

BEFORE THE FAST-TRACK EXPERT CONSENTING PANEL

IN THE MATTER

An application for approvals under section 42 of
the Fast-track Approvals Act 2024

AND

IN THE MATTER

Delmore, a project listed in Schedule 2 to the Fast-
track Approvals Act 2024

MEMORANDUM OF COUNSEL FOR THE APPLICANT WITH RESPONSE TO MINUTE 8

18 July 2025

MAY IT PLEASE THE PANEL

1. INTRODUCTION

- 1.1 This memorandum responds to the direction in Minute 8 “to provide a legal opinion on whether on whether the amended substantive application is within scope.” As further directed it addresses ss 46, 47 and 53 Fast-track Approvals Act (“**FTAA**”) as part of a wider analysis.
- 1.2 The applicant’s primary submission is that the panel has jurisdiction to approve all the changes to the substantive application proposed by the applicant in response to comments to the panel. The Council takes the same view.¹
- 1.3 The analysis supporting that submission is structured as follows:
 - a. The context for the panel’s direction is addressed in **Section 2**.
 - b. The relevant aspects of the FTAA’s statutory framework are addressed in **Section 3**.
 - c. A panel’s jurisdiction to approve an amended substantive application is addressed in **Section 4**.
 - d. The Delmore project is addressed in **Section 5**.
 - e. A brief conclusion is provided in **Section 6**.

2. Context

- 2.1 In its response to comments to the panel the applicant made several changes to the Delmore project as proposed in the substantive application lodged with the EPA under s 42 FTAA.
- 2.2 This raises the question of whether the panel has jurisdiction to approve the Delmore project with those changes in place.
- 2.3 In any context where approvals are sought, the answer to that question depends on the framework of the legislation governing the grant of approvals.
- 2.4 For each type of approval, if the framework of the legislation under which the approval is sought is different, the jurisdiction granted to a decision-maker is also likely to be different.
- 2.5 For example, under the Resource Management Act 1991 (“**RMA**”) a consent authority has no jurisdiction to grant a consent which extends beyond the ambit of the application as initially lodged.²
- 2.6 This does not mean all changes are prohibited.
- 2.7 Amendments to design and other details of an application can be made up until the close of hearing. “The lodging of submissions and the presentation of the opponents

¹ Third legal memorandum of counsel for the Council family dated 18 July 2025 at [1.2]. memorandum

² Established in *Sutton v Moule* (1992) 2 NZRMA 41 (CA), see in particular at [46]

case frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound.”³

- 2.8 However, the jurisdiction to consider and adopt an amendment to an application is reasonably constrained by the ambit of the application.⁴
- 2.9 The test is “whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of: the scale or intensity of the proposed activity; or the altered character or effects/impacts of the proposal.”⁵
- 2.10 A tool to assist in applying this test is to consider whether there might have been other submitters had the activity as ultimately proposed to the consent authority been that which was applied for.⁶
- 2.11 In contrast, a different approach applies to concession approvals applied for under the Conservation Act 1987 (“CA”) based on its specific legislative framework. This is the case despite some similarities between the RMA and CA processes.⁷
- 2.12 Under the CA applicants apply for a concession for an “activity” (which “includes trade, business, or occupation”⁸) rather than its component parts.⁹ A concession may be granted in the form of an instrument which creates an interest in land, such as an easement, lease or licence and this informs the question of jurisdiction.¹⁰
- 2.13 Depending on type of concession sought the application must or may be publicly notified¹¹ providing people with an opportunity to provide written submissions on the application.¹² Submissions must be considered by the Minister when deciding whether to grant the concession.¹³
- 2.14 The Minister then has a broad discretion to impose “such conditions as he or she considers appropriate for the activity”¹⁴ in the context of the Act’s purpose and Minister’s functions to address or mitigate the adverse effects of the “activity” for which a concession is sought.¹⁵
- 2.15 The CA’s focus on “the activity”, the nature of a concession, and the CA’s purpose and the purpose of concessions, mean that the conditions the Minister chooses to impose define the scope of the activity for the purposes of the concession. The Minister does

