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BARRISTER

14 July 2026

For the Expert Panel
Stella Passage Development [FTAA-2512-1163]

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LEGAL SUBMISSIONS FOR BAY OF PLENTY REGIONAL COUNCIL RELATING TO *AUGIER* CONDITIONS

Tēnā koutou

1. Minute 7 of the Expert Panel (para [2](A)) sought further information from any participant other than the Applicant in relation to the issue of whether any conditions identified by the Applicant as *Augier* conditions in Appendix 2 of its response to Minute 5 (**Appendix 2**) may instead fall without the scope of allowable conditions under s108AA(1)(b) of the Resource Management Act 1991 (**RMA**).

2. As the authority responsible for monitoring compliance with any resource consent conditions imposed by the Panel, the Regional Council has an interest in the *vires* of those conditions. There is also a degree of precedent weight carried by decisions of Fast-track panels. Counsel is not aware of any decisions of the Environment Court or other Fast-track panels where conditions have been imposed under s108AA(1)(b) requiring payment of compensation to third parties. All third-party compensation conditions that counsel is aware of have been imposed on an *Augier* basis (based on the common law test) or (more recently) pursuant to s108AA(1)(a), which effectively codifies the *Augier* test.

3. Although Fast-track decisions are not made under the RMA, the Panel must "take into account" the provisions of the RMA that direct decision making on a resource consent, including Part 6 (relating to resource consents) which contains s108AA relating to the requirements for conditions of resource consents.[1] It also contains ss108(2)(a) and 108(10) RMA relating to the imposition of financial contributions.

4. The approach taken by the Applicant in Appendix 2, which explains why the relevant conditions are not directly connected to the effects of the proposed development and therefore would not fall within the scope of s108AA(1)(b), is accepted by the Regional Council. However, such conditions may be imposed by the Panel pursuant to s108AA(1)(a), being conditions that the Applicant has agreed to. The Regional Council considers that Appendix 2 reflects a carefully considered approach aimed at ensuring the conditions imposed by the Panel are lawful.

[1] By virtue of clause 17(1)(b) and clause 18, Schedule 5, Fast-track Approvals Act 2024 (**FTAA**).

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5. For completeness, the Regional Council does not consider that a financial contribution can be imposed under the RMA requiring payment to a party other than the consent authority. Financial contributions are imposed as conditions of resource consents and enforceable by the consent authority. Even if there is doubt as to this position, it is clear that a financial contribution condition cannot be imposed unless it accords with the provisions of the relevant plan (s108(10) RMA). In this case the relevant plan is the operative Bay of Plenty Regional Coastal Environment Plan (**RCEP**), which does not provide for the payment of financial contributions to third parties.[2]

6. While there is no clear jurisdictional bar to the imposition of third-party compensation conditions,[3] as noted, counsel is not aware of any cases where either the Environment Court or a Fast-track panel have imposed such conditions where these have not been offered by an applicant on an *Augier* basis or imposed by a decision maker under s108AA(1)(a) (with an applicant's agreement). For example, the original funding for kaimoana restoration and recognition of cultural values provided for in the conditions granted by the Environment Court in the 2011 Port of Tauranga dredging case was imposed by the Court on an *Augier* basis.[4]

7. While that case was decided prior to the introduction of s108AA, the common law *Newbury*[5] tests relating to the lawfulness (*vires*) of a condition applied (and continue to apply), which have always required a causal nexus between the proposed activity and the proposed condition. That aspect has now been codified in s108AA(b), but it is not a new requirement.

