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 IN RESPONSE TO MINUTE 8 OF THE PANEL

26 SEPTEMBER 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 responds to the Panel's requests in Minute 8 ("**Minute 8**") for Kiwi Property to respond by 5 pm Friday 26 September advising:

    (a) Whether, if the Panel were to find in line with the Council's interpretation of the Port of Tauranga High Court decision, the approximate floorspace "*uplifts*" should be based on an overall total (as set out in the Applicant's memorandum), or in terms of the three individual floorspace categories specified in Schedule 2.

    (b) As to the procedure and timeframes the Applicant would envisage being required in terms of formalising amendments to its proposal, with particular reference to the preparation of revised plans.

2. The Panel also invited Kiwi Property to respond to the Council memorandum of 19 September 2025 ("**Council Memorandum**") with respect to its comments regarding "*receiving environment matters*" and "*condition precedent*".

How uplifts should be calculated

3. Kiwi Property's memorandum of 18 September suggested that, if the Panel finds in line with the Council's interpretation of the Port of Tauranga High Court decision, the application could be reduced in size as follows:

    (a) That the "*commercial*" component be reduced from the 33,048m^2 proposed to the 10,000m^2 specified in Schedule 2 (i.e.: there would be no uplift beyond the figure specified in the schedule).

    (b) That the "*retail*" component be reduced from the 63,547m^2 proposed to 61,600m^2 (being an uplift of 10% over the 56,000m^2 specified in Schedule 2).

(c) That the "*community*" component be reduced from the 10,216m^2 proposed to 3,200m^2 (being an uplift of 60% over the 2,000m^2 specified in Schedule 2).

(d) That will result in a total floorspace of 74,800m^2, being an uplift of 10% over the total of 68,000m^2 specified in Schedule 2.

Minute 8 asks whether, in those circumstances, the approximate floorspace "*uplifts*" should be based on an overall total or in terms of the three individual floorspace categories specified in Schedule 2. Kiwi Property has proposed what it considers to be an appropriate outcome in terms of both forms of analysis.

4. The "*project description*" in Schedule 2 FTAA reads, "*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)*." Kiwi Property reiterates the submissions in its memorandum of 18 September 2025[1] on this topic but also submits as follows:

(a) The words in brackets relate to the specified aspects of the "*commercial retail centre*".

(b) The commas placed around the word "*approximately*" indicate that the word applies to each of the three listed categories. Accordingly, an uplift beyond the specified floor area is enabled for each category.

(c) No maximum floor area is specified for the aggregate of those three categories, let alone the commercial centre in its entirety. There is, therefore, no basis for concluding that uplifts in one category need to be offset by reductions in others (i.e.: so that the total floor space occupied by the three categories is limited to 68,000m^2).

(d) Provided the floorspace of each of the three categories remains "*approximately*" consistent with the specified figure, the aggregate of

[1] Ellis Gould memorandum 18 September 2025, paragraphs 11-27.

those categories will also be "*approximately*" consistent with the total area.

5. In the Ellis Gould memorandum of 18 September 2025, Kiwi Property proceeded on the basis that the word "*approximately*" can commonly and reasonably include a change of plus or minus 10% in a value. In that context, it is submitted that an uplift of 10% to each of the floorspace figures would be acceptable, as would a 10% increase in the aggregate floorspace of those categories.

6. Kiwi Property's suggested floorspace figures have been calculated with the intention of ensuring that the uplifts both:

   (a) *Individually represent a relatively small increase beyond each of the floorspace categories specified in Schedule 2* - Hence:

      (i) There is no uplift beyond the specified amount for the "*commercial*" component. This is proposed to offset, and hence enable, a greater uplift for the "*community*" category which would otherwise be very constrained.

      (ii) It is submitted that the 10% uplift proposed for the retail category falls within the reference in Schedule 2 FTAA to "*approximately … 56,000 square metres retail*".