³ *Atkins v Napier City Council* (2009) 15 ELRNZ 84, [2009] NZRMA 429 at [49] relying on *Haslam v Selwyn District Council* (1993) 2 NZRMA 628

⁴ *Shell NZ Ltd v Porirua City Council* 19/5/05. CA57/05 at [7]

⁵ *Atkins* fn 2 at [20]

⁶ *Atkins* fn 2 at [21]

⁷ E.g. in terms of application content requirements and public notification and submissions

⁸ CA, s 2

⁹ Cf. RMA, see *Federated Mountain Clubs of New Zealand Ltd v Griffin Creek Hydro Ltd* [2024] NZCA 360 at [91].

¹⁰ CA, s 17Q

¹¹ CA, s 17SC

¹² CA, ss 17T and 49

¹³ CA, s 17U

¹⁴ CA, s 17X

¹⁵ *Federated Mountain Clubs* fn 9 at [92]

not have to put conditions in place to ensure all aspects of the activity as described in the application are captured and controlled. For example, a reference to a specific maximum water take in an application for a concession does not necessary constrain the scope of what can be granted unless it is carried over into the concession's conditions.¹⁶ Whereas under the RMA it generally would.

3. FTAA STATUTORY FRAMEWORK

- 3.1 The FTAA introduces a new process for seeking multiple approvals for large projects.
- 3.2 It has its own unique statutory scheme which determines the jurisdiction granted to panels appointed under the FTAA to approve a project as ultimately proposed after comments and requests for further information are accounted for.
- 3.3 A "substantive application" is defined as "an application under section 42 for 1 or more approvals for a listed project or a referred project".¹⁷
- 3.4 Under s 42 of the Act "The authorised person for a listed project...may lodge with the EPA...1 substantive application for the project".
- 3.5 For listed projects, "the project", is the project listed in Schedule 2 FTAA.¹⁸
- 3.6 A substantive application must comply with s 43 FTAA.¹⁹ Section 43 sets out requirements for the substantive application including (*inter alia*) that the substantive application must:
 - a. explain how the project is consistent with the purpose of the FTAA.²⁰
 - b. demonstrate that the project does not involve any ineligible activities.²¹
 - c. provide the specific information required for the approvals sought.²²
- 3.7 For an approval that is a resource consent that would otherwise be applied for under the RMA,²³ the specific information required includes (in summary) a description of the proposed activity(ies) to which the consent application relates; a description of any other activities that are part of the proposal to which the application relates; an assessment of the effects of the activity against ss 5-7 RMA; and an assessment of the effects of the activity against the provisions of applicable planning instruments.²⁴
- 3.8 After a substantive application is lodged with the EPA, the EPA must decide "whether an application is complete and within scope" by applying s 46 FTAA.
- 3.9 A substantive application is complete and within scope if it complies with s 46(2) FTAA. For an application for a resource consent approval to be complete it must

¹⁶ *Federated Mountain Clubs* fn 9 at [101]-[112] (or it is an implied term)

¹⁷ FTAA, s 4

¹⁸ FTAA, s 4

¹⁹ FTAA, s 42(2)(a)

²⁰ FTAA, s 43(1)(b)(i)

²¹ FTAA, s 43(1)(c)

²² FTAA, s 43(1)(d)

²³ FTAA, s 42(4)(a)

²⁴ FTAA, Sch 5 cl 5-9.

comply with the information requirements set out in paragraphs 3.6 and 3.7 above.²⁵ For an application to be within scope it must relate solely to a listed or referred project and it must not appear to involve an ineligible activity.²⁶

