enable and facilitate those changes to occur.

- (c) The concern expressed in the *Katz* Extract that, “*if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene*” does not apply in this case. Kiwi Property has already commenced construction of the Drury Centre and will continue to do so as the surrounding residential catchment develops, and new tenants and occupants are ready to establish.

25. The Council Legal Memo says¹²:

“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.”

Kiwi Property is not arguing that a long lapse period is needed due to “*the uncertainty around the funding and delivery of the transport infrastructure upgrades*”. While the timing of traffic upgrades will affect when certain elements of the Drury Centre may occur, the centre is already under construction and its development would occur over an extended period of time even if all the transport infrastructure upgrades were in place now. That is because the centre’s development is related to the contemporaneous development of its catchment. That is illustrated by the incremental development over the past 20 years of Kiwi Property’s Sylvia Park Metropolitan Centre.

Conditions Precedent

26. Conditions precedent are commonly used in resource consents. In this case, the key conditions precedent will be those that constrain development

¹² Council Legal Memo paragraph 4.31.

beyond specified total floor areas unless identified transport infrastructure is implemented.

27. Council accepts that such conditions are a legally available mechanism¹³ but concludes¹⁴ that “*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.*” In reaching that conclusion, Council argues that:

- (a) Consideration must be given to “*whether there is sufficient certainty as to the effectiveness of proposed mitigation and the practical ability to fulfil the condition*”¹⁵;
- (b) “[T]here is a lack of funding and future timeline for transport upgrades necessary to unlock later stages of the proposed development”¹⁶; and
- (c) The application takes the condition precedent mechanism “*into uncharted territory in a consenting context by seeking to ‘bank’ development for up to 15 years in circumstances where there is no certainty around the timing of necessary upgrades.*”¹⁷

28. Kiwi Property disagrees:

- (a) While the funding arrangements for the transport works of greatest concern to Council (Mill Road and the Opaheke Northern Connection) have fluctuated under successive governments, there is consensus between national and regional government that Drury is to be a priority growth area in the region and it is inevitable in that context that, over time, the arterial road network connecting Drury to the balance of the city will be upgraded.
- (b) Those transport upgrades have been the subject of extensive modelling and analysis over many years by Council, the roading

¹³ Council Legal Memo paragraph 4.36.

¹⁴ Council Legal Memo paragraph 4.38.

¹⁵ Council Legal Memo paragraph 4.37.

¹⁶ Council Legal Memo paragraph 4.37.

¹⁷ Council Legal Memo paragraph 4.39.

authorities and Kiwi Property's consultants. These works will provide much improved connectivity between Drury Centre and the balance of the city. In that context, there is certainty as to the effectiveness of proposed mitigation measures and hence the appropriateness of conditions precedent that constrain development until those works are in place.

- (c) While there is currently doubt about when and in what way the proposed works will be funded, these are roading proposals that:
 - (i) Have been developed by the roading authorities themselves, not Kiwi Property or other landowners;
 - (ii) Have had central and regional government support and (in the case of Mill Road) funding commitments; and
 - (iii) Are identified in Council's Drury / Opaheke Structure Plan and the AUP provisions governing both Drury Centre and the adjacent precinct areas.
- (d) The fact that there is currently a lack of funding and timeline for the transport upgrades does not render the conditions inappropriate in this case. When and if the works are funded and carried out, the conditions will stop constraining development and Kiwi Property will be able to carry out the next phase of the consent. If the works are never carried out, then Kiwi Property will not be able to implement the additional floor space pursuant to the consent. That will be a problem for Kiwi Property but need not concern the Council or the roading authorities.
- (e) From Kiwi Property's perspective, the clarity, certainty and predictability that will arise from the grant of the application vastly outweighs the uncertainty and risk that will arise from the proposed conditions precedent.
- (f) It is ironic that Council (including Auckland Transport) has been perfectly happy to seek and uphold designations with lengthy lapse periods for a plethora of major infrastructure (roading) projects

throughout the region that are not funded and may never be constructed yet is opposing an application for resource consent that endeavours to take regionally important roading proposals into account and reflect them in resource consent conditions.

