Fast-track Approvals Act 2024

MINUTE 6 OF THE EXPERT PANEL
Update on the Application
Drury Metropolitan Centre [FTAA-2502-1019]

(15 September 2025)

Technical advice

[1] The Panel has received advice from Vanessa Hamm dated 12 September 2025 which addresses various legal issues. That advice is **attached** and will also be published on the website.

[2] The Panel invites comments on the legal advice from both the Applicant and Auckland Council by 5pm, 19 September 2025. In particular, the Panel requests that the Applicant provide a response to specifically address the jurisdictional point raised at paragraphs 53-58.

[3] While the panel has not yet formed a view on the jurisdictional issue (and will await the responses to the s67 requests), the Applicant may wish to advise whether it would be prepared to modify the proposal to address this issue if the Panel finds that it does not have jurisdiction to grant consent for proposed activity areas which exceed (by more than a nominal amount) the square metre areas contained in the Schedule 2 project listing.

Mary Hill
Drury Metropolitan Centre Expert Panel Chair

HOLLAND BECKETT

12 SEPTEMBER 2025

MEMORANDUM

To Expert Panel - Drury Metropolitan Centre (the **Panel**)

From Vanessa Hamm, Holland Beckett

Drury Metropolitan Centre – Request for Legal Advice

1. This memorandum relates to the substantive application by Kiwi Property Holdings No. 2 Limited (the **Applicant**) under the Fast-track Approvals Act 2024 (**FTAA**) to develop land for future residential activity and a commercial retail centre. The listing in Schedule 2 to the FTAA states that this includes approximately, 10,000 square metres commercial, 56,000 square metres retail, and 2,000 square metres community activity.

2. In light of comments received, particularly from Auckland Council and Auckland Transport, the Panel has sought legal advice relating to "banking" development capacity (and associated issues relating to the proposed lapse date and receiving environment) and the jurisdiction and process relating to Auckland Council's suggestion that the application could be partially granted or conditions imposed to address the "capacity banking" concerns.

3. In particular, we address the following questions:

   (a) Does the "first in first served" principle apply in a FTAA context, such that the Panel is required to consider this application on its merits rather than being concerned about the "banking" of development capacity by a single applicant?

   (b) If consent is granted for a threshold of development that exceeds the Trigger Table thresholds, together with:

      (i) conditions precedent which ensure that the consented development cannot be implemented unless and until those triggers are met; and
      (ii) a long lapse date (i.e. 15 years as proposed) is imposed,

      should the granted but unimplemented consent be considered as part of the receiving environment?

   (c) If so, to what extent should the Panel consider the implication that the granted but unimplemented consent would use up (some of) the capacity identified in the Trigger Table thresholds and therefore potentially preclude the granting of later applications because that capacity has been "banked" by the granted but unimplemented consent?

   (d) Are the proposed conditions precedent lawful or do they effectively frustrate the consent?

   (e) Can the Panel lawfully decline the application solely on the grounds of inconsistency with the AUP precinct provisions?

   (f) Can the Panel lawfully decline aspects of the proposal that rely on unfunded and unprogrammed infrastructure and only grant aspects that can be adequately serviced by

existing, funded, and committed infrastructure? If so, what is the correct process under the FTAA for making such a decision.

Summary of advice

4. Our view is that the first in first served principle does apply in an FTAA context, and that the Panel is required to consider this application on its merits.

5. In relation to the receiving environment:

   (a) We consider that a consent validly granted (even with a condition precedent and a long lapse date) would, on grant, form part of the receiving environment. However, with reference to the caselaw which adds 'where it appears likely that the consent will be implemented' this will be a question to be considered when any future applications are made.

   (b) We would not rule out that 'banking' is a relevant consideration for the Panel, provided that there is some basis for this – i.e. a planning provision which necessitates this or a relevant adverse effect.

6. A condition precedent can be lawfully framed in this case, which defers the opportunity for an applicant to embark upon the activity until a third party carries out some independent activity, and we do not consider on our review of matters that a condition precent would frustrate the grant of consent. However, the Panel will itself need to be satisfied on the evidence and may wish to explore matters further.

7. It is not open to the Panel to decline the application *solely* on the basis of inconsistency with the Drury Centre Precinct provisions in the Auckland Unitary Plan.

8. We consider that it is open to the Panel, in its discretion, to lawfully decline aspects of the proposal that rely on unfunded and unprogrammed infrastructure, if it considers on the evidence that this is appropriate within the constraints of s 85(3) and 85(4) of the FTAA. We do not consider that the FTAA precludes a decision to decline in part/grant in part and have set out the procedure which we consider the Panel should apply.

