IN THE MATTER of the Fast-track Approvals Act 2024 (**FTAA**)

AND

IN THE MATTER of an application for approvals by Vineway Limited (**Applicant**) to subdivide and develop 109 hectares of Future Urban Zone land into 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 - Project FTAA-2502-1015 – Delmore (**Application**)

THIRD LEGAL MEMORANDUM OF COUNSEL FOR AUCKLAND COUNCIL, AUCKLAND TRANSPORT, AND WATERCARE SERVICES LIMITED REGARDING ISSUES OF SCOPE

Dated: 18 July 2025

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 The purpose of this memorandum is to address the question posed in paragraphs [4] and [5] of the Panel's Minute 8 dated 9 July 2025, namely whether the Applicant's amended substantive application is within scope, in terms of what was applied for and considered under sections 46 and 47 of the FTAA and comments under section 53 of the FTAA were invited on.

1.2 In summary, the Council family is comfortable that the amended substantive application is within scope, because:

(a) The changes do not go beyond the scope of the listed project. They do not expand the geographical location of the project. Most changes relate to, but do not go beyond, activities that are either expressly (i.e. parks) or implicitly (i.e. pedestrian and road connections) contemplated in the listed project. While the additional 1,000m^2 commercial superlot is not expressly referred to in the listed project, its purpose is to provide neighbourhood facilities to support the residential development. Given the relatively small size of the proposed commercial superlot, the Council is satisfied that the activity is subsidiary to the project and therefore would still be within the scope of the project, as that term is defined in section 4 of the FTAA.

(b) Having regard to general principles that apply to modifications to existing consent applications, the changes do not appear to substantially increase the scale, intensity, or character of the activity. We do not consider the changes would not have resulted in any difference to the persons invited to comment under section 53(2) of the FTAA. While it is unlikely that the changes would have resulted in any material difference to whether someone invited to comment would have done so, or the nature of their response, it would be open to the Panel, if it considered it appropriate to do so, to request a response from invitees regarding the changes – even those who did not comment on the original application.

2. KEY CHANGES TO THE SUBSTANTIVE APPLICATION

2.1 The amendments to the substantive application are set out in the revised Assessment of Environmental Effects dated 7 July 2025 and are summarised in the memorandum of changes at Appendix 48.2 of the application documents.

2.2 The key changes[1] are:

(a) The provision of parks – a new 3,100 m^2 neighbourhood park is proposed for stage 1 of the development (removing 12 lots and 1 JOAL). Modifications have also been made to the design of the park proposed for stage 2 of the development.

(b) A 1,000 m^2 commercial superlot is proposed for stage 2, adjacent to the stage 2 park (removing 3 lots and 1 JOAL).

(c) Four additional pedestrian connections (one in stage 1 and three in stage 2) and two additional roading connections (one in stage 1 and the other in stage 2) are proposed.

(d) An overall reconfiguration of the lot numbers is proposed. The proposed changes would result in an overall reduction in the number of lots (either 1205 lots or 1217 lots depending on whether the stage 1 park proceeds, compared to 1219 lots in the original substantive application), but with a reconfiguration which would result in a small increase in lots for stage 1 and a decrease in lots for stage 2.

3. CONSIDERATION OF SCOPE

Legislative requirements and general principles

3.1 Issues of scope have been considered by previous fast-track consenting panels under other similar legislation, such as the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**). Consenting panels under the FTCA generally recognised that case law and principles developed under the RMA on scope are also relevant to consent applications under the FTCA, subject to the important caveat that the description of the project itself sets a clear

[1] In addition to the initial refinements presented to Panel on 15 May 2025 referred to in Appendix 48.2 including 5 additional lots from earthwork refinements and realignment of staging boundary.

restriction on the scope of the application.[2] As such, an 'RMA-style' approach could not be applied if it would allow for a modification that is clearly outside the scope of the referral order or listed project.[3]

3.2 There is no reason why a similar approach to scope should not be applied under the FTAA. The Panel's jurisdiction to consider a substantive application is constrained by the scope of the "project" (as that term is defined in section 4 of the FTAA). This is why section 46 requires a substantive application to be assessed to confirm that it is within scope prior to its referral to a consenting panel.

