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 / Proposal**)

FOURTH LEGAL MEMORANDUM OF COUNSEL FOR AUCKLAND COUNCIL, AUCKLAND TRANSPORT, AND WATERCARE SERVICES LIMITED

Dated: 28 July 2025

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 This memorandum provides further legal comments for the Council family[1] following receipt of the Applicant's response to comments.

1.2 We provide an updated summary of the Council family assessment in light of the further information provided by the Applicant, and then respond to matters in the memorandum of counsel for the Applicant dated 5 July 2025, addressing the following topics:

(a) the FTAA's statutory scheme and how the Council family has reflected that in its comments;

(b) the relevance of the recent *Glenpanel* decision and the Applicant's apparent misunderstanding of the Council's position on that case;

(c) the role of planning and infrastructure considerations under the FTAA and the Applicant's contention that the project's listing in Schedule 2 of the FTAA removes the distinction between Future Urban Zone (**FUZ**) and 'live zoned land';

(d) the effect of Delmore being listed in Schedule 2 of the FTAA, and why that listing does not displace the Panel's independent discretion to assess the degree or scale of benefits that arise from the Proposal;

(e) cost benefit analysis;

(f) the Applicant's approach to the assessment of water and wastewater capacity based solely on granted resource consents;

(g) the scope of Watercare's discretion to decline to provide connections under the Water Supply and Wastewater Network Bylaw 2015;

(h) legal issues concerning conditions of consent.

[1] Auckland Council (encompassing Healthy Waters), as well as Council Controlled Organisations (**CCOs**) Auckland Transport (**AT**) and Watercare Services Limited (**Watercare**) (collectively the Council family).

1.3 Not every submission made for the Applicant has been responded to. This should not necessarily be taken as acceptance of those submissions. Rather, this memorandum focuses on the key matters of difference.

2. UPDATED SUMMARY OF COUNCIL FAMILY ASSESSSMENT

2.1 Following careful review of the further information provided by the Applicant on 7 July 2025, the Council family's updated assessment of the Application remains that there are adverse impacts meeting the section 85(3) FTAA threshold. That is to say, it is assessed that there remain a number of adverse impacts that, individually and collectively, are sufficiently significant to be out of proportion to any regional benefits, even after taking into account any conditions or modifications to address those adverse impacts, namely:

(a) Water supply servicing[2] – It remains Watercare's assessment that the existing bulk water supply network is limited in this area and does not have sufficient capacity to support growth in the existing live zoned areas in addition to the Delmore Project. For the reasons explained in this memorandum and Watercare's further comments, the Applicant's assessment of capacity based solely on granted resource consents fundamentally misunderstands how capacity planning must be undertaken having regard to Watercare's statutory functions and duties. The absence of a clear proposal for water supply servicing is a key infrastructure deficit, creating significant uncertainty as to the feasibility of development (if consent is granted).

(b) Viability of wastewater servicing[3] – Watercare's assesment remains that the earliest connections could be provided without precluding development of the existing live zoned areas and sequenced growth would be from 2050+. Watercare's further comments also confirm that it will not be accepting trucked wastewater from the Proposal. The Applicant has not demonstrated a viable long-term private wastewater solution, and the absence of this is a significant adverse impact with potential public health risks for the future community.

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2 This is Issue 1 at paragraph 240 of the 25 June Strategic and Planning Memo, and related Issues 10 and 11.

3 Issue 2 at paragraph 240 of the 25 June Strategic and Planning Memo, and related Issues 10 and 11.

(c) Design and metrics of neighbourhood parks[4] – Mr Pope notes that, while the majority of deficiencies have been addressed, some key matters remain outstanding such that this remains a significant issue, albeit one which could potentially be addressed through the provision of further information.

(d) Transport infrastructure issues[5] – It remains AT's assessment that the formation of only part of NoR 6 does not deliver a regionally significant benefit. It would only serve the development site and provide no efficiency or wider arterial corridor benefits. The proposed alignment deviation has potentially significant cost implications for AT and the Council. A memorandum from SGA in AT's updated comments confirms that this alignment was not approved as suitable during the NoR Hearings. AT's further comments identify further adverse transport impacts, including:

(i) Severe congestion at the Grand Drive/SH1 Interchange with 600-metre queues extending along Grand Drive during morning peak hours;

(ii) Intersection safety issues at the Wainui Road/Upper Ōrewa Road intersection which will experience a 183% increase in right-turning traffic;

(iii) Internal road hierarchy deficiencies (lack of collector roads) which will lock in suboptimal public transport outcomes and not provide safe cycling facilities. This in turn will lead to a highly car-dependent community, contradicting sustainable transport objectives and generating higher trip rates than anticipated;

(iv) Inadequate assessment of stormwater discharges and flow paths with respect to safety of pedestrians and road users.