9. We flag a potential jurisdictional issue for the Panel to consider, which it may wish to seek legal submissions on from the parties and/or advice. The application includes activities by m^2 breakdown which exceed (in some case by some margin) the approximate areas in Schedule 2 to the FTAA. In light of the High Court decision regarding Port of Tauranga Limited's Stella Passage project,[1] consideration should be given to whether there is jurisdiction to grant the application as sought.

Relevant background

10. The Applicant has lodged a substantive application for development of Stage 1 and Stage 2 of the Drury Centre Precinct across multiple contiguous properties in Drury. The proposal is to amend Stage 1, and to obtain all necessary resource consents in respect of Stage 2 of the Drury Metropolitan Centre involving:

    (a) Subdivision of superlots on Stage 1 to create 292 fee simple lots for future residential development; and

[1] *Ngāti Kuku Hapu Trust v The Environmental Protection Agency* [2025] NZHC 2453.

(b) The construction and operation of retail, commercial, community, residential and visitor accommodation activities with associated buildings and ancillary car parking on Stage 2; bulk earthworks to enable the Project; and the construction and installation of reticulation networks and roading infrastructure to service the Project.

11. The site is located within the Drury Metropolitan Centre which was the subject of a relatively recent and now operative Plan Change 48. Plan Change 48 contains a "*Threshold for Subdivision and Development Table*" (**Trigger Table**) which sets out specific transport upgrades required when specific land use activity triggers are met (e.g. number of residential dwellings; GFA for retail, commercial and community activities; and peak hour trip generation).

12. Pursuant to the Drury Centre Precinct provisions, the thresholds are set out at I450.6.2, and infringements are then as per I450.4.1(A5) and (A6). These afford non-complying and discretionary activity status respectively, and therefore provide unrestricted scope to consider the effects with respect to effects on developments in the other precincts, which are also subject to the same provisions.[2] An application is subject to the Special Information Requirements at I450.9(4) and (5), where an integrated transport assessment is required to consider effects across the local transport network (again, the same requirements apply to the Drury East and the Waihoehoe Precincts).

13. The application proposes conditions that effectively amount to a revised trigger table that reflects the alternative transportation evidence provided by the Applicant. Proposed condition 85 of the land use consent provides for a condition precedent which would prevent the occupation of dwellings, retail, or commercial space or the release of s224(c) certificates for vacant lots in Stage 1 until the specified transport infrastructure upgrades are constructed and operational as set out in a table contained in the condition.[3]

14. Both the land use and subdivision consent conditions propose a 15 year lapse date unless given effect to earlier (or extended under s125).

15. Auckland Council through its comments on the application raises (among other matters) the argument that the application is at odds with "*a core precinct principle that resource consent applications, development and subdivision must be integrated with infrastructure delivery*." Brookfields argue that "*this 'banking' of capacity potentially undermines development feasibility for other landowners within the Drury Centre, Drury East and Waihoehoe Precincts*."[4] The receiving environment issue is explained by Brookfields as follows: "*… it is inappropriate and undesirable to leave consents unimplemented for long periods of time [because] once granted, they become part of the environment*. … *This has implications for the 'Trigger Table' provisions in the Drury Centre, Waihoehoe and Drury East Precincts as several thresholds of development capacity would be 'consumed' by this consent, whether or not it is given effect to during the lapse period.*"[5]

16. We note that the Drury Centre, Drury East and Waihoehoe precincts have a common set of subdivision and development thresholds linked to the delivery of specific transport infrastructure upgrades. We also note that prior resource consents granted appear to have articulated where subdivision and development stand as against those thresholds, across all three precincts, at the time of any resource consent being granted – e.g. Drury Centre Precinct: Conditions of Consent (Decision 17 July 2023) condition 88, advice note 1.[6] A similar advice note is proposed by the Applicant in this matter.

17. We group and address the issues as follows:

[2] See for example, Waihoehoe Precinct I450.4.1(A2) and (A3), and I452.6.2.
[3] Attachment 2 to the Applicant's Response dated 28 August 2025.
[4] Legal Memorandum from Brookfields dated 11 August 2025.
[5] Paragraph 4.28.
[6] Decision under the COVID-19 Recovery (Fast-track Consenting) Act 2020.

(a) First in first served – does this principle apply?

(b) Receiving environment matters.

