

BEFORE AN EXPERT CONSENTING PANEL

IN THE MATTER

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

AND

IN THE MATTER

of an application by Kiwi Property Holdings No.2 Limited under section 42 FTAA for approvals relating to the Drury Metropolitan Centre Project Consolidated Stages 1 and 2

**MEMORANDUM OF COUNSEL FOR THE AUCKLAND COUNCIL IN
RESPONSE TO MINUTE 6**

Dated: 19 September 2025

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LAWYERS

MAY IT PLEASE THE PANEL:

1. This memorandum of counsel for the Auckland Council responds to the Panel's Minute 6 dated 15 September 2025, which invited comments on the legal advice by Holland Beckett dated 12 September 2025 (**Legal Advice**) from both the Applicant and Auckland Council by 19 September 2025.
2. This memorandum adopts the same subject headings as used in the Legal Advice for ease of reference, albeit in a slightly different order, beginning with the potential jurisdictional issue identified in the Legal Advice.

Jurisdictional Issue

3. The Legal Advice identifies a potential jurisdictional issue arising from the Application's exceedances of the Schedule 2 FTAA parameters for the listing of the project:

"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)"

4. The Application as presented seeks consent for activities that substantially exceed these listed parameters:
 - Commercial: 33,048m² vs 10,000m² listed;
 - Community: 10,216m² vs 2,000m² listed;
 - Retail: 63,547m² vs 56,000m² listed.
5. Having reviewed the position, including in the context of the High Court's findings in *Ngāti Kuku Hapu Trust v Environmental Protection Agency* [2025] NZHC 2453, the Council considers that a material jurisdictional issue arises. As a result, the Panel lacks jurisdiction to approve the Application as currently proposed. It is noted that the Panel has sought comment from the Applicant on whether 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 the Schedule 2 project listing.

Analysis

6. We addressed relevant legislative requirements and general principles in a recent memorandum for the Delmore Panel on matters of scope. We provide a link to that memorandum in the footnote below, and in the interests of expediency do not repeat that discussion¹ (in that instance, we reached a different scope conclusion in the particular circumstances that arose).
7. As noted in that memorandum, 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, namely (relevant to listed projects):

project—

- (a) means,—
 - (i) in relation to a listed project, the project as described in Schedule 2:
 - ...
 - (b) includes any activity that is involved in, or that supports and is subsidiary to, a project referred to in paragraph (a)
8. 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.
9. The High Court's decision in *Ngāti Kuku Hapu Trust* – which post-dates our previous Delmore memorandum – is directly relevant. That case concerned Port of Tauranga Limited's application under the FTAA for the Stella Passage Development, a project to extend wharves in Tauranga Harbour.
10. The jurisdictional issue arose because the Schedule 2 listing described the project as extending only "the Sulphur Point wharf", but Port of Tauranga's actual application sought to extend both the Sulphur Point wharf and the Mount Maunganui wharf. The EPA had accepted the application as within scope, but local hapū challenged this decision.
11. Port of Tauranga argued that the omission of the Mount Maunganui wharf from Schedule 2 was a drafting error, and that contextual factors (including

¹ https://www.fasttrack.govt.nz/_data/assets/pdf_file/0017/9134/AC-3rd-legal-memorandum-to-Delmore-Panel-on-Scope.pdf

the project name and geographical location description) showed Parliament intended to include both wharves. The High Court rejected these arguments.

12. The Court emphasised that compliance with section 46(2)(b) is mandatory, not discretionary:

[21] Compliance with s 46(2)(b) is a mandatory threshold for acceptance of an application under the FTA. No question of discretion arises. If the application did not comply with s 46(2)(b), it could not lawfully be referred to the panel.

13. The Court's analysis turned on the language of section 46(2)(b) FTAA, which provides that a substantive application may only be accepted if *"the application relates solely to a listed project or a referred project."* Boldt J explained that the word "solely" establishes strict jurisdictional boundaries that cannot be expanded beyond what Parliament actually listed:

[57] ... The requirement, in s 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.