8. Similarly, the Environment Court in the direct referral proceedings relating to the current Stella Passage dredging proposal (which were withdrawn by the Port of Tauranga to pursue the Fast-track application) imposed compensation conditions which reflected those offered by the applicant on an *Augier* basis.[6]

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[2] Refer operative Bay of Plenty Regional Coastal Environment Plan, Section 11 Financial Contributions.
[3] The reference to "third party compensation" is used as short-hand in these submissions and is not intended to suggest that tangata whenua parties, who are seeking compensation in this case, have the same status as other potential parties who might seek compensation. It is acknowledged that tangata whenua have a special status under the RMA, including through the matters of national importance recognised in sections 6(e), 7(a) and 8 of the RMA. Under the FTAA, the Panel's obligation is to "take into account" ss 6 and 7 RMA, and it must give the greatest weight to the purpose of the FTAA (FTAA, Schedule 5, clause 17(1)&(2)(a)).
[4] *Te Rūnanga o Ngāi Te Rangi Iwi Trust v BOPRC* [2011] NZEnvC 402.
[5] *Newbury DC v Secretary of State for the Environment* [1981] AC 578, adopted in *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).
[6] *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2024] NZEnvC 337.

9. Fast-track Panels have (to date) also relied on *Augier* compensation offers under s108AA(1)(a),[7] or (in addition) as a positive effect to offset residual adverse effects under s104(1)(ab) RMA.[8]

10. The Regional Council has a concern that, if the Panel were to find that some of the conditions offered by the Applicant voluntarily might also relate to compensation for matters "*directly connected to an adverse effect of the activity on the environment*" under s108AA(1)(b), imposing the payment of a monetary contribution risks undermining the policy intent of the financial contributions regime. The very purpose of that regime is to address adverse environmental effects which are directly connected to the activity, where they cannot otherwise be avoided, remedied or mitigated. The regime ensures that payment amounts are carefully assessed and paid to the Regional Council to be applied for the specific environmental purposes for which they are collected.

11. In brief, the Section 11 Financial Contribution provisions explain that "*The Regional Council does not require financial contributions as 'development impact fees' as is the case with city and district councils*."[9] Rather, financial contributions are available to remedy, mitigate or offset the adverse effects on natural and physical resources that cannot otherwise be avoided, remedied or mitigated. "*The amount must not exceed the reasonable cost of funding positive environmental effects required to offset the net adverse effects <u>caused directly by the activity</u>*."[10] [emphasis added].

12. Specific examples of where the RCEP might provide for the imposition of financial contributions relate to the protection of aquatic habitats of indigenous species, protection of water quality for kaimoana gathering, and protection, restoration and enhancement of benthic habitats or harbour margins. It follows that, in this case, if the Panel found there were residual adverse effects which could not be avoided, remedied or mitigated, the Panel would have jurisdiction to impose a financial contribution to fund positive environmental outcomes, provided they were imposed in accordance with the purposes specified in the RCEP and the level determined in the manner described in the RCEP.

13. In conclusion, if the Panel is satisfied that any of the items listed in Appendix 2 are in fact direct effects of the activity on the environment, it is submitted that it should also inquire as to whether those are effects which can be avoided, remedied or mitigated through conditions of consent that are not more onerous than necessary to achieve their intended purpose. If there are residual effects on the environment which are not capable of management through the effects hierarchy, then the financial contributions regime in the

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[7] Such as the Waitaha Hydro Scheme [FTAA-2505-1069] decision dated 17 April 2026, where the Panel stated that "*We also accept that for RMA approvals, s.108AA means that while we can suggest the Applicant consider different compensation levels, we cannot impose different compensation levels without the Applicant's agreement*" (para 1150).
[8] See Tekapo Power Scheme decision [FTAA- 2503-1035] dated 3 November 2025, (para 84.5). Note these conditions were also offered by the Applicant on an *Augier* basis.
[9] RCEP, Section 11, para 3, p405.
[10] RCEP, Section 11, "Amount of Contribution", para 1, p407.

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RCEP provides for the payment of financial contributions to the Regional Council to be applied for the specific purposes provided for in the RCEP. These purposes are broad and include a number of issues of concern which have been raised by tangata whenua.

14. If the Panel considers there are specific cultural effects which are not covered by the Financial Contributions provisions of the RCEP, then it is submitted that the Panel would then consider whether the *Augier* conditions offered by the Applicant are reasonable and not more onerous than necessary (s83 FTAA). The latter test would appear to be satisfied given the Applicant has agreed to them.

Nāku noa, nā

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