BEFORE AN EXPERT CONSENTING PANEL APPOINTED BY THE ENVIRONMENTAL PROTECTION AUTHORITY

UNDER	the Fast-track Approvals Act 2024 (the **FTTA**)
IN THE MATTER	of an application by Waterfall Park Developments Limited for the Ayrburn Screen Hub; a proposed production facility featuring two studios, accommodation, and supporting facilities and amenities

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MEMORANDUM OF COUNSEL FOR DAVID JOHN KIDD – LEGAL ARGUMENT ON 'PERMITTED BASELINE'

Dated 4 February 2026

MACTODD LAWYERS
Level 2, Remarkables House
26 Hawthorne Drive,
Frankton
Queenstown 9300
P O Box 653, DX ZP95001, Queenstown 9348
Telephone: (03) 441 0125;
Solicitor Acting: Jayne Macdonald
Email: jmacdonald@mactodd.co.nz

The Panel's Minute 10

1. These submissions are made on behalf of David Kidd, and take up the invitation in the Panel's Minute 10 for any commenting party to provide comment on the legal argument addressed in the applicant's legal memorandum, as parts of its s55 response, at paragraphs [107] – [118].

2. Mr Kidd thanks the Panel for the opportunity to provide a response.

Anticipated environment / restricted discretionary activities / s104(1)(c)

3. The Applicant submits that, for landscape and visual effects, the Panel should adopt an "anticipated environment" comparator reflecting the Residential Activity Area ("RAA") development enabled by the PDP Structure Plan, notwithstanding that the RAA requires restricted discretionary activity consents. The Applicant then contends those consents are "virtually certain" to be obtained, and that (i) this brings the RAA within the "anticipated environment" concept, or (ii) alternatively, it may be taken into account as an "other matter" under s104(1)(c), read through the lens of the FTAA purpose-weighting direction.

4. It is submitted that the Applicant's approach conflates what is "contemplated" by the plan with what is "anticipated" in the sense relevant to the receiving/anticipated environment comparator. In this regard, the Applicant expressly acknowledges that the RAA "requires restricted discretionary activity consent to be realised". That is a material distinction. A restricted discretionary activity is not an "as of right" outcome; it is contingent on a merits assessment and may be refused if the proposal is not acceptable on the restricted matters.

5. Nor is the claim that restricted discretionary consent is "virtually certain" established by the plan provisions the Applicant relies on. The matters over which discretion is restricted are not narrow or purely technical. They include, for subdivision, landform modification, nature conservation and landscape enhancement, open space/recreation, natural hazards, infrastructure matters and (notably) Lake Hayes catchment water quality contributions/methods. For residential land use, discretion includes effects on

landscape character associated with bulk and external appearance, as well as landform modification, lighting/landscaping, infrastructure, hazards, and again Lake Hayes catchment water quality. These are not matters that render consent a "rubber stamping" exercise. On the face of the plan framework, the RAA outcome is not properly characterised as "virtually certain".

6. In addition, the Applicant's own authorities do not carry the weight it places on them. The memorandum accepts that *Frost* and *Mahora* were controlled activity contexts. Those cases support the uncontroversial point that effects are assessed in context, including what is contemplated/anticipated in the zone. They do not support treating a consent-contingent restricted discretionary development as the environmental baseline by which adverse effects are discounted. The Applicant's reliance on *Waimarino* is also qualified by its own concession that the activity status "is not entirely clear".

7. It is submitted that the more appropriate approach is therefore:

- to accept that the Structure Plan provides context as to long-term planning expectations; but
- to reject treating an unconsented, restricted discretionary future development as the "anticipated environment" baseline for effects assessment, absent evidence of granted consents or other objective evidence that the outcome is likely to occur.

FTAA purpose-weighting and the legal content of "anticipated environment" under the RMA

8. The Applicant submits that because s104 is imported via Schedule 5 clause 17(1)(b), and clause 17 gives the FTAA purpose "greatest weight", the s104(1) framework and the "anticipated environment" authorities can be "read in light of" FTAA purpose to justify adopting the RAA comparator. It is submitted that this reasoning should be rejected.

9. Clause 17 is a weighting direction. It does not provide a basis to rewrite the legal content of RMA concepts or the threshold conditions for applying case-law comparator approaches developed under the RMA. In other words, while the FTAA purpose may legitimately influence the Panel's overall evaluative judgement within

the lawful decision-making framework, it does not provide a 'licence' to convert a consent-contingent restricted discretionary scenario into a baseline "environment" for effects assessment.

The s104(1)(c) "other matter" fallback

10. The Applicant's alternative submission is that the RAA comparator may be considered as an "other matter" under s104(1)(c), as "relevant and reasonably necessary", because otherwise the comparison is "artificial and unrealistic". It is submitted that this is, in substance, the same contested proposition by another label.

11. While s104(1)(c) is broad, the Panel's task remains to undertake a robust assessment of effects on the environment, not to dilute those effects by assuming unconsented future development will occur. The RAA outcome remains contingent on restricted discretionary consents over substantive matters (including landscape/bulk and landform modification), and it is therefore not "reasonably necessary" to adopt it as a comparator baseline. While the Panel may, if it considers it helpful, receive evidence about potential future development scenarios for context, it should not treat such a scenario as a substitute for, or proxy baseline in, the effects assessment.

Summary

12. For these reasons, the Panel should:

    a. reject the Applicant's proposition that restricted discretionary RAA outcomes form part of the "anticipated environment" comparator;
    b. reject the attempt to justify that proposition by reference to FTAA purpose-weighting; and
    c. decline to treat the RAA outcome as a s104(1)(c) "other matter" comparator where doing so would inappropriately assume the granting and content of future consents.

13. The Applicant asserts that, unless the Panel adopts the RAA as an "anticipated environment" (or s104(1)(c) comparator), the landscape effects comparison would be "artificial and unrealistic". That is a misleading framing of the issue. A more appropriate approach is to assess the proposal's landscape and visual effects against the existing environment (including existing landscape character and values), while

acknowledging the PDP Structure Plan and zoning provisions as part of the relevant planning framework.

Dated 4 February 2026

Jayne Macdonald, Counsel for David Kidd