4 Issue 3 at paragraph 240 of the 25 June Strategic and Planning Memo.

5 Issues 4 to 6, at paragraph 240 of the 25 June Strategic and Planning Memo, as well as related Issues 10 and 11.

(e) Freshwater and terrestrial ecology[6] – The development represents a potentially significant adverse impact on indigenous biodiversity that has not been properly assessed, avoided, or mitigated, including:

(i) wetland loss/offset implications in the context of the NoR 6 arterial road works and unassessed hydrological changes to wetlands;

(ii) stream morphology and increased erosion pressure leading to local and downstream loss of stream value in the receiving tributary of the Orewa River; and

(iii) lack of proper site-specific surveys for fauna and flora and reliance on desktop analysis for a development of scale affecting complex natural habitats and existing covenanted areas.

(f) Sedimentation effects[7] – A key issue remains relating to the need for an Adaptive Management Plan, which is not accepted by the Applicant. The adverse impacts related to earthworks (sedimentation) are assessed as significant without an AMP. However, the Panel is able to resolve this issue by imposing the recommended AMP condition.

2.2 Additional information provided by the Applicant has however resolved the Council family's earlier concerns with respect to structure planning connectivity to the wider FUZ area (although Mr Pope notes in this regard that the Delmore project continues to provide an uncoordinated approach for the delivery and coordination of infrastructure and roading).[8]

2.3 The Council family's assessment that the section 85(3) FTAA threshold for declining an approval is met is also informed by its evaluation of the scale of the regional benefits that arise from the Proposal. As noted above, the partial delivery of NoR 6 does not confer any regional benefit. The Council family's assessment of ecological effects is that, rather than being a regional benefit, the effects are potentially adverse. The purported housing supply benefits

6 Issue 7 at paragraph 240 of the 25 June Strategic and Planning Memo.
7 Issue 8 at paragraph 240 of the 25 June Strategic and Planning Memo.
8 Issue 9 at paragraph 240 of the 25 June Strategic and Planning Memo.

are unsubstantiated without proper economic analysis showing net societal benefit over the planned development sequence.

2.4 Further discussion of these matters is provided in Mr Pope's update planning memorandum under the same issue headings identified in the Memorandum of Strategic and Planning Matters for Auckland Council dated 25 June 2025.

3. FTAA'S PURPOSE, WEIGHTING AND FRAMEWORK

3.1 The Applicant contends that the Council has failed to appreciate the "transformational effect" of the FTAA[9] and implies the Council has approached the Delmore Application as if under the Resource Management Act 1991 (**RMA**) regime. With respect, this is incorrect.

3.2 The Council's legal memorandum and evaluation were expressly based on the FTAA's bespoke decision-making framework, not the RMA's usual tests. The Council is acutely aware that the FTAA fundamentally changes certain aspects of the usual resource consent process. Indeed, the Council's 25 June 2025 legal memorandum detailed how the purpose of the FTAA must be given the greatest weight, ahead of RMA Part 2 matters, [10] and acknowledged that the non-complying activity gateway in s 104D does not apply.[11]

3.3 The Council family accepts that the FTAA's statutory purpose *"to facilitate the delivery of infrastructure and development projects with significant regional or national benefits"* is the most influential consideration in the Panel's decision-making. The Council has not suggested it is enough to warrant decline of the Proposal solely because it conflicts with the operative Auckland Unitary Plan (**AUP**) zoning and is "out of sequence" under the Future Development Strategy (**FDS**). Rather, the Council's position has been that the extent of Delmore's regional benefits must be balanced against its adverse impacts in the manner prescribed in section 85(3) to (5) of the FTAA[12] to determine whether those impacts are out of proportion to the benefits, such that the Panel's discretion to decline the Application is

9 Memorandum of Counsel for the Applicant at [2.15]
10 Paragraphs 2.6, 3.15, 3.21, 3.23.
11 Paragraph 3.15(b).
12 Which follows consideration of the assessment matters in section 81 and clause 17 of Schedule 5 – including clause 17(1)(a).

engaged. The Council is fully aware that this creates a high bar for declining a project.