- 3.10 It is submitted that in this context, the term “scope” relates to whether a substantive application is within the scope or ambit of the FTAA itself. Not whether there is jurisdiction to make changes to a substantive application as it journeys through the FTAA approvals process.
- 3.11 Section 47 FTAA provides a process for the EPA and the Minister to identify and manage conflict and competition between certain existing resource consents and new resource consent approvals sought under the FTAA.
- 3.12 Section 47 does not relate to the lawful scope or ambit of changes to a substantive application after it has been referred to a panel.
- 3.13 Section 47 provides a separate, and prior, step for determining whether all or some of the approvals in a substantive application as lodged with the EPA conflict or compete with an existing resource consent(s) and if they do, whether this has been managed in accordance with ss 30 and 47 FTAA. A substantive application cannot progress to be considered by a panel until the steps in those sections have been complied with.
- 3.14 After a substantive application is referred to an expert panel, the panel must direct the EPA to “invite written comments on a substantive application” from the people and entities listed in s 53(2).²⁷ The panel may also direct the EPA to invite written comments from any other person the panel considers appropriate,²⁸ but there is no provision for a substantive application to be publicly notified.
- 3.15 If a resource consent approval is sought an invitation to provide written comments must be provided to the Director General of Conservation and iwi authorities and groups that represent hapū that are parties to relevant Mana Whakahono ā Rohe or joint management agreements, as well as those listed in s 53(2) more generally.²⁹
- 3.16 After receiving the written comments, the applicant for a substantive application may provide the EPA “with a response to the comments”.³⁰
- 3.17 Any time up until deciding the application the panel may direct the EPA to “request further information in relation to the application”, or to “prepare or commission a report ... on an issue relevant to the application.”³¹
- 3.18 The person or body subject to the request must “provide ...the information or report requested” or explain why they decline to do so.³²

²⁵ FTAA, s 46(2)

²⁶ FTAA, s 46(2)(c) and (d)

²⁷ FTAA, s 53(1)

²⁸ FTAA, s 53(3)

²⁹ FTAA, Sch 5 cl 13

³⁰ FTAA, s 55(2)

³¹ FTAA, s 67

³² FTAA, s 67(2)

- 3.19 The substantive application and all of the information collected by the panel under those process steps “must” be considered by the panel when making its decision whether to approval or decline an approval and on conditions.³³
- 3.20 When deciding resource consent approvals, the consideration that is to be given the most weight is the purpose of the FTAA: facilitating the delivery of the project to which the application relates and its regionally or nationally significant benefits.³⁴
- 3.21 The provisions of Parts 2, 3, 6, 8, 10 RMA that direct decision-making on applications for resource consents are also a relevant consideration,³⁵ but they are to be given less weight than facilitating delivery of the project.³⁶
- 3.22 Any time up after a substantive application has been provided to a panel and before the panel has made its decision, the Minister may give a direction to the EPA that process of the application be suspended if the Minister considers that:³⁷
- a. different or further approvals are required in respect of the project; and
 - b. those approvals relate to the same specified Act as an approval that is sought in the substantive application; and
 - c. the nature of the project would be better understood if the substantive application were amended to seek those approvals before the panel proceeds further.”
- 3.23 If the substantive application is amended to include different or further approvals as a result of the Minister’s direction, the panel must process the parts of the amended substantive application relating to those further or different approvals as if they were a new substantive application *except* for the purposes of making its decision on the application under s 81 FTAA.³⁸
- 3.24 The parts of the application that are unchanged by the amendments still form part of the amended application but the new timeframes applying as a result of the amendments apply.³⁹
- 3.25 Put simply, amending the substantive application restarts the approval process and timeframes for the purposes of steps like provision of written comments. However, the panel is still tasked with deciding 1 substantive application for the project. It is just deciding the substantive application as amended in response to the Minister’s direction not as originally lodged with the EPA.

4. JURISDICTION

- 4.1 Although the FTAA provides for the grant of resource consents ordinarily sought under the RMA, its legislative framework is different to the RMA. The jurisdiction

³³ FTAA, s 81(2)(a). For completeness, it is noted that the panel may, in accordance with s 81(6), in its discretion, consider information provided outside the statutory timelines applying to the process steps set out in section 3 of this memorandum

³⁴ FTAA, Sch 5 cl17 and s 3

³⁵ Excluding ss 8 and 104D RMA: FTAA, Sch 5 cl 17(1)(b) and (2)(a)

³⁶ FTAA, Sch 5 cl 17

³⁷ FTAA, s 62(1) and (2)

³⁸ FTAA, s 63(5)(a)

³⁹ FTAA, s 63(5)(b)

granted to consent authorities under the RMA as described in section 2 of this memorandum does not automatically apply.