(c) Condition precedent.

(d) FTAA matters.

First in first served – does this principle apply?

18. The benefit afforded by the first in time principle is of course a procedural benefit – it enables the first application to be determined on its own merits and does not allow for a comparative assessment of competing claims to the same resource.[7] Before turning to the application of the first in first served principle under the FTAA, we deal firstly with the resource at issue in this matter which is not water (which is the context in which relevant case law on the first in first served principle has primarily arisen).

19. We consider that the first in time principle is applicable in a land use context. At a much smaller scale, in a land use context, the principle can arise when the number of vehicle entrances able to be secured from a right of way is used up by one landowner. In this case, the issue is somewhat more complex. The Auckland Unitary Plan, in three precincts, provides a common set of 'thresholds' for activities, development or subdivision (Column 1) enabled by required transport infrastructure (Column 2). There is potential for a resource consent to authorise activities, development or subdivision up to the stated thresholds in one precinct, with the potential consequence that subsequent applicants in the same precinct or other precincts will be unable to secure resource consent for the same activities, development or subdivision within the stated thresholds.

20. We consider that the first in first served principle does apply in an FTAA context for the following reasons:

(a) In *Fleetwing*, the Court of Appeal examined the scheme of the Resource Management Act 1991 (**RMA**) carefully including s 5, s 88 (as to what an application for resource consent must include), and as to the timetable and provisions in Part 6 of the RMA for processing a resource consent application. It found no basis for any comparative assessment, and went on to say that:[8]

> *the statutory scheme requires the Council to focus on that consideration and determination of each application so as to meet the prescriptive and tight timetable. In each case the Council must advance the application through to the point of public notification and then plan for the hearing and determination of the application so as to meet the statutory time limits. It is, we think implicit that if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other.*

(b) Under the FTAA s 5 remains relevant,[9] and the FTAA contains its own provisions as to information requirements and the timetable and steps for processing a substantive application. We can read nothing into the FTAA which would support a conclusion that the first in time principle does not apply. If anything, the scheme of the FTAA is much more prescriptive and tight.

[7] *Fleetwing Farms Ltd v Marlborough District Council* [1997] ELHNZ 235.
[8] *Fleetwing Farms Limited v Marlborough District Council*, CA 255,96 at p 8.
[9] FTAA, Sch 5, cl 17(1)(b) and 17(2)(a).

21. Accordingly, our view is that the first in first served principle does apply in an FTAA context, and that the Panel is required to consider this application on its merits.

22. That said, consideration of the application on its merits will of course include consideration of any actual and potential effects on the environment of allowing the activity, and the Auckland Unitary Plan.[10]

Receiving environment matters

23. For the purposes of this memo, we adopt the High Court's summary in *Speargrass Holdings* of the law on what constitutes the "environment":[11]

> *The leading statement on what constitutes the "environment" for the purposes of s 104 of the RMA is found in the Court of Appeal's decision in Hawthorn. There the Court held that it included the environment as it might be modified by the implementation of resource consents which had been granted at the time the application was being considered and where it appeared likely that those resource consents would be implemented. I agree that this calls for a "real world" approach, not an artificial approach, to what the future environment will be. The consent authority must not minimise the effects of the proposed activity, either by comparing it with an unrealistic possibility allowed by the relevant plan, or by ignoring its effects on what is, or undoubtedly will be, part of the environment in which the activity will take place.*

24. It is a consistent feature of caselaw on this issue, that the approach must be realistic/real world, and not unrealistic/artificial.

25. We address the issue of condition precedent further below. However, on the assumption that a consent is validly granted with a condition precedent, it is our view that on grant, the consent would form part of the existing environment *provided that* as the caselaw also indicates, it appears likely that the consent will be implemented.

26. The question of implementation in this case has some complexities given the proposed lapse date, and the prospect that any consent will be implemented gradually given the unfunded/unprogrammed infrastructure. It will be a question of fact and degree at any given time as to whether:

    (a) The Applicant has carried out enough works to give effect to any consent such that it has not lapsed; and/or

    (b) If not, it is likely that the resource consent will be implemented.

27. If, having obtained consent, the Applicant carries out enough work to give effect to the consent, we consider that it will be difficult to then say that the consent is unlikely to be implemented *in full* barring clear evidence to the contrary.

28. The question that then arises is whether the Panel should consider the implication that the granted but unimplemented consent would use up (some of) the capacity identified in the Trigger Table thresholds and therefore potentially preclude the granting of later applications because that capacity has been "banked" by the granted but unimplemented consent.