3.3 However, the assessment undertaken pursuant to sections 46 and 47 of the FTAA would not prevent an applicant from subsequently modifying its substantive application. Although the FTAA does not expressly make provision for amendments to substantive applications, this is no different to the RMA or other fast-track legislation such as the FTCA. Despite that, the Courts have long accepted that it is part of the resource consent application process that sensible modifications will take place. Refer for instance to *Waitakere City Council v Estate Homes Ltd*,[4] where the Supreme Court accepted at [29] that:

> … in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. …

3.4 There is now a significant body of case law concerning the approach to take under the RMA to evaluating whether amendments to a resource consent application have gone beyond the scope of the original application, so as to make it a new application where a fresh application / re-notification must be considered.

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[2] See for example, the decision of the expert consenting panel on The Hill – Ellerslie, 17 April 2023 at 4.15-4.22: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/The-Hill-Ellerslie/Decision-/The-Hill-Ellerslie-Panel-decision-17.4.23.with-conditions.pdf.

[3] For a broader discussion of this issue, see the decision of the Wooing Tree expert consenting panel, 29 September 2021, section D, at [78] onwards: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Wooing-Tree/decision/MINOR_CORRECTION_FTC29_Record_of_Decision_under_Clause_36-Wooing_Tree_FINAL.pdf.

[4] *Waitakere City Council v Estate Homes Ltd* (2006) 13 ELRNZ 33 (SC).

3.5 In *Collins v Northland Regional Council*,[5] Asher J accepted the following statement by the Planning Tribunal in *Haslam v Selwyn District Council*:[6]

> The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. … In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions.

3.6 Asher J also commented in *Collins* that:[7]

> … It is part of the resource application consent process that sensible modifications will take place. Whether there is a need to re-notify will turn on the facts and will often be a question of degree. The extent of the modification and its impact are critical factors. These are best considered on the knowledge of the parties at the time of the change. It will be difficult to establish a need to notify if the change appears to be minor, even if it is later shown to have effected a significant change. It is the fairness of the process that is at issue, not the merits of different proposals.

3.7 It must likewise be a part of the FTAA resource consent application process that sensible modifications will take place from time to time, for instance in response to comments received or as a consequence of matters raised by the Panel. Further, in terms of the passage in *Haslam* quoted above, it is to be expected that the lodging of comments by opponents may lead to an applicant modifying its proposal to meet objections that are found to be sound. We consider that must be part of the statutory intent of FTAA in providing for comments.

3.8 Accordingly, the Applicant's proposed changes raise two potential scope issues:

(a) Is the amended application within the scope of the listed project?

[5] *Collins v Northland Regional Council* [2013] NZHC 3039 at [26].
[6] *Haslam v Selwyn District Council* (1993) 2 NZRMA 628 (PT).
[7] *Collins v Northland Regional Council* [2013] NZHC 3039 at [27].

(b) Applying general principles regarding the ability to modify an existing consent application, are the amendments outside the scope of what was applied for in the substantive application?

Is the amended application within the scope of the listed project?

3.9 Having regard to the first issue, Schedule 2 of the FTAA describes the project as follows:

> *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*

3.10 The listed project also defines the approximate geographical location of the project. The proposed amendments all fall within the site area described in both the listed project and the substantive application and therefore the amendments do not expand the geographical area of the project.

3.11 In terms of the activities themselves:

(a) The listed project specifically refers to parks and other associated features being included in the project. Other associated features would necessarily include infrastructure to support the development, including road and pedestrian connections. As such, the amendments to provide for an additional park and additional road and pedestrian connections do not raise any scope issues *vis a vis* the listed project;

(b) The overall number of lots is similar to, if not somewhat less than the original application. The reconfigurations to the number of residential lots do not exceed the scope of the listed project.