Submission

- 4.2 Based the text of the FTAA’s statutory framework in light of its purpose and context,⁴⁰ the applicant’s submission is that a panel has jurisdiction to approve changes to a substantive application that are put forward in written comments to the panel, the applicant’s response to written comments, or in responses to a further information request, provided those changes:
- a. are within the ambit of “the project” as described in Schedule 2 FTAA; and
 - b. mean the project’s regionally or nationally significant benefits will still be delivered; and
 - c. for responses, answer the comments received or the further information requested.
- 4.3 A panel has jurisdiction to approve changes that require different or further approvals to those sought in the substantive application as lodged provided the changes comply with the requirements in paragraph 4.2 above, and those approvals are sought under the same specified Act(s) as the approvals sought in the substantive application as lodged.

Reasons

- 4.4 First, the primary focus of the FTAA, the substantive application, and a panel’s decision is “the project”. The purpose of the FTAA is to facilitate the delivery the project and its regionally and/or national significant benefits. A substantive application is made for the project. The primary decision-making consideration is delivering the project.⁴¹
- 4.5 Under the FTAA a project is broadly defined in Sch 2. For example, the Delmore project is defined as:
- “Subdivide land and develop approximately 1,250 residential dwellings and associated features such as parks, including delivery of the State Highway 1 Grand Drive interchange and Wainui area connection”
- 4.6 The “approximate geographic location” of a project is also stated. For the Delmore project this is:
- “109 hectares at 88, 130, and 132 Upper Orewa Road, and 53A, 53B, and 55 Russell Road, Orewa”.
- 4.7 It is therefore the *project* that is the reference point for changes to the application. There is flexibility to amend the design and other details of a substantive application,

⁴⁰ Legislation Act 2019, s 10

⁴¹ Refer to section 2 of this memorandum

including if this requires different or further approvals, provided those changes mean the *project* as defined is still being delivered.

- 4.8 This interpretation is supported by the Ministerial suspension process described in section 3 of this memorandum.
- 4.9 Amendments to a substantive application to change or incorporate further approvals in response to Ministerial direction are expressly able to be made and approved as part of a decision on the substantive application as a whole.⁴² Their introduction only changes the process to be followed. It does not raise jurisdictional issues relating to grant of the application.
- 4.10 Second, the express provision for the Minister to direct changes to the approvals sought does not prevent changes requiring different or further approvals being made in written comments, responses to comments, or responses to further information requests.
- 4.11 There is no statutory direction or restriction on what can be addressed in “written comments” provided to the EPA except that they must be “on” the substantive application. In other words, they must be “on” the approvals sought or the wider project itself as defined in Schedule 2.⁴³
- 4.12 Similarly, there is no statutory direction or restriction on what can be addressed in a response comments, except that it must respond (meaning answer)⁴⁴ to the comments received.
- 4.13 There is also no statutory direction or restriction on what is provided in response to a further information request other than that the information provided must be the information requested.
- 4.14 This indicates that the scope of the matters able to be raised in comments and responses is intended to be broad. For those processes to have material effect comments and responses must be able to include the ability to seek and make changes to the project as described in the substantive application as lodged.
- 4.15 Further, the nature of the comment and response process under the FTAA supports an interpretation which sees the scope for changes being as broad as possible.
- 4.16 The FTAA does not provide for public notification and submissions. This means that the RMA situation where other people or groups may have submitted on an application as initially lodged if it had included changes made after notification does not arise. It is that situation that underpins the RMA approach to scope.
- 4.17 The FTAA provides for input from a limited contingent of entities. It then expressly requires the applicant to respond to that input. It then provides the panel with the

⁴² Provided they are the same type of approvals as those already sought in the substantive application as lodged

⁴³ Per the definition of “substantive application” in s 4 FTAA as reproduced at paragraph 3.1 of this memorandum

⁴⁴ Pocket Oxford Dictionary, 4th Ed, pg 693

opportunity, through the further information process in s 67, to seek further comments on the applicant's response.