14. The Court refused to read additional scope into Schedule 2 listings based on assumptions about drafting errors or contextual interpretation:

[58] Courts are always slow to conclude that unexpected or difficult statutory wording is the product of a drafting error... it would be wrong to find there has been a drafting mistake unless that is the only available conclusion.

15. The Court's analysis focused strictly on the actual words used in Schedule 2:

[73] It follows there is simply no basis, when reading the description of the Stella Passage Development, to look beyond the words in the schedule. They could not be clearer. ...

Present Case

16. The jurisdictional issue here is acute. The Application seeks development that significantly exceeds the express numerical parameters Parliament specified.
17. We note that the Schedule 2 listing uses the terms "approximately" and "including". We have considered whether those qualifiers might assist the Applicant. The *Ngāti Kuku Hapu Trust* demonstrates that the Court will scrutinise the actual scope very carefully. In our opinion, the use of the words "approximately" and "including" cannot save exceedances of the magnitude at issue here:

- (a) The Collins Dictionary (Online) defines "approximately" as meaning *"close to; around; roughly or in the region of"*. The Cambridge Dictionary (Online) defines the term as *"close to a particular number or time although not exactly that number or time"*.
- (b) These definitions suggest some minor and reasonable variance will be allowable, however not increases such as those proposed in the present case.
- (c) Substantial exceedances of listed parameters effectively transform the project into something materially different from what Parliament approved for inclusion in Schedule 2.
- (d) The word "including" typically indicates that the listed items are examples or components of the broader project, rather than exhaustive limitations. However, this does not mean the word "including" permits unlimited expansion beyond the specific parameters that follow.
- (e) When Parliament chose to specify precise square metre figures for each activity type, it did so for a reason. The word "including" should be read as indicating these are the key components of the commercial retail centre, not as providing carte blanche to exceed the specified areas by significant margins.
- (f) There is also an important distinction between:
 - ancillary activities that support the listed project components and remain subsidiary to them (which are provided for in the FTAA definition of "project"); and
 - substantial increases in the scale of the specifically listed activities themselves.

Conclusion

18. The Application exceeds the scope of the Schedule 2 listing substantially, and should be modified to align with the Schedule 2 parameters.

First in First Served – Does this Principle Apply?

19. The ‘first in first served’ principle from *Fleetwing* is fundamentally a procedural priority rule for determining hearing order between multiple filed applications competing for the same finite resource. Here, there’s only one application before the Panel, and no competing applications exist to prioritise against.
20. Accordingly, the Panel may conclude that the *Fleetwing* principle is not of immediate relevance.
21. Having said that, to the extent that the Panel may regard the *Fleetwing* principle as instructive, we note the following matters:
 - (a) The principle is typically applied to natural resources.
 - (b) We do not consider the principle is of assistance in considering the present land use / subdivision context.
 - (c) The Panel may find it helpful to consider *Coleman*,² where an argument was advanced that to the extent that a road was a scarce resource, it should be dealt with on a “first come first served” basis, relying on cases such as *Fleetwing*. The High Court rejected that argument noting that “*such cases can have no application to the present circumstances*” and that the road in question was “*not a scarce resource for distribution amongst competing applicants*”. The Court appeared to view the issue of infrastructure adequacy assessment as distinct from resource allocation.
 - (d) For completeness, we also observe in passing that the Court of Appeal subsequently identified certain limits to the *Fleetwing* rule in *Central Plains*, while emphasising that those limits did not connote the principle’s abandonment.³ It is unnecessary to go into further detail for present purposes.
22. We agree with paragraph 22 of the Legal Advice that “*consideration of the application on its merits will of course include consideration of any actual and potential effects on the environment of allowing the activity, and the Auckland*

² *Coleman v Tasman District Council*, High Court Wellington, AP224/97, 19 November 1998, at p12.