      (iii) While a 60% uplift is proposed for the "*community*" component (i.e.: 3,200m^2 in place of the 2,000m^2 specified in Schedule 2), the absolute increase of 1,200m^2 is small in the context of the overall development[2].

   (b) *Collectively represent a relatively small increase (10%) beyond the aggregate of the floorspace identified in Schedule 2* – Consistent with Kiwi Property's approach to the retail category discussed above, it is

[2] The additional 1,200m^2 is approximately 1.7% of the total of 68,000m^2 specified in Schedule 2 FTAA.

submitted that a 10% uplift is acceptable in terms of the aggregate of the three listed categories.

7. Kiwi Property has taken a different approach to the "*community*" category (where a 60% uplift to 3,200m^2 is sought) because compliance with the specified limit of 2,000m^2 (or a 10% uplift to 2,200m^2) will materially constrain the company's ability to provide desirable community facilities of an appropriate scale as part of the metropolitan centre:

   (a) The proposed reduction in the scale of community activities from the 10,216m^2 originally sought to 3200m^2 will necessitate the loss of the aquatic centre.

   (b) Kiwi Property wishes to retain the currently proposed library building if the Panel concludes that the scale of the overall development needs to be reduced, but doing so requires allocating 3,200m^2 floorspace to the library and related community services.

Procedures and timeframes for amending the proposal, if required

8. In the event the Panel finds in line with the Council's interpretation of the Port of Tauranga High Court decision[3] and determines that amendments are required to the proposal, Kiwi Property considers that that its consultants will require up to **seven working days** to prepare revised plans.

9. That estimated time frame assumes that the Panel minute will specify that the proposal either:

   (a) Needs to comply strictly with the floor areas listed in Schedule 2 FTAA; or

   (b) May have a small, specified uplift (e.g.: as set out in para [2](b) of the Minute).

10. Kiwi Property anticipates that any required reduction in floor space will be managed by:

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

(a) Removing floors from office buildings;

(b) Deleting the aquatic centre (which is located on the periphery of the centre); and

(c) Revising retail floorspace within structures.

The intention will be to avoid changes to the centre layout and to the visitor and resident experience at ground level.

11. It is understood that the Panel's decision is currently due on or around 31 October 2025[4]. Kiwi Property records that, if revisions are required to the proposal and the Panel considers additional time is necessary, Kiwi Property would make a request to suspend processing of the application to ensure that the Panel is not under undue time constraints.

12. For completeness, Kiwi Property records its view that the Panel need not seek comment on any revised plans from other parties. This is on the basis that:

(a) There will be no additional or materially different adverse effects generated by a reduced proposal, as any revisions will reduce the intensity and overall scale of development and will not change the centre layout or experience at ground level.

(b) Parties will, in any event, have an opportunity when commenting on the Panel's proposed conditions[5], to identify any changes to those conditions that they consider are required in response to the amended plans.

(c) The Panel has the ability to regulate its own procedure "*as it thinks appropriate, without procedural formality, and in a manner that best promotes the just and timely determination of the approvals sought in a substantive application*"[6].

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[4] The original date for a decision was 20 October 2025. To date, the application has been suspended for a total of 8 working days.
[5] As provided for in section 70 FTAA.
[6] Clause 10, Schedule 1 FTAA.

(d) The framework of the FTAA does not envisage continual comments and responses[7]. Further, in our submission the Panel is not required to adopt an iterative process[8].

(e) In the above circumstances, no natural justice or procedural fairness issues are considered to arise if the Panel chooses not to seek comments on revised plans.

Response to Council comments on receiving environment matters.

13. The Holland Beckett Advice (at paragraph 29) suggests that the effects of "*banking*"[9] of capacity could be a permissible consideration, if there is an express consideration within either:

(a) The relevant planning framework; or

(b) The Fast Track Approvals Act 2024.