3.4 In short, the Council's recommendation that the RMA-related approvals for Delmore should be declined was not made lightly or by applying any lesser test; it was reached only after concluding, on the evidence, that certain adverse impacts of the Delmore Proposal are sufficiently significant that they would outweigh its benefits, even when the purpose of the FTAA is given the mandated greatest weight.

4. THE *GLENPANEL* DECISION

4.1 The Applicant places considerable emphasis on the Court of Appeal's recent judgment in *Glenpanel*[13] arguing that the Council's stance is *"inconsistent with the findings of the Court of Appeal in Glenpanel."*[14] The Applicant appears to have misunderstood the thrust of the Council's observations regarding *Glenpanel* in its 2 July memorandum.

4.2 *Glenpanel* was decided under the Covid-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**), which had a different decision-making framework to the FTAA. A key issue in *Glenpanel* was the application of RMA section 104D's "non-complying activity" gateway test in the fast-track context.[15] The panel found that adverse effects would be more than minor and that the project was contrary to a set of objectives and policies in the Proposed District Plan, including the avoidance of urbanisation of rural land outside urban growth boundaries and the protection of landscape values of outstanding natural features.

4.3 The Court of Appeal noted that the fast-track regime was intended to "bring forward" projects that would otherwise likely be granted under the RMA in the future, including "planned projects",[16] and found that the Panel in *Glenpanel* erred by concluding that *"the plain wording of the provisions of the Proposed District Plan prevented the application from being granted because urbanisation of this area was planned for a later time"*.[17]

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13 *Glenpanel Development Ltd v Expert Consenting Panel* [2025] NZCA 154.
14 Memorandum of Counsel for the Applicant at [2.15].
15 *Glenpanel Development Ltd v Expert Consenting Panel* [2025] NZCA 154 at [14]-[16].
16 At [43].
17 At [44].

4.4 However, as the Council pointed out in its second legal memorandum dated 2 July 2025, the FTAA has its own distinct evaluative framework which does not carry over RMA section 104D at all; and imposes the proportionality test in section 85(3) and an express instruction in section 85(4) that inconsistency with planning documents is not, by itself, a sufficient reason to decline. The simple point is therefore that the express words of the FTAA reflect this aspect of the *Glenpanel* decision and therefore, in this sense, it does not 'shift the needle' on the decision-making framework.

4.5 The Applicant's legal memorandum cites *Glenpanel* for the proposition that the very purpose of fast-tracking is to advance projects likely to be consented eventually. However, the Applicant overlooks other important observations made by the Court of Appeal in *Glenpanel* that:

(a) Bringing forward consideration of projects in this way does not mean applications should be granted;[18]

(b) The more nuanced approach to appraisal of objectives and policies flowing from *East West Link* does not dictate an outcome;[19] and

(c) Under the more nuanced approach, uncertainties connected with where and how the urban development would take place, including uncertainties about exactly how such urbanisation would occur, would properly be taken into account by the Panel.[20]

4.6 While these statements from *Glenpanel* arose under a different statutory scheme, they do underscore that a fast-track panel process is not a 'rubber-stamp'; it must still assess effects and can refuse consent if warranted.

4.7 In summary, the Council's position is not "inconsistent" with *Glenpanel*. Rather, the Applicant and Council simply draw different conclusions from the evidence as to whether Delmore's adverse effects reach the threshold set by the FTAA whereby the Panel may decline an approval.

4.8 Finally, the Applicant submits that *Auckland Council v Matvin*[21] is of limited assistance due to the subsequent *East West Link* decision and its more

18 At [45].
19 Ibid.
20 At [46].
21 Applicant's legal memorandum, at [6.1].

nuanced approach to plan interpretation. However, while *East West Link*[22] and *Glenpanel*[23] both refer to a more 'nuanced' approach to policy interpretation, they do not undermine the core findings in *Matvin*[24] regarding the interpretation of the AUP's Future Urban Zone provisions. We make several observations in this regard:

(a) His Honour Woolford J's analysis of the directive language in the FUZ provisions – emphasising that words like "avoid," "prevent," and "cannot be used" should be given their natural meaning – remains good law.