29. The Council Legal Memo¹⁸ states:

*“In **Hildeman v Waitaki District Council**, 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.”*

That case can be distinguished from the current circumstance:

- (a) The need for the intersection upgrade in *Hildeman* was triggered by the development yet neither the applicant nor the council were proposing to fund that work. In this case, the works identified in the conditions precedent have been contemplated by the authorities for some time, in some cases are underway or are planned and funded (including by central government), and in other cases are addressed in the DCP.
- (b) The proposed Drury conditions precedent enable development to an appropriate intensity for each level of infrastructure whereas in the *Hildeman* case no development could occur in the absence of an intersection upgrade that realistically was not going to occur.
- (c) Furthermore, the *Hildeman* case does not preclude the imposition of conditions precedent. The Court chose not to impose such a condition in that case. The Panel likewise has a discretion whether to use such

¹⁸ Council Legal Memo, para 4.35.

conditions in this case. In that regard, Kiwi Property notes that the Drury Centre Precinct land is zoned for a metropolitan centre; the roading authorities are intending to improve the road network; Kiwi Property is also carrying out significant improvements to the network; and Council is charging high development contributions (see below) to fund such improvements.

30. The Council Legal Memo¹⁹ states:

*“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. The Court emphasised that there must be sufficient certainty that proposed mitigation measures would be effective before a condition precedent can appropriately be imposed.”*

For the reason set out in paragraph 28 above, the factual situation in this case supports the imposition of the proposed conditions precedent. Further, the transport network improvements referred to in those conditions have been designed and are listed precisely because they are expected to mitigate the effects of concern.

Evidential Issues

31. The following section addresses a number of issues raised by Council officers or advisors, and which are summarised in the Council Legal Memo or the Council Planning Memo.

Council’s concerns regarding infrastructure funding and delivery / banking consent

32. Ms Duffield raises a series of concerns regarding the relationship between the Project and the provision of infrastructure in Drury. The Council Planning Memo summarises those concerns as follows (emphasis added):

“21. The assessment provided by Ms Brigid Duffield (Annexure 1) in terms of Council’s Funding and Financing highlights a primary concern, which is that the proposal is of a scale that relies on major transport infrastructure for which there is no confirmed funding or delivery timeline. Multi-billion dollar projects, such as the Mill Road connections and the Drury South Interchange, are prerequisites for the later stages

¹⁹ Council Legal Memo paragraph 4.36.

of the proposed consented development but remain unprogrammed and unfunded in any central or local government plan. ...

22. Granting consent for development contingent on unfunded infrastructure creates significant uncertainty and risk. It effectively "banks" development capacity without any certainty as to when, or if, the enabling infrastructure will be delivered. This requires careful consideration as it relates to the sequenced approach to growth relative to infrastructure delivery as outlined in the Drury Precinct, particularly as it relates [to] Policy I450.3(21), which requires development to be coordinated with the provision of sufficient infrastructure."

33. These are not new arguments. They are redolent of the approach adopted by Council in opposing PC48 that applied urban Metropolitan Centre zoning to the Drury land. They reflect Council's apparent unwillingness to accept that urban development and the implementation of infrastructure required to support it can and should occur contemporaneously and in a coordinated way rather than sequentially. It is not necessary, or even desirable, to require all detailed infrastructure planning and funding to be in place before urban development starts to occur. In contrast, that approach is a recipe for stasis because there is no rationale for commencing infrastructure development unless and until there is clarity that development can and will occur that will make use of and fund it.
34. Council's Development Contributions Policy ("**DCP**") imposes significant development contributions on Drury Centre developments²⁰ to fund the infrastructure that it says will be required over the next 30 years to enable development at Drury to occur. In practice, the detailed design of those assumed works, the land acquisition and construction costs involved, and the time frame within which they will occur will all vary from those assumed in the DCP but, notwithstanding those uncertainties, Council is content to impose financial obligations on developers such as Kiwi Property.
35. Kiwi Property's Project does not generate uncertainty or risk:
- (a) Urban development in and around the Drury Centre cannot be occupied until water, wastewater and other services are in place. In

²⁰ Being approximately \$93,000 per HUE (household unit equivalent) in 2025, increasing over time to \$111,000 (in 2025 dollars) in 2035.

practice, such development will not be undertaken until the developer has certainty in that regard (lest capital is sunk in unproductive assets).

