BUDDLE FINDLAY

25 July 2025

To
The Expert Panel appointed to consider and decide the Delmore application (**Panel**)

From
David Allen
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By email

Dear Panel,

Advice as to scope under the Fast-track Approvals Act 2024: changes to the substantive application following the receipt of comments

1. Thank you for seeking our advice on questions going to scope, arising from changes proposed by Vineway Limited (**Applicant**) on its substantive application under the Fast-track Approvals Act 2024 (**FTAA**) relating to the Delmore project (**Application**).

2. The Application relates to a project to:[1]

> 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. The Panel invited comments from certain parties under s 53 of the FTAA including the Auckland Council, Auckland Transport and Watercare Services Ltd (**Council family**). In its 5 July 2025 response to the comments received, the Applicant made changes to the Application to respond to comments from the Council and others invited to provide comments.

4. In summary, the changes proposed by the Applicant are:[2]

   (a) the addition of a neighbourhood park (and a modification to the design of another park);

   (b) the addition of a 1,000 m^2 'commercial superlot';

   (c) changes to certain roading and pedestrian connections;

   (d) adjustments to retaining walls, culverts, jointly owned access lots, planting mixes and on-lot and street tree, and earthworks extent;

   (e) additional detail around the options for managing on-site wastewater; and

[1] As described in Schedule 2 to the FTAA.
[2] As described in the memorandum of counsel for the applicant with response to Minute 8 (dated 18 July 2025) at [5.4]; and third memorandum of counsel for Auckland Council, Auckland Transport, and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [2.2].

(f) an overall reconfiguration of the number of residential lots, and the boundary between the 'Stage 1' and 'Stage 2' areas.

5. In this context, the Panel has sought our advice on whether the changes to the Application made by the Applicant following the Council's comments are within the scope of the project as listed in Schedule 2 of the FTAA.[3]

6. The Panel also requested comments from the Applicant and the Council on the issue of scope,[4] which were respectively submitted on 18 July 2025 and which we have considered in preparing this advice.

Summary of advice

7. In our opinion the changes to the substantive application by the Applicant in response to the comments are within scope of the project as listed in Schedule 2 of the FTAA. For completeness we also consider that the changes are within the scope of the substantive application.

8. We respond to the Panel's question by:

(a) first addressing the ability within the FTAA process to make changes;

(b) then, having considered changes may occur through the FTAA process, considering the changes proposed against;

(i) the project description as listed in Schedule 2 of the FTAA; and

(ii) the substantive application.

9. The panel has already received robust legal submissions from both the Applicant and the Council family. As we agree with the key positions reached in those submissions, this advice has been kept succinct. Should that panel wish we are very happy to expand on any matters.

Does the FTAA allow for changes during the application process?

10. In our opinion the FTAA clearly envisages changes can be made through the process. That is clear from the processes established by the FTAA, including:

(a) a request for written comments on the substantive application, which is broadly framed, for those parties required or invited to be asked for comments;[5]

(b) the ability for the applicant to respond to those comments;[6] and

(c) the ability for a panel to request further information or a report.[7]

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[3] For completeness the Application seeks both resource consents that would otherwise be applied for under the RMA and archaeological authorities ordinarily sought under the Heritage New Zealand Pouhere Taonga Act 2014. We understand the latter approvals are not affected by the proposed changes, and therefore it is only the matter of resource consents that are considered in our advice.
[4] Minute 8.
[5] FTAA, s 53(1)
[6] FTAA, s 55.
[7] FTAA, s 67. Natural justice requires the opportunity for an applicant to respond to any such information or report.

11. That changes can be made through the FTAA process aligns with common RMA practice for changes to be proposed to a proposal after consent applications have been lodged with the relevant authority. While there are many cases on point[8] while old, the Planning Tribunal in *Haslam v Selwyn District Council* succinctly stated:[9]

> 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.

12. We consider that the same approach applies to the FTAA process (with the necessary modifications). It fits within the processes mentioned above and is beneficial to the process if applicants can refine or modify an application in response to comments from other parties (provided the legal tests are met).[10]

13. We consider the purpose of the FTAA gives further support to this position. That is, allowing some degree of change to be made to an application assists in "[facilitating] the delivery of infrastructure and development projects with significant regional or national benefits".[11] It also fits within using "timely, efficient, consistent and cost-effective processes".[12] The alternative of not allowing such changes, but rather requiring the resubmission of an amended application, would frustrate rather than facilitate the delivery of such projects and deliver inefficient outcomes.