(b) The key development from *East West Link* is the recognition that genuine, on-the-merits exceptions may be permitted where they would not subvert the general policy and where sustainable management clearly demands it.

(c) However, the Supreme Court was clear[25] that this exception is fact-specific, requiring circumstances where granting consent would advance rather than undermine the policy framework and where sustainable management clearly demands it. We also draw to the Panel's attention the Supreme Court's comment that the *"the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified"*.[26]

(d) As discussed further in **Section 5** below, under the FTAA regime, 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.

5. PLANNING AND INFRASTRUCTURE ISSUES REMAIN RELEVANT UNDER THE FTAA

5.1 A central theme of the Applicant's Memorandum is that the issues raised by the Council family in relation to the FUZ status of the land, the timing of

22 At [101], [109]-[110].
23 At [33]-[47].
24 At [29]-[38].
25 At [110].
26 At [110].

infrastructure upgrades, and alignment with strategic plans should carry little to no weight under the FTAA.

5.2 The Applicant argues that because Delmore is listed in Schedule 2 this *"removes the distinction between FUZ and 'live zoned land'"*.[27] The Council does not agree that the effect of the FTAA listing or *Glenpanel* is such that the FUZ status of the land is entirely negated. The Court of Appeal in *Glenpanel* did not say that the provisions of the objectives and policies in the Queenstown Lakes Proposed District Plan relating to urbanisation of rural land outside urban growth boundaries are irrelevant. The Applicant's submission that the FUZ status is irrelevant is not supported by the text of the FTAA or any legal authority. It is counter to clause 17 of Schedule 5 to the FTAA, which incorporates section 104(1)(b) such that relevant provisions of the AUP must be had regard to as part of the wider FTAA assessment.

5.3 It is important to distinguish between treating planning documents as a binding constraint (which the Panel must not do under section 85(4)) and considering the underlying issues those documents address. The Council family has never argued that simply because the land is FUZ, consent must be refused.

5.4 While the FTAA allows development to proceed ahead of traditional plan sequencing, it does not follow that the real-world implications of out-of-sequence development can be ignored. On the contrary, the FTAA's section 81(3) and Schedule 5 require the Panel to consider effects on the environment, infrastructure requirements / implications, and relevant RMA planning matters, albeit with a different weighting.

5.5 The FUZ status and FDS timing for live zoning the Delmore land reflects an adopted planning judgment that significant supporting infrastructure (e.g. water, wastewater, and transport) is needed before intensive development occurs, and that such infrastructure is not expected to be in place before a future date. While the Panel is empowered to accelerate development ahead of that schedule, the consequences of doing so must still be grappled with. This approach is entirely consistent with the findings in *Glenpanel*.

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27 Applicant's legal memorandum at [2.14], and also at [5.9], item 2.

6. EFFECT OF LISTING OF DELMORE IN SCHEDULE 2 FTAA

6.1 The Applicant argues that the listing of Delmore in Schedule 2 of the FTAA means that *"the existence of significant regional benefits has already been established"* and it is not open to the Panel to conclude otherwise when undertaking its assessment under section 81(4) of the FTAA.

6.2 Looking to the text and purpose of the FTAA, we agree with the Applicant's legal memorandum that that the Panel's focus should be on "the extent of the project's regional or national benefits" meaning their "scope and degree".[28] However, the Council family does not agree that the project's listing displaces the Panel's independent discretion to assess whether the contended benefits are "significant", or otherwise, in light of all evidence before it.

6.3 In this regard, the Applicant has not responded to the following points at [3.34] of the Council's 25 June legal memorandum:

(a) The Ministry for the Environment's advice in relation to Delmore's potential listing is clear that it reflects an *"initial (Stage 1) analysis of the application"*, and is subject to the following disclaimer: *"Given time and scope constraints, the initial assessment is solely based on information provided by applicants. There may be additional relevant information which has not been provided to MfE."* The Applicant has not explained how this initial, stage 1, and expressly disclaimed analysis can properly result in a deeming of significant regional benefits that cannot be displaced by further assessment and the receipt of additional information and evidence.

(b) Under the FTCA, where several expert consenting panels appointed under that legislation found that they were not bound by Ministerial determinations that projects would help achieve the purpose of the FTCA, and were required to make their own independent assessments of applications against the statutory purpose.[29] The Applicant has not explained why it believes that the Panel does not likewise have to make its own assessment of the regional benefits of the proposal.