- (b) Given the constraints on development in the proposed conditions precedent, development of the Drury Centre will necessarily be tied to implementation of the specified roading infrastructure. Unless and until that infrastructure is implemented, the Drury Centre development will be constrained to the specified thresholds.

36. With regard to the claim that the consent will effectively "*bank*" development capacity:

- (a) The Project is consistent with the form and extent of development envisaged for the land in the AUP Metropolitan Centre zone and Drury Centre Precinct.
- (b) While consistent threshold provisions apply to the Drury Centre, Drury East and Waihoehoe Precincts, those areas are intended to develop in conjunction with each other because they are complementary and mutually supportive. That is, development of the Drury Centre Precinct will create a commercial, retail, social and employment hub that will attract residents to the Drury East and Waihoehoe Precincts while the residential development that occurs in the Drury East and Waihoehoe Precincts will contribute to the catchment of the Centre.
- (c) Council is boxing at shadows of its own making. The consent sought is not about "*banking*" development capacity that will not be used. Instead, it is a necessary prerequisite to the Centre continuing to develop over many years in the form and to the scale anticipated by the AUP. The consent will give Kiwi Property confidence that ongoing investment in the Centre will be worth the risk. Put another way, development is already being undertaken on the Drury Precinct in reliance of existing resource consents. This application will enable that process to continue into the future subject to compliance with the threshold / trigger conditions precedent.

- (d) That Kiwi Property has commenced works on the Centre and is seeking further consents for extensive additional development should support its proposal (and the purpose of the FTAA) rather than being seen by Council as a negative factor. Neither RMA nor FTAA impose licensing regimes (where development opportunities are eked out). If other parties want to seek consents and commence development in Drury, they are entitled to lodge applications and have them assessed on their merits in the context of existing and approved development.
 - (e) If Kiwi Property is constrained from developing beyond the specified thresholds because infrastructure projects have not been commissioned, the same will be true of other developments in the Drury East and Waihoehoe Precincts that are subject to the same threshold / trigger regime.
37. In short, the triggers will ensure the integration and co-ordination of infrastructure with development referred to in the AUP provisions relied on by Council.²¹ Development cannot and will not run ahead of infrastructure. The key issue before you is not whether conditions precedent governing the later stages of the proposed development should be upheld but, instead, the level of development that those conditions should enable before the remaining infrastructure is required to be in place (i.e.: the development thresholds discussed in the traffic evidence and reports).

Economic Issues – Cost- Benefit Analysis and Methodology

38. The economic commentary and analysis provided by Council identifies the following issues:
- (a) The argument discussed above (see paragraphs 15-17) that “*benefits*” are to be measured on a net rather than gross basis.
 - (b) That the economic evaluation should have included a cost-benefit analysis that compares the full range of incremental costs and

²¹ See for example paragraph 4.44 of the Council Legal Memo which references the explanatory text in Part B3.5 of the RPS provisions in the AUP.

benefits against a clearly defined counterfactual.²²

- (c) That the Applicant's methodology may overstate the economic benefits by not fully accounting for opportunity costs (e.g.: of allocating the limited transport infrastructure capacity available under the shared trigger upgrades to this Application) displacement effects, and resource constraints.²³
- (d) The potential implications of "*congestion effects*"²⁴.

39. With regard to whether a cost-benefit analysis should have been provided:

- (a) There is no statutory requirement under FTAA for a cost-benefit analysis to be submitted with an application.
- (b) A cost-benefit analysis is required under section 32 RMA in the context of a plan change but there is no corresponding requirement in RMA in the context of a resource consent application.
- (c) The Property Economics report submitted with this memorandum explains that, while a cost-benefit analysis can be a useful tool for infrastructure providers when assessing the efficient allocation of resources and the ranking of development options, it has limited usefulness and appropriateness when assessing resource consent applications for development projects under either RMA or FTAA.
- (d) As explained in the Property Economics report, there is no relevant counterfactual given that:
 - (i) The Project proposes a Drury Metropolitan Centre on land zoned exclusively for that purpose; and
 - (ii) FTAA is promoting early development of major projects to encourage economic activity in the region.

²² Council Legal Memo paragraph 2.4.