[10] In accordance with the matters which the Panel must consider pursuant to the FTAA, Sch 5, cl 17(1)(b).

[11] *Speargrass Holdings Limited v Queenstown Lakes District Council* [2018] NZHC 1009 at [64], citing *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA) at [41] and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [85].

29. In our view, this could be a permissible consideration in some cases, but it would need to be grounded in the an express consideration within the relevant planning framework or within the FTAA itself, or a related adverse effect that invites consideration of this issue. Absent such a gateway, it would be wrong to consider this issue in isolation.

30. As to the possible relevance of adverse effects, putting aside potential adverse effects on the transport network (which appears to be primarily related to the effects on the local network of adjusting the development thresholds), the type of effect which could fall into this basket is the distribution or otherwise of the various land uses amongst the Drury Centre, Drury East and Waihoehoe precincts if there were to be some adverse distributional effect as a result. That said, it appears that the primary 'consumption' relates to retail GFA, and that this would be largely located within the Drury Centre precinct in any event.[12] The Panel may wish to explore this in more detail.

31. Alternatively, the Panel may take the view that the requirement, under cl 17(1))(a) of Schedule 5 of the FTAA, that the Panel is required to give primary consideration to the purpose of the FTAA, is applicable here. That is, if the actual effect (due to banking effects) will be to block the delivery of infrastructure and development projects, then the Panel may consider that the purpose of the FTAA conflicts with those parts of the Application, and that this consideration requires that those parts of the application should be declined. We consider such a conclusion would only be available if the risk of banking is high, and the likely impact on other developments can be seen to be significant, such that it constitutes a real limitation on the delivery of infrastructure.

32. In summary therefore:

    (a) We consider that a consent validly granted (even with a condition precedent and a long lapse date) would, on grant, form part of the receiving environment. However, with reference to the caselaw which adds 'where it appears likely that the consent will be implemented' this will be a question to be considered when any future applications are made.

    (b) We would not rule out that 'banking' is a relevant consideration for the Panel, provided that there is some basis for this – i.e. a planning provision which necessitates this or a relevant adverse effect. Arguably, in cases where the effect of banking will be significant, the purpose of the FTAA may provide such a foundation.

Condition precedent

33. Relevant caselaw on the issue of conditions precedent is set out in the legal memoranda from Auckland Council[13] and the Applicant.[14] That discussion includes *Westfield*[15] which confirmed how a condition precedent could be validly framed.

34. We agree with Counsel for Auckland Council that careful consideration must be given to whether the factual matrix supports the use of a condition precedent. However, we also agree with Counsel for the Applicant that the factual matrix in *Hildeman* was very different to the present case:

    (a) In *Hildeman*, the intersection in question was one of a number of problem intersections, and the Council's evidence was that if they were ranked in priority for the spending of public money, the particular intersection would not get to the top of the list for some time.[16]

[12] See attached precinct and zoning plan at Appendix 1.
[13] Memorandum of Counsel for Auckland Council dated 11 August 2025 at paragraphs 4.32-4.40.
[14] Memorandum of Counsel for the Applicant dated 28 August 2025, at paragraphs 26-30.
[15] *Westfield (New Zealand) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254.
[16] *Hildeman v Waitaki District Council* [2010] NZEnvC 51 at [52].

(b) There was no evidence to indicate that any increase in the number of vehicles using the intersection might be generated by activities other than the proposed camping ground,[17] and the applicant had advised its inability to fund any upgrade on an economically viable basis.[18] We also note that no intersection upgrade had been designed, specified or costed.[19]

(c) As such, the Environment Court had an evidential basis on which to conclude that the works in a condition precedent were unlikely to eventuate and such a condition would therefore potentially render the grant of consent futile.

(d) We do not think the factual matrix is the same here. The Auckland Unitary Plan details in Table I450.6.2.1 the transport infrastructure required. The Panel has before it the Integrated Transport Assessment Report for the Applicant,[20] and comments from NZTA, both of which address where the infrastructure requirements sit in the designation/construction/planning phase. On our review, there is a stronger evidential basis that the relevant upgrades will occur at some point in time, albeit some are not presently programmed or funded.

35. Accordingly, we consider that a condition precedent can be lawfully framed in this case, which defers the opportunity for an applicant to embark upon the activity until a third party carries out some independent activity. Similarly, we do not consider that a condition precent would frustrate the grant to consent. However, the Panel will itself need to be satisfied on the evidence and may wish to explore matters further.