As changes through the FTAA process are allowable, what are the limits on such changes occurring?

14. In our opinion there are two scope questions to be asked for a listed project through the FTAA process being, as relevant in this case, whether the changes proposed by the Applicant in response to comments are:

    (a) within scope of the project as listed in Schedule 2 of the FTAA; and

    (b) within the scope of the substantive application lodged with, and accepted as complete by, the EPA.[13]

[8] See for example, *Gray Cuisine Ltd v South Waikato District Council* [2010] NZEnvC 230, [2012] NZRMA 93 at [59] and [63].
[9] *Haslam v Selwyn District Council* (1993) 1B ELRNZ 15 (PT) at 21. Supported in *Collins v Northland Regional Council* [2013] NZHC 3039 at [26].
[10] This position aligns with the Memorandum of counsel for the Applicant with response to Minute 8, at 4.2 and the Third memorandum of counsel for Auckland Council, Auckland Transport and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [3.7].
[11] FTAA, s 3.
[12] FTAA, s 10(1).
[13] FTAA, s 42(1).

Schedule 2 listing

15. The authorised person for a listed (or referred) project may lodge with the EPA a substantive application for the project.[14] The first key scope point is what is a project? "Project" is defined in s 4(1) of the FTAA and, as relevant, means "the project as described in Schedule 2" and includes "any activity that is involved in, or that supports and is subsidiary to" that project.

16. There are some unique provisions in the FTAA that limit what can be applied for in a substantive application. For example, 'ineligible activities' cannot be applied for,[15] and a listed project must be as described in Schedule 2 to the FTAA.[16] Plainly, any changes to an application could not introduce ineligible activities or go beyond the project description.[17]

17. In this case ineligible activities are not in issue. So, the key parameters for the scope of the project are:

    (a) the Schedule 2 listing for the project as set out above, which:

        (i) is broadly worded in relation to subdivision for residential development and "associated features";[18] and

        (ii) also refers to the "approximate geographical location"; and

    (b) the purpose of the FTAA to facilitate the delivery of infrastructure and development projects with significant regional and national benefits.

18. The changes by the Applicant, as summarised above, in our opinion fit within listing description for the project. Further, the FTAA definition of a project also includes "any activity that is involved in, or supports and is subsidiary to, a project …".[19] In particular, counsel for the Council family clearly set out how and why the small commercial super lot proposed by the Applicant supports, and is subsidiary to, the project.[20] We agree and consider it reflects a common activity supporting and subsidiary to (and in our opinion also an 'associated feature' of residential development at this scale).

19. Importantly, the affected area has not expanded beyond the "approximate geographical location" noted in Schedule 2.[21]

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[14] FTAA, s 42.
[15] Defined in s 5 of the FTAA and applied in various provisions including ss 43(1)(c), 46(2)(c) and 85(1)(a).
[16] Under s 4(1) of the FTAA, 'listed project' "means a project listed in Schedule 2". 'Project' means, in relation to a listed project, "the project as described in Schedule 2" and includes "any activity that is involved in, or that supports and is subsidiary to" the project.
[17] Consistent with the Third memorandum of counsel for Auckland Council, Auckland Transport and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [3.1].
[18] Not that we consider it necessary in this case, but we do consider if there was a significant issue as to what the listing description meant support could be gained from the listing application (and the same for a referral application and decision).
[19] FTAA, s 4.
[20] Third memorandum of counsel for Auckland Council, Auckland Transport and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [3.12]–[3.13] and [3.17].
[21] Even if it had the "approximate" nature of the description indicates a degree of impreciseness and hence some limited potential latitude depending on the circumstances. But the potential to exceed any scope parameters immediately arises if new areas are added. This is especially so where there are consultation requirements in the FTAA and a requirement to list persons considered affected.

20. In our opinion the 'facilitation' element of the FTAA's purpose also provides some guidance to the listing of a project. It necessitates some active consideration of how to deliver the benefits. In this case, it supports elements such as a commercial super lot, facilitating the benefits of the overall project (and responds to a comment from the Council family). We also do not consider that the proposed changes will reduce the project's benefits so there is no argument as to whether the purpose of the FTAA has been compromised by the changes).

The substantive application

21. The substantive application must relate "solely to a listed project".[22] Given the numerous statutory requirements, including those mentioned above, the substantive application adds significant 'meat to the bones' of a listed project's description in Schedule 2 of the FTAA.