²³ Council Legal Memo paragraph 2.5; Annexure 2 (Economics) to the Council Planning Memo.

²⁴ Annexure 2 (Economics) to the Council Planning Memo.

40. With regard the to the argument that the application should have considered opportunity costs, displacement effects, and resource constraints:
- (a) As noted above, the commercial and residential development enabled by the Drury Centre, Drury East and Waihoehoe Precincts is complementary and mutually supportive. Development of a strong Drury Centre will be a critical catalyst for the residential development in the area. Hence this application and a Drury East Precinct resource consent application currently being processed by Council have been prepared by the same key advisors (planning and traffic), use the same assumptions, and are deliberately complementary.
 - (b) The argument that Council could and should use its resources to construct other infrastructure elsewhere in the city ignores:
 - (i) The opportunity represented by Kiwi Property's current and ongoing commitment (already apparent on the ground) to construct the Drury Centre which will create immediate economic activity in the region and encourage the construction of housing in the vicinity.
 - (ii) The consensus between central and regional government²⁵ that urbanisation of Drury is a priority for the region, illustrated by the current and ongoing commitment from central government to fund supporting infrastructure (e.g.: the Drury Rail Station, the six-laning of SH1, and arterial road improvements in the vicinity).
41. With regard to "*congestion effects*":
- (a) Congestion is an inherent consequence of population growth and intensification. Intensive development does, however, increase the

²⁵ For example, the Government Policy Statement on Housing and Urban Development (September 2021) identifies Drury as one of two "*Priority greenfield growth areas*" in the Auckland Region for priority focus and investment within the Urban Growth Partnership.

availability and utility of public transport services which the Project is intended to support and take advantage of.

- (b) The proposed conditions precedent which tie the scale of development to implementation of transport infrastructure are intended to address the congestion issues raised by Council. Whether the conditions are appropriate is a matter for you to assess with regard to the advice and reports from traffic engineers.

Roading Issues – Public v Private Ownership / Easements

- 42. The Council advisors have raised concerns regarding the proposed private internal road network at the Drury Centre, seeking a public network or easements that guarantee access for public transport and/or emergency services. Similar issues are raised regarding the control of traffic signals within and on the periphery of the site.
- 43. Kiwi Property opposes those suggestions.
- 44. A key practical concern for Kiwi Property, based on its ownership and management of other large commercial centres in New Zealand (e.g.: Sylvia Park, LynnMall, and Te Awa-The Base in Hamilton), is the need to retain control over the internal road network so the centre can be redeveloped, improved or augmented over time without having to work through road closure / land swap processes or contractual arrangements with councils or other authorities.
- 45. The AUP provisions governing access and traffic, in conjunction with the Drury Centre Precinct, provide a consenting framework that addresses adverse RMA effects. It is essential, however, that Kiwi Property retains the ability to speedily and easily manage and alter internal road layouts rather than becoming entwined in negotiations with a plethora of Council officers and advisors.
- 46. These preferences reflect hard-won experience involving both:
 - (a) Challenging and laborious negotiations in circumstances where for historic tenure reasons councils have an interest in the centre land

and have held up improvements in access to and within Kiwi Property centres (e.g.: Centre Place in Hamilton).

- (b) The circumstances that apply most notably at Sylvia Park where all internal accessways are in Kiwi Property ownership and the Council does not have any right of occupation.

47. In the case of Sylvia Park:

- (a) Throughout the life of the centre public bus routes have commenced and terminated in the centre, access has been provided to the Sylvia Park Rail Station (constructed by Kiwi Property at its cost), and emergency services have had permanent access into and through the centre.
- (b) Kiwi Property has throughout that time been able to manage traffic flows and amend the internal road layout to improve the operation of the centre without having to obtain approval from the Council and without incurring the delays such processes would involve.
- (c) The infrastructure relating to the traffic signals both within the centre and on its periphery is in Kiwi Property's ownership and is located on the site.

Roading Issues – Timing of the Southern Motorway off-ramp to Drury Centre

- 48. The traffic engineering reports submitted with this memorandum explain why Messrs Hughes and Parlane consider that a greater quantum of development can safely and appropriately be implemented before the Southern Motorway off-ramp to Drury Centre needs to be implemented.
- 49. In that context, the Waihoehoe / Great South Road intersection will need to be upgraded. The final design of the intersection upgrade needs to be determined. In that regard:
 - (a) For consistency, the traffic engineers have been instructed to use the intersection upgrade plans that have previously been modelled.
 - (b) Kiwi Property has assumed construction of a workable and optimised

intersection within the existing road reserve.