FTAA matters

Basis on which applications can be declined – inconsistency with Auckland Unitary Plan

36. With respect to the basis on which applications can be declined under the FTAA, we consider that it is not open to the Panel to decline the application *solely* on the basis of inconsistency with the Drury Centre Precinct provisions in the Auckland Unitary Plan. This is for the following reasons:

(a) Pursuant to s 81(2)(f) the Panel may decline an approval "only in accordance with section 85".

(b) Section 85(3) sets out the basis on which the Panel has a discretion to decline an approval, which in summary is that there are 1 or more adverse impacts in relation to the approval sought *and* those are sufficiently significant to be out of proportion to the project's regional or national benefits even after factoring in conditions.

(c) Section 85(4) is explicit that (emphasis added):

> *To avoid doubt, a panel **may not** form the view that an adverse impact meets the threshold in subsection (3)(b) **solely on the basis that the adverse impact is inconsistent with or contrary to a provision of** a specified Act or **any other document that a panel must take into account or otherwise consider in complying with section 81(2).***

(d) While the Panel must consider the Drury Centre Precinct provisions of the Auckland Unitary Plan pursuant to s 81(2), 81(3), and Sch 5 c 17(1)(b) (which imports s 104(1)(b) of the RMA), s 85(4) explicitly removes any discretion to decline an approval solely on the basis of inconsistency with (or being contrary to) a provision in such a document.

[17] At [73].
[18] At [85].
[19] At [90].
[20] CKL, dated 14 March 2025.

37. We do not consider that the FTAA rules out inconsistency with a statutory planning document as a relevant consideration. In that regard, we agree with the position expressed by Counsel for the Auckland Council.[21]

38. For completeness we note that the word "document" is used in ss 16 and 82 and defined for that purpose, but the definition is expressed to relate to those sections only.

Decision to grant in part / decline in part and relevant procedure

39. The Panel has asked whether it can lawfully decline aspects of the proposal that rely on unfunded and unprogrammed infrastructure and only grant aspects that can be adequately serviced by existing, funded, and committed infrastructure.

40. We consider that it is open to the Panel, in its discretion, to lawfully decline aspects of the proposal that rely on unfunded and unprogrammed infrastructure, if it considers on the evidence that this is appropriate within the constraints of s 85(3) and 85(4) of the FTAA.

41. There is a question as to whether the FTAA anticipates that decline/grant of proposals *in part*.[22] We consider that this is permitted, and we reach this conclusion on two independent grounds.

42. First, we consider that the provisions around granting approval permit the Panel to impose conditions that have the consequence of excluding part of the application. Specifically s 81 requires that the Panel:

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

    (b) decline the approval.

43. We consider that in setting conditions to be imposed on the approval, these could have the effect of declining the approval in part (e.g. a modified version of the Applicant's proposed condition 85). Accordingly, we consider that the Panel may, in effect, grant an approval in part.

44. We are also satisfied that a pathway exists to decline an approval in part, through the pathway contained in s 69 of the FTAA. That section provides that if the Panel is intending to decline an approval, and if it has not previously undertaken this process, it must provide a draft decision to the application and an invitation to:[23]

    (a) Propose conditions on, *or modifications to*, any of the approvals sought; or

    (b) Withdraw *the part of the* substantive application that seeks any of the approvals sought.

45. This envisions a draft decision that identifies that part of the application is such that it prevents the application from being granted, and which invites the applicant to abandon the part of the application that would result in this outcome.

46. We note that the combined effect of ss 69 and 70 is that neither the partial grant nor the partial decline can occur without an opportunity for the Applicant to respond. This reflects the need to observe natural justice when proposing to substantially modify the application. It also means that regardless of the route chosen, the Applicant will have an opportunity to respond directly before that decision takes effect.

[21] Memorandum of Counsel for Auckland Council dated 11 August 2025 at paragraphs 4.17-4.18.
[22] FTAA, ss 69 and 70.
[23] Section 69(2)(b).

47. In our view, the approach set out in s 69 appears to be preferrable for where an application may be declined in part. This is because the language of s 69 expressly contemplates a partial withdrawal, and because there is room for argument that conditions imposed under s 81 cannot be fundamentally inconsistent with the approval. Accordingly, this route appears to be the one that the FTAA intends to apply in this circumstance.