14. In response, the Council Memorandum identifies (at paragraph 26) Drury Centre Precinct provisions it says provide the "*planning provision*" basis for considering "*banking*" effects. Kiwi Property does not agree:

(a) The provisions referenced by Council in its paragraph 26(a) do not change the essential characteristic of the Trigger Table thresholds and related rules, which is that the floorspace of activities is limited unless and until the specified infrastructure is in place or consent is granted to go beyond the triggers. The quoted provisions did, however,

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[7] Note that, if a panel decides to decline an application the applicant may propose modifications to or withdraw part of its proposal (section 69(2)(b) FTAA). While the revised proposal must be in scope, there is no automatic right for parties invited to comment to be heard in relation to such a modified proposal.

[8] Addressing essentially the same wording under the COVID-19 Recovery (Fast-track Consenting) Act 2020 with respect to a Panel's ability to regulate its own procedure, the Court of Appeal in *Glenpanel Development Ltd v Expert Consenting Panel* [2025] NZCA 154 noted that it is for a panel to decide how it should proceed when balancing timeliness and just-decision making (at para [52]). In that case, the Panel had 50 working days to make its decision.

[9] The Holland Beckett Advice expresses the issue as follows (at para 28): "*Whether the Panel can consider the implication that a 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."*

address a practical issue regarding activity status that would arise if construction of the infrastructure and of the development enabled by that infrastructure coincided in time. Hence, the provisions anticipated consent being sought before the infrastructure was in place provided one of the specified circumstances was met.

(b) Kiwi Property disagrees with the Council's claim in paragraph 27 of the Council Memorandum that "*this framework anticipates close temporal coordination between consent and infrastructure delivery*." The Trigger Table provisions Council refers to are intended to ensure specified infrastructure is in place at the same time as or prior to development. They do not require development to occur at the same time as infrastructure is delivered (although they do enable that to occur).

15. Further, and as recorded earlier for Kiwi Property[10]:

(a) 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.

(b) The approach adopted by Kiwi Property in the application is consistent with the Drury Precinct provisions (i.e.: development of the Drury Centre is tied to implementation of the specified roading infrastructure).

16. The Council Memorandum also suggests that the FTAA's purpose may provide a foundation for considering "*banking*" effects (at paras 29 - 30). Kiwi Property does not agree. The FTAA's purpose is a positive one. It concerns the facilitation of significant projects seeking approvals under the FTAA. It does not extend to considering the impact on a speculative future proposal on another site under a different Act.

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[10] Response to Comments, Attachment 8 - Legal Memorandum dated 28 August 2025 at para 32 – 37; Memorandum of Counsel for the Applicant in Response to Holland Beckett Advice dated 18 September 2025 at paras 5 -7.

17. Both the Holland Beckett Advice and the Council Memorandum appear to suggest that any risk of blocking the delivery of infrastructure and development projects generally may justify consideration of "*banking*" effects (albeit that the Holland Beckett Advice suggests[11] 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). In that regard:

(a) The FTAA's purpose is to "*facilitate the delivery of infrastructure and development projects with significant regional or national benefits*". Therefore, the FTAA is only concerned with infrastructure and development projects that have "*significant regional or national benefits*", not just *any* infrastructure and development project.

(b) As the development thresholds specified in the Precinct provisions only apply to residential, retail, commercial and community activities, there can be no risk to infrastructure projects as a result of the Application being granted.

(c) In any event, Kiwi Property's proposal will facilitate, not delay, the delivery of supporting infrastructure (e.g.: the roading network) both through direct investment and via development contributions that will help fund such works.

(d) Unless and until the infrastructure projects addressed in the Precinct provisions are implemented all other landowners affected by those rules will be in the same position as Kiwi Property (i.e.: they will be prevented from commencing further activities).

(e) With reference to the proviso in the Holland Beckett Advice (i.e.: that the risk of banking would need to be high, and the likely impact on other developments significant):

(i) The risk of "*banking*" is not high for the reasons outlined in our

[11] Holland Beckett Advice at paragraph 31.

previous advice.[12] If the consents are not implemented in full, it is likely to be a result of undelivered infrastructure, in which case, other development would also be prevented even if the Application had not been granted.