- (c) Council has designated extensive additional land in the vicinity of the intersection for road widening and improvement purposes. That will make it easy to carry out appropriate and optimised works if issues arise with the extent of the current road reserve.
50. Kiwi Property considers that the Southern Motorway off-ramp to Drury Centre will improve driver convenience and, consequently, will prove attractive to customers once implemented. The traffic modelling commissioned by Kiwi Property demonstrates, however, that the Waihoehoe / Great South Road intersection and the balance of the road network will be able to cater for up to 3,800 vph before the Southern Motorway off-ramp to Drury Centre needs to be implemented.

Proportionality Assessment

51. The Council planner's "*proportionality assessment*" is set out in the Table in paragraph 183 of the Council Planning Memo. Kiwi Property's planners carried out a corresponding assessment at Part 13 of the AEE submitted with the application.
52. With respect, the Council planner's assessment is overstated and does not engage with the focused test in section 85 FTAA (discussed at paragraphs 12-14 above). The Council planner appears to conclude that in all but two cases (stormwater and wastewater) that each potential adverse effect individually is so unacceptable as to be out of proportion with the Project's (total) regional and national benefits.
53. By way of illustration with reference to the table in paragraph 183 of the Council Planning Memo:
- (a) The planner concludes with regard to infrastructure funding, staging and delivery risk that the, "*adverse impact of approving a development that is dependent on unfunded infrastructure, and which subverts the established staging framework is significantly out of proportion to the claimed benefits.*" Kiwi Property disagrees:

- (i) The Project is not dependent on unfunded infrastructure. The conditions precedent will ensure that development only occurs beyond specified limits once the necessary infrastructure is in place.
 - (ii) The Project will not subvert the “*established staging framework*”. Instead, the conditions precedent will ensure that the staging is appropriate (subject to the Panel’s conclusions on the traffic and transport issues).
- (b) The planner concludes with regard to the use of private roads for key public transport routes that, “*The adverse impact on the public transport network is significant and directly undermines a primary strategic goal for the Drury Centre. The reliance on private roads for essential public services is out of proportion to the project's benefits, as it creates an unacceptable level of risk and uncertainty for a critical infrastructure service.*” Kiwi Property disagrees. Private ownership of public transport routes through Sylvia Park for the past 20 years has generated no issues. The claimed risk is overstated and has not been borne out in reality in practice. There is no basis for concluding that the outcome will be different at Drury.
- (c) The planner concludes with regard to flooding and natural hazard risk that, “*The unresolved and potentially significant flood risk to people and property is a significant adverse impact. The failure to demonstrate that the development will be safe from flood hazards is out of proportion to the project's benefits.*” Kiwi Property disagrees:
 - (i) A failure to demonstrate something is not an adverse effect, let alone one that in isolation is out of proportion with the Project’s benefits.
 - (ii) In any event, Kiwi Property refutes that such risks will arise, for the reasons set out in detail in the response to Council’s comments on flooding and natural hazards.

- (d) The planner concludes with regard to stormwater management and asset ownership, “*The unacceptable operational and liability risks associated with the proposed private ownership of public-serving assets are significant adverse impacts. Without resolution, these effects are out of proportion to the benefits of the proposed stormwater system.*” Kiwi Property disagrees:
- (i) The planner has compared these adverse effects with “*the benefits of the proposed stormwater system*”. That is not the assessment required by section 85.
 - (ii) The company is prepared to agree to whatever ownership structure Healthy Waters wants for the stormwater assets. The problem to date has been that Healthy Waters’ preferences have oscillated between private ownership (the case until now) and public ownership (this month’s preference).
 - (iii) In practice, private ownership of stormwater assets has not caused Healthy Waters any concern in the past. By way of example, Kiwi Property was required 20 years ago to construct a 5m² section box culvert under Sylvia Park when the site was developed, to link the public drainage system higher in the catchment with the public drainage system between the site and the Tamaki River. Council then (and subsequently) refused to take ownership of that asset on the basis that it would be preferable if Kiwi Property retained ownership and took responsibility for maintenance. Despite that private ownership, the culvert continues to function and to connect the upstream and downstream elements of the network.
- (e) The planner concludes with regard to wastewater servicing constraints that, “*The adverse impact of approving development beyond the capacity of the wastewater network is significant. While staging conditions can manage this, it underscores the disconnect between the scale of development sought and the readiness of enabling infrastructure, which is a recurring theme for this Application.*” This is the one matter where the planner does not claim a disproportionate

effect. In any event:

- (i) Provided staging conditions are implemented, as proposed, there will be no adverse effects in this regard.
 - (ii) More broadly, major urbanisation projects necessarily involve the contemporaneous construction of servicing infrastructure and development. To do otherwise is innately inefficient and wasteful.
- (f) The planner concludes with regard to open space that, *“The proposed does not provide essential, functional, and publicly secured open space for a high-density community is a significant adverse impact. This deficit is out of proportion to the project’s claimed (but uncertain) benefits. The impact cannot be adequately addressed without modification to the open space provision within the proposal.”* Kiwi Property disagrees:
- (i) Through the PC48 process Council’s parks department made it clear that it would not accept open space being vested in it because it wished to avoid the cost of acquiring and maintaining the land. In that context, the Drury Centre Precinct provisions explicitly anticipate and recognise that open space may be privately owned.
 - (ii) The proposed open space has been designed, located, and will be maintained to maximise the amenity of the public and the attractiveness of the centre. Those open spaces are an inherent component of the Project and are secured by the proposed conditions. The complaint from Council that the Project does not provide “*publicly secured*” open space is rejected.
 - (iii) The application is for the core of the metropolitan centre, which is intended to be an intensive and highly urbanised environment. It is inevitable and desirable that larger public spaces be located outside the metropolitan centre core.
 - (iv) Kiwi Property’s experience is that it can and will maintain

public open spaces within the metropolitan centre better than will the Council if the land is vested.

- (v) Notwithstanding the complaints of the Council officers, Kiwi Property's understanding is that they have yet to develop and start implementing an open space strategy for Drury Centre and Drury East. Until that occurs Kiwi Property has no realistic option but to identify its preferred open spaces and to incorporate them into the comprehensively designed metropolitan centre for which consent is sought.
 - (g) The planner concludes with regard to ecological effects that, "*The impact is out of proportion to the project's benefits, as the core principle of addressing residual effects has not been met in the application as proposed, and require the inclusion of an offset proposal to be provided for through conditions of consent.*" Kiwi Property disagrees. The ecological experts have explained why the Project will not have adverse ecological effects and to the contrary will produce net ecological benefits. In any event, any such effects would be resolved in full through implementing offset works if the Panel thought that necessary.
 - (h) The planner concludes with regard to urban design that, "*While conditions may address some issues, the proposal as submitted fails to deliver on key urban design principles for a metropolitan centre. The cumulative effect of these design issues is out of proportion to the benefits, as it compromises the core function and identity of the planned centre.*" Kiwi Property disagrees. The Project is supported by extensive urban design analysis and will give rise to high quality urban development with extensive connectivity, high amenity and accessible public open spaces.
54. The analysis of Kiwi Property's planners demonstrates that, far from each of those matters generating adverse effects that individually are disproportionate with the Project's benefits, even collectively they do not come close to enabling the application to be declined.

Conditions

55. Section 83 FTAA provides 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.”*
56. The Council²⁶ states that, *“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.”*
57. Whether that analysis is correct or not, Kiwi Property’s position is that:
- (a) Many of the amended and new conditions proposed by the Council advisors and officers are in practice significantly more onerous than they need to be;
 - (b) Those conditions therefore offend section 83 FTAA; and
 - (c) Those conditions are also excessive in terms of the RMA.
58. In that regard, Kiwi Property’s responses to the Council’s proposed amended and new conditions form part of the material prepared by its planners submitted with this memorandum.

DATED this 28th day of August 2025



Douglas Allan / Alex Devine
Counsel for Kiwi Property Holdings No. 2 Limited

²⁶ Council Legal Memo paragraph 4.22.