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28 Applicant's legal memorandum at [4.26].

29 The FTCA decisions on the following projects: Tasman Aquaculture Trials, at [45], Kohimarama Retirement Village, at [31], Hananui Aquaculture, at [53].

6.4 We note the following further points:

(a) The Applicant's reference[30] to sections 21 and 22 of the FTAA is somewhat perplexing, given those provisions relate to referral applications, not listed projects such as Delmore.

(b) In any event, the text of sections 81 and 85 of the FTAA plainly contemplates an assessment of the scope and degree of a project's regional or national benefits, encompassing the extent of their 'significance'.

(c) The Applicant's approach could lead to perverse outcomes where a Panel identifies on the much more fulsome evidence and assessment that a project will not give rise to regionally significant benefits, but is not able to act on that and is forced to approve a project that does not meet the statutory purpose. It must therefore be permissible to assess whether the particular project being brought forward will actually give rise to the degree of potential benefits which supported the initial listing on a regional or national scale.

(d) The Council family's interpretation is consistent with the text of the relevant provisions. Section 81(4) of the FTAA requires the Panel to consider the extent of the project's regional or national benefits, not its "significant" regional or national benefits, when taking the purpose of the FTAA into account in its assessment of a proposal. It is this assessment by the Panel of the benefits of the Proposal which forms the basis for its assessment under section 85(3)(b) of whether adverse impacts are out of proportion to the benefits of the proposal. Were the Panel simply bound by the preliminary 'stage 1' assessment as to the benefits of a proposed project, the FTAA would not make specific provision for the Panel itself to consider the extent of a project's regional or national benefits.

30 Applicant's legal memorandum at [4.25].

7. ASSESSMENT OF COSTS AND BENEFITS OF THE PROPOSAL

7.1 The Applicant's legal memorandum is critical of Mr Stewert and Dr Meade recommending a cost benefit analysis of the Project to determine whether it actually delivers net benefits. It is suggested that:

(a) this is effectively a section 32 RMA analysis;[31] and

(b) the costs and benefits of urbanisation of the site have already been weighed under the AUP.[32]

7.2 The assessment and decision under the AUP was to zone the site as FUZ, which serves as a holding zone and provides for future urbanisation of land subject to structure plan and rezoning processes. That assessment cannot be a substitute to consideration of the costs of this specific urbanisation proposal at this time.

7.3 Secondly, while the FTAA does not expressly include an express requirement to undertake a cost benefit analysis, the Council's economists have identified this framework as a tool by which to consider the net effects of this Proposal as against a counterfactual, and determine whether those are positive or outweighed by adverse impacts. This systematic approach does not entail any double counting of costs as suggested in the Applicant's legal memorandum. Mr Stewart's response memorandum explains why this approach is reasonable and feasible, and in fact necessary to assess the claimed benefits of the Proposal.

8. THE APPLICANT'S APPROACH TO THE ASSESSMENT OF WATER AND WASTEWATER CAPACITY

8.1 The Applicant has provided an assessment of water and wastewater network capacity based on its assessment of demand from granted resource consents and the Milldale Fast Track.[33] This ignores demand from growth enabled in existing live zoned areas and sequenced growth under the FDS.

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31 At [6.2].
32 At [6.4].
33 Appendix 45.1 - B&A Delmore Capacity Memo.

8.2 No clear legal basis is identified for this approach, which fundamentally misunderstands how capacity planning must be undertaken having regard to Watercare's statutory functions and duties.

8.3 Watercare's responsibilities (and therefore its capacity planning) are not limited to an 'environment' analysis of the kind described in *Hawthorn*[34] (i.e. encompassing permitted activities and granted resource consents likely to be implemented). Even if this narrow approach were adopted, permitted activities would need to be accounted for which are not, on the Applicant's approach.

8.4 Watercare must act consistently with the relevant aspects of any plan or strategy of the Council to the extent specified in writing by the governing body of the Council.[35] The FTAA has not altered that legal duty.

8.5 Watercare's current Statement of Intent 2024-2027 in response to the Council's 2024-2027 Letter of Expectation sets out that it will:[36]

(a) Act consistently with Council's FDS for major infrastructure development for future urban areas;

(b) Align its asset management plan with the FDS.