³ *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, at [91].

Unitary Plan" (and note that the *Fleetwing* principle, even if it were to apply or be relevant in some way, would not override the Panel's obligation to consider the substantive planning framework and adverse effects of the proposal).

Receiving Environment Matters

23. The discussion of *Hawthorn* at paragraph 23 onwards of the Legal Advice appears to be fairly orthodox. Paragraph 26 highlights some of the likely complexities arising given the long lapse date proposed (15 years), and the prospect that any consent will be implemented gradually given the unfunded / unprogrammed infrastructure relied on. We observe in passing that there does then seem to be something of a 'leap' at paragraph 27, where it is assumed that despite these acknowledged complexities, *"it will be difficult to then say that the consent is unlikely to be implemented in full barring clear evidence to the contrary"*.
24. The Legal Advice goes on to provide a thoughtful analysis of the question *"whether the Panel should consider the implication that the 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"* (paragraph 28).
25. The Council agrees with the discussion at paragraph 31 and the conclusion at paragraph 32(b) that 'banking' may be a relevant consideration for the Panel where there is some basis for this (e.g. a planning provision or an adverse effect).
26. The precinct provisions themselves provide the "planning provision" basis referenced in paragraph 31 of the Legal Advice. For example:
 - (a) Standard I450.6.2 and Table I450.6.2.1 (alongside the related objective / policy framework) establish a detailed framework requiring development thresholds to be tied to infrastructure that is either:
 - "constructed and operational prior to lodgement of the resource consent application";

- "under construction with relevant consents and/or designations being given effect to prior to the lodgement of the resource consent application..."; or
- "proposed to be constructed by the applicant as part of the resource consent application...."

(b) The Precinct Description at I450.1 also explicitly acknowledges that *"there is insufficient council family or central government funding available for transport and other infrastructure to support the full build-out of Drury East, which may affect the speed at which land within Drury East can be developed."* This demonstrates that the planning framework was designed with full knowledge of funding constraints and the need to carefully sequence development with actual infrastructure availability.

27. This framework anticipates close temporal coordination between consent and infrastructure delivery, not consents granted years or decades in advance of unfunded / unprogrammed infrastructure. The Application seeks to depart from this carefully calibrated system by banking development capacity for up to 15 years, dependent on multi-billion dollar infrastructure that remains completely unfunded and unprogrammed, contrary (in the Council and Auckland Transport's assessment) to the precinct's integration requirements.
28. The Council's comments have also highlighted potential effects concerns (e.g. economist James Stewart refers at paragraph 7 of his 11 August 2025 report to the *"opportunity cost of the reservation of limited infrastructure capacity has been omitted entirely and this may represent a significant cost particularly if effect to the Proposed Development consent is not given until much later"* – i.e. an economic effect).
29. The Legal Advice adds that, where the effect of banking will be significant, the purpose of the FTAA itself may provide such a foundation. The latter point is articulated in the Legal Advice as being *"if the actual effect (due to banking effects) will be to block the delivery of infrastructure and development projects, then the Panel may consider that the purpose of the FTAA conflicts with those parts of the Application, and that this consideration requires that those parts of the application should be declined"*.

30. This astute observation has potential relevance here – for reasons similar to those discussed below in relation to conditions precedent, there may be a risk of this occurring, arising e.g. from the combination of a 15-year lapse period with conditions precedent dependent on multi-billion dollar transport projects (Mill Road connections, Drury South Interchange etc), which have no committed funding or delivery timeline.
31. In any event, regardless of the Panel's ultimate view on matters such as capacity banking (and conditions precedent – see below), the Council continues to regard the 15-year lapse period sought as excessive. A maximum 10-year period would better align with enabling aspects of the project that can realistically proceed with existing and nearer term infrastructure.