- 4.18 An interpretation which maximises the changes that can be made to a substantive application in response to written comments, including through incorporating further or different approvals, maximises the potency of written comments.
- 4.19 This counterbalances the effect of the prohibition on public notification and submission.
- 4.20 Finally, the purpose of the FTAA is to facilitate (meaning to "make easy")⁴⁵ the delivery of infrastructure and development projects with significant regional or national benefits.
- 4.21 The broader the scope of allowable changes to a substantive application the broader the opportunity to maximise the significant regional or national benefits and reduce any adverse impacts. Further, the lower the risk of subsequent legal challenge.
- 4.22 Both these outcomes are more consistent with the FTAA's purpose than an approach to jurisdiction which reduces the scope of allowable changes to a substantive application.

5. Application

- 5.1 As set out above the Delmore project is defined as:

"Subdivide land and develop approximately 1,250 residential dwellings and associated features such as parks, including delivery of the State Highway 1 Grand Drive interchange and Wainui area connection"

- 5.2 The "approximate geographic location" of a project is also stated. For the Delmore project this is:

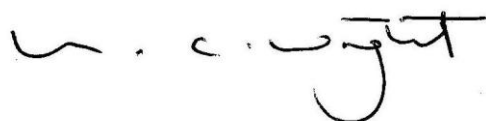
"109 hectares at 88, 130, and 132 Upper Orewa Road, and 53A, 53B, and 55 Russell Road, Orewa".

- 5.3 The changes to the Delmore project proposed by the applicant in response to comments come within this description, and meet the other requirements set out at paragraphs 4.2 and 4.3 of this memorandum.
- 5.4 These changes are:⁴⁶
 - a. The provision of a new neighbourhood park in the Stage 1 area.
 - b. A commercial superlot in the Stage 2 area.
 - c. Four additional pedestrian connections within the site and the addition of stub road connections to adjacent properties.

⁴⁵ Pocket Oxford Dictionary, 4th Ed, pg 283

⁴⁶ Per the updated AEE, Appendix 48 to the applicant's response to comments, and as summarised at paragraph 2.2 of the Council's third memorandum of counsel dated 18 July 2025

- d. Adjustments to retaining walls, culverts (with one changed to a circular culvert), jointly owned access lots, planting mixes and on-lot and street tree, earthworks extent.
 - e. Increased detail around the options for managing on-site wastewater.
 - f. An overall reconfiguration of the number of residential lots, and in some cases the location and of lots, and of the boundary between the Stage 1 and Stage 2 areas.
- 5.5 All of the changes in paragraph 5.4(a)-(e) were made to respond to comments from the Council and others invited to provide written comment to the panel.
- 5.6 The changes in paragraph 5.4(f) are necessary to facilitate delivery of the project considering the changes described in 2.40(a)-(e). They therefore form a critical and legitimate part of the applicant's answer to written comments.
- 5.7 All of the changes made fall within the scope of the project as described in Schedule 2. They remain within the same approximate geographic area and they relate to residential subdivision and development of residential dwellings, and "associated features".
- 5.8 The Delmore project continues to deliver the regionally significant benefits set out in the Assessment of Effects, and which resulted in the project being listed in Schedule 2 FTAA. Indeed, in the applicant's submission, the changes made further support those benefits.
- 5.9 Finally, and for the avoidance of doubt, to the extent the RMA test does apply, these changes do not alter the scale or intensity of the proposed activity, or its character or effects (except possibly to reduce them in the eyes of those that provided written comments).
- 6. Conclusion**
- 6.1 The applicant submits that the panel has jurisdiction to approve all the changes to the substantive application proposed by the applicant in response to comments to the panel.



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