8.6 The Applicant's legal memorandum states that the FDS acknowledges that development ahead of programmed timelines may occur, and that Watercare has "failed to grasp this point" and not considered wider FDS principles in its comments.[37] It is further asserted that Delmore aligns with all FDS principles by reference to the Applicant's revised AEE. The Applicant's submissions do not pass scrutiny against FDS principles 3 and 5 which are particularly relevant to Watercare's interests.

8.7 Principle 3 is "Make efficient and equitable infrastructure investments". Two associated sub-principles are:

(a) Principle 3(a): "Take a regional view to infrastructure investment and costs". This is focused on achieving the infrastructure investment

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34 *Queenstown-Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 at [34] to [57].

35 Section 58 of the Local Government (Auckland Council) Act 2009 (**LGACA**)

36 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-annual-reports/Statements/watercare-soi-2024-2027.pdf

37 Applicant's legal memorandum at [6.41]

efficiency of consolidating growth within the existing urban area. It goes on to state that:

> Funding infrastructure to support growth in already identified future urban areas will be phased over a longer timeframe and balanced with the investments required in the existing urban areas.
>
> Rezoning and development in future urban areas earlier than when council can fund bulk and network infrastructure and services (out-of-sequence development) creates significant challenges to this regional approach. It often requires the reallocation of council infrastructure funding which impacts on the delivery of other planned infrastructure. This is why out of-sequence development is generally discouraged - further addressed in Principle 5.

(b) Principle 3(b): "Make the best use of existing infrastructure". This principle focuses on consolidating growth in existing areas to achieve efficiencies.

8.8 Principle 5, "Enable sufficient capacity for growth in the right place and at the right time", is broadly focused on prioritising and sequencing growth. While this principle acknowledges the need to be responsive to out of sequence growth proposals, there are important caveats to this:

> Given the need for council to be responsive in its planning, there may be scenarios where unanticipated and / or out-of-sequence development is appropriate. This may be the case with alternate or new infrastructure funding approaches which limit impacts on council's financial position and commitments. Council will therefore consider agreements with the private sector to provide the bulk infrastructure for development where this does not unduly impact the council's debt profile or other funding commitments. Consideration of the trade-offs and costs that might occur when development occurs out-of-sequence, ahead of existing priorities, will be applied.

8.9 The frame of analysis that Watercare has applied in its approach to capacity planning and commenting on this Proposal is entirely consistent with these relevant wider principles of the FDS. Conversely, the Applicant has only briefly touched upon these important aspects of the FDS principles in its revised AEE. Its assertion that the Proposal is consistent with those principles is based on inadequately supported assumptions that are contrary to Watercare's assessment with respect to issues of capacity and timing.

8.10 The Applicant notes[38] that the direction that Watercare act consistently with Council documents is subject to its overarching statutory obligation to:

[38] Applicant's legal memorandum, at [6.42].

"manage its operations efficiently with a view to keeping the overall costs of water supply and waste-water services to its customers (collectively) at the minimum levels consistent with the effective conduct of its undertakings and the maintenance of the long-term integrity of its assets." This is correct from a legal point of view. Watercare's stance on this Proposal is consistent with this obligation and it does not agree with Mr Thompson's analysis of cost recovery efficiency. The reasons for this are explained in Watercare's further comments. In short, Mr Thompson has adopted an overly narrow and simplistic view of ICG cost recovery efficiency across the Watercare network in relation to investment.

9. WATERCARE'S DISCRETION TO DECLINE TO PROVIDE CONNECTIONS UNDER THE BYLAW

9.1 The Applicant's legal memorandum comments on the scope of Watercare's discretion to decline to provide connections under the Bylaw, stating that:

(a) Watercare's discretion whether to grant connections must be exercised in accordance with the terms of the Bylaw;[39]

(b) Clauses (5)(c)-(d) and (6)(a)-(b) are the relevant clauses; and

(c) Watercare's position is based on a failure to understand the limits of its decision-making discretion.[40]

9.2 As noted in the Council family's first legal memorandum, the High Court and Court of Appeal in held *Thirty Eight Moffat Ltd* that the power of Watercare to decline to accept the vesting of assets did not stem from the Bylaw.[41] For example, as the High Court held:[42]

> … There is no right, as such, to water from the public water system; Watercare must agree. The phenomenon of agreement is something with which most Aucklanders are familiar: a contract between customer and Watercare. Similarly, there is no right, as such, to connect a watermain to the public water system. Again, Watercare must agree. …

39 At [6.33].
40 At [6.44].
41 Council family legal memorandum of 25 June 2025.
42 *Thirty Eight Moffat Ltd v Auckland* Council [2021] NZHC 2978, at [40].

