

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 HOLLAND
BECKETT ADVICE TO THE PANEL**

18 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 advice to the Panel from Holland Beckett, Lawyers dated 15 September 2025 (“**Advice**”), attached to Minute 6 (“**Minute**”). Parties are directed to respond by 5 pm, 19 September 2025.
2. In particular, the Minute:
 - (a) Requests Kiwi Property to respond to the jurisdictional point raised at paragraphs 53-58 of the Advice; and
 - (b) Invites Kiwi Property to advise whether it would be prepared to modify the proposal to address these issues 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 Schedule 2 to the FTAA.
3. This memorandum records Kiwi Property’s position regarding the matters addressed in the Advice, using the headings adopted in the Advice, before turning to the matters noted in paragraph 2 above.

Issue 1 – First in first served – does this principle apply?

4. Kiwi Property agrees with the conclusions and reasoning in the Advice on this topic.

Issue 2 – Receiving Environment Matters

5. This section of the Advice discusses the Council’s argument that granting consent to Kiwi Property’s application will amount to Kiwi Property “*banking*” development capacity. Kiwi Property makes the following observations in that regard.

6. The Council's use of the term "*banking*" might be seen as alluding to the oft-criticised concept of "*land banking*", whereby land is held back from development over a period of time, thereby reducing land supply and increasing upward pressure on prices. That is quite different from the current circumstances, however:
 - (a) Far from holding back development for economic benefit, Kiwi Property has already commenced its Metropolitan Centre works and is seeking the consent in order to give clarity as to the scale and content of the centre that may be developed over the next 15 years, provided the infrastructure requirements are in place (and noting that Kiwi Property is currently investing hundreds of millions of dollars in infrastructure on and around its Drury land at a time when Council has stated it has limited funds to invest in infrastructure).
 - (b) Kiwi Property owns the vast majority of land subject to the Metropolitan Centre zone and is seeking to realise value through undertaking development as soon as possible, as has occurred over the past 20 years at its Sylvia Park Metropolitan Centre zoned site. There is no factual basis for Council's fears.
7. Paragraph 32(b) of the Advice states that, "*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.*" Kiwi Property submits:
 - (a) The purpose of the FTAA is "*to facilitate the delivery of infrastructure and development projects with significant regional or national benefits.*"
 - (b) The Drury Centre Precinct provisions, by incorporating infrastructural triggers for development, effectively invite the imposition of conditions precedent which have the effect of constraining development pending the provision of the specified infrastructure. Those infrastructural triggers apply to all three Drury precincts (Drury Centre, Drury East and Waihoehoe), however. Thus, development on

all three precincts will be constrained equally until the infrastructure is in place – infrastructure that in the initial phases Kiwi Property is primarily responsible for implementing directly and funding via development contributions, precisely because its consenting and construction programme is running in advance of the other precincts.

- (c) Accordingly, the grant of consent to Kiwi Property’s application will “facilitate the delivery of ... development projects with significant regional or national benefits” without compromising the residential development around the centre. It will catalyse the residential development rather than generating adverse effects.

Issue 3 - Conditions Precedent

- 8. Kiwi Property agrees with the conclusions and reasoning in the Advice on this topic.

Issue 4 – FTAA Matters

- 9. Kiwi Property notes the comments in the Advice on:
 - (a) The basis on which applications can be declined – inconsistency with the AUP.
 - (b) Decisions to grant in part / decline in part and relevant procedure.
- 10. The comments in the Advice regarding the potential jurisdictional issue are addressed below.

Issue 5 – Potential Jurisdictional Issue

- 11. Paragraph 9 of the Advice notes, “*We flag a potential jurisdictional issue for the Panel to consider ... The application includes activities by m² 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, consideration should be given to whether there is jurisdiction to grant the application as sought.*”

12. Compliance with the description of the proposal in Schedule 2 to the FTAA is a matter that Kiwi Property and its advisors considered prior to lodgement. It was concluded then that the proposal was consistent with the description, for the reasons noted below.

Summary of the Port of Tauranga Decision

13. The High Court decision¹ concerned an application by Port of Tauranga Limited (“**POTL**”) to extend two wharves, Sulphur Point and Mount Maunganui, which sit on opposite sides of Tauranga Harbour. The proposal has a long and contentious history and had been the subject of several interim decisions from the Environment Court. An application to utilise the fast-track process under the COVID-19 Recovery (Fast-Track Consenting) Act 2020 had been declined on the basis it would be more appropriate for the project to go through a standard RMA consenting process.
14. The description for the Project included in Schedule 2 FTAA does not explicitly refer to both the Sulphur Point wharf and the Mount Maunganui wharf extension. Rather it reads (emphasis added):

Authorised Person	Project Name	Project Description	Approximate Geographical Location
Port of Tauranga Limited	Stella Passage Development	In stages, <u>extend the Sulphur Point wharf</u> , including associated reclamation and dredging of the seabed	8.5 hectares of the coastal marine area within Tauranga Harbour at Sulphur Point and Mount Maunganui

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

15. The application for the project to be listed in the Schedule clearly included the Mount Maunganui wharf extensions, as did the Government's press release announcing the listed projects that would be included in Schedule 2. However, the "*project description*" ultimately included in Schedule 2 did not.
16. The High Court accepted that this was potentially an error (i.e.: a mistake in the drafting of the statute and not reflective of a decision by the Minister to constrain the scope of the application) but ultimately found that POTL's substantive application did not meet the requirements of section 46 (i.e.: it was not complete and within scope) because the inclusion of the Mount Maunganui extension meant the application did not relate "*solely*" to a listed project in terms of section 46 FTAA. As a result, the EPA's decision that the application was within scope was wrong in law, and the Court set it aside.
17. The Court found (at [57]) that the requirement, in section 46(2)(b), that applications relate *solely* to a listed project indicates Parliament intended the schedule would determine the scope of the projects the EPA could consider.