3.12 The only aspect of the amended application that proposes an activity which is not described either expressly or by necessary implication in the listed project is the 1,000 m^2 commercial superlot. However, having regard to the definition of a "project" in section 4, this amendment is of a type that would fall within subclause (b) of the definition. Under section 4, in relation to a listed project, the project is defined as the project as described in Schedule

2,[8] and also includes "*any activity that is involved in, or that supports and is subsidiary to, a project referred to in paragraph (a)"*.[9]

3.13 The proposed inclusion of the commercial superlot was in response to comments by the Auckland Council family that the proposal did not include sufficient facilities to support a residential development of that size, including the absence of any neighbourhood centre. The revision is directed at providing supporting facilities to the residential development that forms the core of the listed project, and therefore it reasonably falls within the meaning of an activity that supports the listed project. The proposed 1,000m^2 lot would occupy a very small proportion of the overall development (which has an estimated site area of 109.18 ha). As such, it is also plainly subsidiary to the core activities referred to in the listed project.

3.14 For these reasons, the Council family considers that the revisions in the amended substantive application do not fall outside the scope of the listed project and therefore do not contradict the scope assessment undertaken pursuant to ss 46-47 of the FTAA.

Are the amendments within the scope of the substantive application?

3.15 An RMA-style approach would allow for modifications to an application provided there is no substantive change to the scale or intensity of the activity or to the character or effects of the proposal.

3.16 The changes made by the Applicant were primarily to address comments made by the Council family regarding deficiencies in the application. The Council family intends to separately update the Panel on its response to the various revisions and responses made by the Applicant. The following comments are solely directed at scope and should not be construed as indicating a change in the overall position of the Council family to the application.

3.17 The proposed changes do not appear to result in any substantial increase to the scale or intensity of the effects of the proposal. The changes would result in an overall small reduction in the number of residential lots. The proposed parks and additional pedestrian and road connections are in response to concerns regarding the connectivity of the proposed development, and would

[8] Subclause (a)(i) of the definition of a project in section 4 of the FTAA.
[9] Subclause (b) of the definition of a project in section 4 of the FTAA.

not change the character of effects or their scale or intensity. It is acknowledged that the revisions do now propose a commercial superlot, where no commercial activity had previously been proposed. However, given the small size of the commercial lot, it is not considered that this would result in any material change in effects. It is not of a scale or size that would result in a material increase in traffic effects, for example from traffic from outside the development travelling to the site. Its purpose is focused on servicing the immediate neighbourhood of the development. In the particular circumstances, including that the FTAA appears to anticipate that small supporting and subsidiary activities can be included in a project even if not specifically referenced in the listed project, the Council family is comfortable that the proposed inclusion of the commercial superlot would not substantially alter the character of the proposal or its effects.

3.18 Ultimately, a core consideration will be whether the proposed changes would result in procedural unfairness in the sense that had the changes to the application been included at the outset:

(a) Would this have led to any difference in the people invited to comment on the application?

or

(b) Having regard to the nature and degree of the changes, is it reasonably likely that those invited to comment would have provided a different response had they been aware of the changes?

3.19 Having regard to the first consideration, the Panel identified those persons that must be invited to comment on the application pursuant to section 53(2) of the FTAA.[10] This included the owners and occupiers of the land to which the substantive application relates and owners and occupiers of adjacent land. The Panel considered that there were no additional persons that it would be appropriate to invite comments from, under section 53(3) of the FTAA. Given the geographical location of the project remains unchanged and the changes do not result in any expansion to the list of relevant local authorities, iwi authorities / treaty settlement entities, ministers or relevant

[10] Minute 3 of the Panel dated 26 May 2025.

administering agencies, the changes would not have resulted in any change to the persons invited to comment on the application.

3.20 It is acknowledged that not everyone who was invited to comment did so. While the nature of the changes is such that it is unlikely that their inclusion from the outset would have resulted in any additional comments, it is open to the Panel to request further information, under section 67(1)(a)(iv), from any person or group invited to provide comments under section 53. As such, it would be possible, should the Panel decide to do so, to provide an opportunity for any invitee to make a response to the amendments to the substantive application, even if the invitee declined to provide comments at the outset. The Panel does of course also have the power to request further information from the applicant under section 67. This may include further assessment of the effects of any of the proposed amendments, if the Panel considers further information is needed to enable it to assess whether the changes result in any substantial change in the effects of the application.

DATED the 18th day of July 2025

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