22. The accepted substantive application sets the base for the rest of the FTAA process, including comments. Any changes requested through comments, or proposed in response to comments, must come within the scope of the substantive application, otherwise the panel has no jurisdiction to consider them.

23. The highest authority in relation to questions of scope under the RMA is the Supreme Court's decision in *Waitakere City Council v Estate Homes Ltd*.[23] In that case, the Supreme Court stated:[24]

> We accept 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. …

24. The Supreme Court in *Estate Homes* also stated that, where a question of scope arises, "the question of any prejudice to other parties, and the general public, is always relevant."[25]

25. Subsequent RMA case law is that amendments may be within the scope of an original applications if they:[26]

    (a) are fairly and reasonably within the ambit and scope of the original consent application and do not result in what is in substance a different application;

    (b) do not result in a significant difference in scale and intensity of the proposed activities or the character of their environmental effects compared with the activities described in the original consent application; and

    (c) do not prejudice any person.

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[22] FTAA, s 46(2)(b).
[23] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.
[24] At [29].
[25] At [35].
[26] *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27, (2021) 22 ELRNZ 557 at [22]. The key cases referred to include the Supreme Court decision in *Estate Homes*; *Atkins v Napier City Council* (2008) 15 ELRNZ 84 (HC) at [20]–[21]; *H.I.L Ltd v Queenstown Lakes District Council* [2014] NZEnvC 45, (2014) 18 ELRNZ 29 at [42]; and *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005 at [7].

26. Under the FTAA process, post completeness acceptance, the issue of prejudice may arise:

    (a) where additional persons may have been invited to comment on the substantive application if the changes were included in the application as lodged; and/or

    (b) where persons invited to comment may have provided different comments on the application if the changes were included in the application as lodged.

27. We consider that the RMA case law above is relevant to a consideration of scope under the FTAA.[27] While the procedure under the FTAA is much more focused than the RMA, the comments process is a critical part for external input from the limited parties involved to give their position to the panel. Those comments are predicated on the substantive application.

28. Addressing the scope matters in turn in relation to the Application, we consider that the amendments proposed by the Applicant:

    (a) Are "fairly and reasonably" within the scope of the substantive application. A focus of the legal submissions for the Council family is rightly on the new commercial super lot. Its inclusion responded to comments that the proposal did not include sufficient facilities to support residential development.[28] We are comfortable that the inclusion of the commercial super lot "fairly and reasonably" sits within the bounds of the substantive application.

    (b) Do not result in a significant difference in scale and intensity of the proposed activities or the character of their effects from those in the substantive application. The substantive application relates to a large residential subdivision and development. The proposed amendments, in our opinion, relate to more technical / process option provisions, or to providing additional provisions to support a residential development of its size. The Applicant[29] states that the changes responded to the Council family's comments. Again, the memorandum from the Council family is helpful in addressing these matters, stating that due to the small size of the commercial super lot it is not considered to "result in any material change in effects."[30] Additionally for a FTAA application, the amendments will not, in our option, materially change the benefits.

    (c) No prejudice arises in relation to whether additional persons may have been invited to comment. The geographic area has not changed. The amended matters met the requirements of (a) and (b) above. We do not see a reason why the amendments in this case would have resulted in the panel deciding to invite other persons to comment.

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[27] The only matter we would add from the FTAA process is a practical one of timing. Given the clear time directions under the FTAA, and the inability of a panel to change timeframes, it may practically arise in some cases that there is simply no time for a panel to consider further changes beyond those it must consider under s 81(2)(a). But that is not the case here.
[28] Third memorandum of counsel for Auckland Council, Auckland Transport, and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [3.13].
[29] Memorandum of counsel for the Applicant with response to Minute 8, at 5.5.
[30] Third memorandum of counsel for Auckland Council, Auckland Transport, and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [3.17].

(d) No prejudice also arises in relation to persons who may have made different comments. In this case the amendments reflected comments, and the panel has, through Minute 9, provided an opportunity for the Council family to review the additional information and respond. Further, as above, amended matters meet the requirements of (a) and (b) we do not consider that the changes are such that those who chose not to comment would otherwise have done so.[31] However, the panel could request further information from any other party invited to comment if it wished.

Yours sincerely

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[31] Consistent with the Third memorandum of counsel for Auckland Council, Auckland Transport, and Watercare Services Limited regarding issues of scope (dated 18 July 2025) at [1.2(b)].