The Drury Centre Project description in Schedule 2 FTAA

18. The Drury Centre fast track application is described as follows in Schedule 2:
 - (a) The **project name** specified is, "*Drury Metropolitan Centre—Consolidated Stages 1 and 2*". That description is sufficiently broad to include amendments to already approved elements of Stage 1 and the additional development capacity sought for Stage 2.
 - (b) The **project description** specified is (emphasis added), "*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).*" Those figures are in addition to the floor areas already consented under Stage 1. This is the element of the description that is relevant to your consideration of the jurisdictional point raised in the Advice.
 - (c) The **approximate geographical location** specified is, "*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.” This contains the titles to be occupied by Stages 1 and 2. The proposal for which consent is sought is located within the specified land area.

19. The Drury Centre application seeks floor areas of activities beyond those identified in the Schedule 2 **project description**. A table comparing the two are set out below:

Activity / Land Use	GFA included in Sch 2 description	GFA sought in application
Commercial	Approximately 10,000m ²	33,048m ²
Retail	Approximately 56,000m ²	63,547m ²
Residential	GFA not specified	384 dwellings/lots
Visitor Accommodation	GFA not specified	282 rooms
Community	Approximately 2,000m ²	10,216m ²
Total specified floor areas	Approximately 68,000m ²	106,811m ²

Analysis

20. Kiwi Property submits that the Drury Centre Project can be distinguished from the POTL Project considered in the High Court decision because it involves an increase in scale of the listed activities within the specified site, rather than involving two distinct projects in different locations with different adverse effects. While with greater scale comes greater effects, it is the *level* rather than *type* of effect which differs.

21. More importantly, the form of wording used in the Drury Centre project description is open ended as to the upper level of development for which consent may be sought in the fast-track application:
- (a) The wording 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).*”
 - (b) The description specifies no upper or lower floor area limits governing the extent of “*future residential activity*” for which consent may be sought under FTAA. Thus, provided the other elements of the project description are met, the proposal could include any amount of residential activity.
 - (c) The floor areas quoted refer to specified components of the “*commercial retail centre*”. The word “*including*” indicates that the list of components is open ended. That is, other activities commonly found in commercial retail centres could be included in the proposal for which consent is sought and, if so, would not be subject to upper or lower floorspace limits.
 - (d) There is no suggestion in the project description that the specified floor areas are intended to function as an upper limit on the size of the centre. To the contrary, Kiwi Property submits that they are correctly interpreted as a minimum requirement for any such application. That is, they indicate that:
 - (i) The specified activities (commercial, retail, community) must be included in the project.
 - (ii) Each of those activities must be of a scale that provides at least the minimum floor areas specified in the list.
 - (iii) In their absence of compliance with both of those requirements, the project could be rejected as failing to comply with the project description in Schedule 2.

- (e) Kiwi Property's submission that the specified floor areas for commercial, retail and community activities are minima, not targets or maxima, is consistent with the purpose of the FTAA, being "*to facilitate the delivery of infrastructure and development projects with significant regional or national benefits*". In short, the greater the quantum of floorspace included in any Drury Centre application, the greater the potential benefits and hence the more consistent the proposal is likely to be with the statutory purpose. Kiwi Property accepts that increased floorspace may also generate additional adverse effects that the Panel will be required to consider when assessing the application on its merits.

Willingness to amend the application if it is considered to be out of scope

22. Kiwi Property confirms that it would be prepared to modify the proposal 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 Schedule 2 to the FTAA.
23. In that context, Kiwi Property notes that, even if the interpretation set out above is not accepted by the Panel, the use of the word "*approximately*" in the project description implies that the specified areas may be increased whilst staying within scope. For the purposes of this exercise, Kiwi Property suggests that a 10% increase would remain within scope.
24. Kiwi Property has considered how the application could be reduced in size whilst retaining essential elements. It suggests the following:
- (a) That the "*commercial*" component be reduced from the 33,048m² proposed to the 10,000m² specified in Schedule 2.
 - (b) That the "*retail*" component be reduced from the 63,547m² proposed to 61,600m² (being an uplift of 10% over the 56,000m² specified in Schedule 2).
 - (c) That the "*community*" component be reduced from the 10,216m² proposed to 3,200m² (being an uplift of 60% over the 2,000m² specified in Schedule 2).

- (d) That will result in a total floorspace of 74,800m², being an uplift of 10% over the total of 68,000m² specified in Schedule 2.
- 25. This proposal retains a proportionally high uplift for the community component but that will enable retention of the library building in its current form. That increase is offset by the removal of any uplift for the commercial component and the reduced retail component.
- 26. The adjustment will reduce the uplift from the specified numbers but from Kiwi Property's perspective will also reduce the quality of the overall development, notably because:
 - (a) It will necessitate the loss of the aquatic leisure centre (Building F1); and
 - (b) It will reduce the benefits that flow from co-locating employment (i.e.: commercial office) and retail / entertainment functions.
- 27. Kiwi Property's preference, therefore, is for the application to be granted in its original form if the Panel considers it has scope to do so.

DATED this 18th day of September 2025



Douglas Allan / Alex Devine

Counsel for Kiwi Property Holdings No. 2 Limited