(ii) In those circumstances, the likely impact on other developments cannot be seen to be significant.

Response to Council comments on conditions precedent

18. In short, the Council memorandum argues that:

(a) Notwithstanding the different circumstances applying in this case[13], the principle in *Hildeman v Waitaki District Council* [14]that conditions precedent should not be imposed where they would "*potentially render the grant of consent futile*" is still apposite[15].

(b) Reliance on the projects listed in the Precinct provisions for granting resource consent is problematic[16] because approving development dependent on multi-billion-dollar unfunded infrastructure with no delivery timeline creates a clear risk of futility (in terms of the *Hildeman* decision)[17].

(c) The Council's concern is that conditions precedent for later-stage development would effectively "*sterilise*" the consent rights for an indefinite period[18].

19. Kiwi Property disagrees and says:

(a) The approach taken to conditions precedent in *Hildeman* is not a "*principle*" that must be applied in all cases. It is simply the outcome

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[12] Memorandum of Counsel for the Applicant in Response to Holland Beckett Advice dated 18 September 2025 at para 6. See also Response to Comments, Attachment 8 - Legal Memorandum dated 28 August 2025 at para 24(c), 25, 36(d) – 37.
[13] Specified in the Kiwi Property legal memorandum of 28 August 2025, paragraph 29.
[14] *Hildeman v Waitaki District Council* [2010] NZEnvC 51.
[15] Council Memorandum paragraph 34(a).
[16] Council Memorandum paragraph 34(f).
[17] Council Memorandum paragraph 35.
[18] Council Memorandum paragraph 35

that the Court considered appropriate in that case, on the facts. You have a discretion to grant consent subject to the conditions precedent proposed by Kiwi Property.

(b) Granting the application subject to the proposed conditions will not "*potentially render the grant of consent futile*". The consent forms part of a broader development that is already underway, with Stage 1 works being undertaken immediately south of the subject site. The consent will enable at least a further 68,000 m^2 of commercial, retail and community development to occur in stages over time. Kiwi Property intends to start that construction as soon as possible. There is no risk in practice that the consent will languish without being implemented.

(c) If, which Kiwi Property denies will occur in practice, the "*conditions precedent for later-stage development would effectively 'sterilise' the consent rights for an indefinite period*" that would be a matter of concern to Kiwi Property as the affected consent holder and landowner, not Council:

(i) Kiwi Property is the owner and developer of the Metropolitan Centre zoned land subject to the application. No other party can develop a Drury Metropolitan Centre because there is no other Metropolitan Centre zone in the vicinity of Drury.

(ii) This is a risk that Kiwi Property is prepared to take. It wants the development certainty that will be provided by the consent so it can work with potential tenants and occupiers to develop the centre without repeatedly having to seek incremental consents over time, with the cost and uncertainty that involves

(iii) Further, the grant of single comprehensive consent creates certainty for Council and the broader community as to the layout to the centre and the location and form of its key components. Kiwi Property's expectation was that Council would consider it helpful and beneficial (rather than

problematic) to undertake a comprehensive consenting exercise at this early stage.

(d) The fundamental differences between this case and the circumstances applying in *Hildeman* are, in practice, critical to your determination and support the use of conditions precedent in this case. They include:

(i) The fact that, 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. The works may not be funded but they are planned and anticipated by all parties to occur.

(ii) The development of a large and highly complex Metropolitan Centre on the site is anticipated by Council's structure planning exercise for Drury, the AUP zoning of the land, the Drury Centre Precinct provisions and agreements between central and local government.

(iii) The recognition and listing of the project in Schedule 2 FTAA to a scale that necessarily requires the imposition of conditions precedent if consent is to be granted (whether at 68,000m^2 or 74,800m^2).

DATED this 26th day of September 2025

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