48. In our view it would also be open to the Panel to make a request for information under s 67 of the FTAA seeking submissions or input from the Applicant on whether the application should be granted in part only. However, even if this were to occur, the Panel would still be required to proceed through the s 69 pathway (including the invitation for a proposal) before declining the approval. Given the priority under the FTAA for speedy decision-making, it may be preferrable to move immediately to the s 69 process. However, the advantage of using s 67 in this way is that the Panel would have the benefit of the Applicant's views on the reduced scope prior to preparing a draft decision.

49. Otherwise, in light of ss 69, 70, 72[24] and 81 of the FTAA, we consider that the appropriate procedure for the Panel to adopt, should this eventuate, would be to:

    (a) Issue a draft decision that notes that the approval would be declined on the basis of the inclusion of those parts of the application that the Panel wishes to decline in part.

    (b) Simultaneously issue a minute which highlights the matter being considered by the Panel, and invites the applicant to:

        (i) Propose conditions on, or modifications to, any of the approvals sought; or

        (ii) Withdraw the part of the substantive application that seeks any of the approvals sought.

    (c) After receiving the applicant's response, provided that it is satisfactory to the Panel, comply with ss 70 and 72 as to provision of the Panel's draft decision and conditions to the parties specified in those sections.

50. This is different from the approach taken in relation to the Delmore project (Residential subdivision and roading interchange at Orewa), where the Expert Panel has issued a draft decision declining resource consent and granting the archaeological approval, and has sought comments under ss 69, 70 and 72 simultaneously. However, this is because the nature of that decision does not create a possibility that a narrower application would be granted. Here, we consider it would be preferrable to follow the s 69 process first, and address possible conditions all together at the point where the narrower application is under consideration (if that occurs).

51. In summary, if the Panel decides that it would only be prepared to grant part of the application, it could adopt one of three routes:

    (a) Under s 67, issue a minute raising this issue and seeking advice from the Applicant and any other party on whether the application could/should be reduced in this way;

    (b) Under s 69, issue a draft decision – declining the approval – but identifying (most likely in a minute) the aspects of the application that would need to be withdrawn for it to be granted; or

[24] Section 72 requires the Panel to invite comments from the Minister on the draft decision, including any conditions, with a 10 working day period prescribed.

(c) Under ss 70, indicate that the Approval will be granted, but provide draft conditions that have the effect of declining those parts of the application found to be unacceptable.

52. We can provide more detailed advice on any of these pathways as required.

Potential jurisdictional issue

53. In considering the question of partial decline/grant we thought it prudent to check the listing of the project in Schedule 2 to the FTAA. The listing is:

Authorised person	**Project name**	**Project description**	**Approximate geographical location**
Kiwi Property Holdings No.2 Limited	Drury Metropolitan Centre – Consolidated Stages 1 and 2	Develop land for future residential activity and a commercial retail centre (including, approximately, 10,000 square metres commercial, 56,000 square metres retail, and 2,000 square metres community activity)	53.2 hectares within the Drury Centre Precinct, bound by Flanagan Road, Brookfield Road, and Fitzgerald Road, at 61 and 97 Brookfield Road, 133, 139, 155, 173, and 189 Fitzgerald Road, and 68, 108, 120, 124, 128, and 132 Flanagan Road, South Auckland

54. Project listings have recently come under scrutiny in *Ngāti Kuku Hapu Trust v The Environmental Protection Agency* [2025] NZHC 2453.

55. The project description in this case is listed with *approximate* areas and our understanding is that these are exceeded (in some cases by some margin) by the application:

(a) Commercial: 10,000m^2 (listing) versus 33,048m^2 proposed.

(b) Retail: 56,000m^2 (listing) versus 63,547m^2 proposed.

(c) Community: 2,000m^2 (listing) versus 10,216m^2 proposed.

(Total 68,000m2 (listing) versus 106,911m^2 proposed).

56. We acknowledge that the overall footprint of the project remains the same as the listing (53.2 hectares).

57. While the FTAA provision which relates to ensuring that a substantive application relates only to a listed project applies at the stage at which a substantive application is vetted for completeness,[25] our preliminary view is that any scope issue would be capable of founding an appeal on a question of law against a Panel's substantive decision.

58. Consideration should be given to whether there is jurisdiction to grant the application as sought. The Panel may wish to seek legal submissions from the parties and/or advice on this issue. Given what we have said above, we consider that if there is any jurisdictional issue, then it could be addressed through Applicant-led modifications to the application, or conditions to be imposed on the grant of an approval.

[25] FTAA, s 46(2)(b).

Appendix 1 – precinct and zoning plan