Conditions Precedent

32. The Council acknowledges that conditions precedent can be lawfully framed where the factual matrix supports their use. However, as emphasised in the Legal Advice at paragraph 34, *"careful consideration must be given to whether the factual matrix supports the use of a condition precedent"*.
33. In this case, a key concern relates to reliance on conditions precedent for later-stage development, which are tied to unfunded and unprogrammed upgrades.
34. The Legal Advice seeks to distinguish *Hildeman v Waitaki District Council* at paragraph 34 based on different factual circumstances. We make several observations:
 - (a) *Hildeman* was cited for the core principle, which remains apposite, that conditions precedent should not be imposed where they would *"potentially render the grant of consent futile"*.⁴
 - (b) The concern relating to conditions that have the effect of frustrating a consent is not unique to the context of conditions precedent and the Panel will be familiar with the body of case law on this topic.⁵

⁴ *Hildeman v Waitaki District Council* [, at [83].

⁵ See e.g. the cases cited at A108.11(6) of *Brooker's Resource Management*.

- (c) An issue of futility can arise in circumstances other than the precise circumstances that arose in *Hildeman* (needless to say, every case is different).
 - (d) In commenting on *Hildeman*, the Legal Advice acknowledges at paragraph 34(d) that some of the required upgrades are “*not presently programmed or funded*”. Therein lies the Council’s (and Auckland Transport’s) concern. Section 2 of Ms Duffield’s report dated 11 August 2025 outlines the unprogrammed / unfunded status of several significant enabling projects relied on by the Application (the direction connection from SH1, Drury South Interchange, Mill Road Southern Connection, Mill Road Northern Connection, Opaheke Northern Link). The table in section 2 of Ms Duffield’s report notes that the Ultimate Opāheke Northern connection has an indicative delivery extending to 2049 (underlining the nature of the problem).
 - (e) While ultimately a matter for the Panel, the Council remains of the view that the factual circumstances here do not support conditions precedent for later-stage development.
 - (f) Reliance on these projects for granting **resource consent** is problematic. While these infrastructure upgrades were incorporated into the AUP precinct provisions through Private Plan Change 48 to establish the policy framework for future consenting decisions, their inclusion in the precinct does not constitute evidence of funding / timing of delivery (without committed funding or delivery programmes). As noted already, the Precinct Description at I450.1 expressly acknowledges the issue. The precinct provisions set the policy expectation for infrastructure coordination, but granting consent dependent on unfunded / unprogrammed infrastructure represents a fundamentally different step that requires careful consideration by the Panel.
35. Circling back, approving development dependent on multi-billion dollar unfunded infrastructure with no delivery timeline creates a clear risk of futility (even if the precise facts differ from *Hildeman*). There is a risk that conditions precedent for later-stage development would effectively ‘sterilise’ those consent rights for an indefinite period.

Basis on which applications can be declined – inconsistency with Auckland Unitary Plan

36. Paragraphs 36 to 38 are consistent with the analysis contained in our legal memorandum of 11 August 2025, and we have no specific comment other than to reiterate the following passages in relation to section 85(4) FTAA (which we note the Legal Advice agrees with):

4.17 The provision does not prohibit consideration of inconsistency or contrariness with planning documents – it only prevents reliance on inconsistency alone as sufficient grounds for decline. This suggests Parliament intended that inconsistency remains a relevant consideration. It simply cannot be the only factor supporting a decline decision. Where inconsistency with planning provisions is, for instance, coupled with actual adverse impacts (environmental, social, or economic etc), both factors may legitimately contribute to a decision to decline.

4.18 While section 85(4) prevents reliance solely on planning inconsistency as grounds for decline, the underlying policy framework and the real-world issues it addresses remain highly relevant to the overall proportionality assessment.

Decision to Grant in Part / Decline in Part

37. We note that the Legal Advice reaches the same conclusion as that articulated at paragraph 4.2 onwards of our legal memorandum of 11 August 2025, albeit via a slightly different analysis. We have no specific comments.

DATED the 19th day of September 2025



Matt Allan / Rowan Ashton
Counsel for Auckland Council family