9.3 Moreover, the Applicant's legal memorandum omits an important clause of the Bylaw, which would provide for Watercare to decline connections to FUZ land:[43]

> (5) Watercare may refuse an application for approval to connect to a network where:
>
> …
>
> (e) the connection is outside the area currently served by the water supply or wastewater network, regardless of its proximity to any specific component of the water supply or wastewater network;

9.4 As the Applicant notes, this process is not concerned with a future decision of Watercare on an application to connect the Proposal if it is granted.[44] However, Watercare has properly understood the scope of its discretion in this regard, and is responsibly signalling that it may refuse connections in that scenario in light of its assessment of capacity and its statutory duties.

9.5 However, even if the approval of a utility connection is not (and cannot be) a matter for the Panel to decide, the capacity of infrastructure (or lack thereof) upon which the Proposal relies, is an issue that is directly relevant to the adverse impacts of the Proposal.[45] The High Court has said that in assessing a resource consent application, the decision-maker should consider the current state of the resource and its adequacy to service those properties who are already entitled to develop.[46] The adverse impact of granting an application for development that cannot be undertaken as of right where such capacity constraints exist, and no viable alternatives have been proposed, is directly relevant to the adverse impacts of the Proposal.

10. CONDITIONS OF CONSENT

Conditions to be no more onerous than needed

10.1 The Applicant submits that the express direction in section 83 FTAA, that conditions must be no more onerous than necessary to address the reason for which it is set, is a substantive change from the jurisprudence related to conditions under the RMA.[47] The implication of the Applicant's submission is that conditions that are more onerous than necessary to address the purpose

43 Water Supply and Wastewater Network Bylaw 2015, clause 6(5)(e).
44 Applicant's legal memorandum, at [6.44].
45 *Norsho Bulc Ltd v Auckland Council* (2017) 10 ELRNZ 774 at [92] – [93].
46 *Coleman v Tasman District Council* [1999] NZRMA 39, at 47.
47 Applicant's legal memorandum, at [4.9] onwards.

for which they are set (i.e. disproportionate conditions) are lawful under the RMA. This cannot be correct.

10.2 However, we agree with the Applicant that the decision-making process that the Panel must go through under the FTAA when setting conditions is to:

(a) identify the reason it considers a consent condition is needed; and

(b) ensure that it is no more onerous than necessary for addressing that issue.

10.3 The Panel must also take into account the various matters set out in clause 17(1) of Schedule 5 when setting conditions (which 'imports' *inter alia* RMA sections relating to conditions), giving the greatest weight to the purpose of the FTAA.

10.4 In saying this, we do not understand the Applicant to be submitting that by section 83 FTAA the Panel is empowered by this approach to permit material environmental harm in service of facilitating project delivery.

Deemed Certification

10.5 The Council submits that RMA jurisprudence regarding the unlawfulness of deemed certification remains apposite and applicable under the FTAA.[48]

10.6 The reason that management plan conditions are needed is that the Applicant has not provided detailed information as to how relevant effects will be managed and seeks to resolve that detail at a later date. This is lawful where this detail is later certified by the regulator based on skill and judgement.[49]

10.7 In this Application, management plans are being proposed to manage a range of important matters including erosion and sediment control and effects on long tail bats, threatened or at-risk wetland birds, and native lizards. Limited detail is included in the draft plans produced by the Applicant to date given the scale of the site and the works proposed.

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48 *New Zealand Transport Agency – Waka Kotahi* [2024] NZEnvC 133, at [124] – [128] citing *Meridian Energy Ltd v Wellington City Council* [2011] NZEnvC 232 at [402].

49 *Turner v Allison* [1971] NZLR 833.

10.8 The intended effect of the deemed certification proposal from the Applicant seems to be that if the Council has not certified a management plan within a specified period, the plan is deemed to be certified.[50] That does not meet the purpose for which certification conditions are imposed, i.e. to provide for regulatory oversight of detail not provided at the resource consent stage. In other words, it is no more onerous than required for the condition to provide for the process of certification to take as long as it takes:

(a) If the Applicant provides a high-quality plan for certification, then it can expect certification to be forthcoming without unreasonable delay – noting the general duty that would apply under section 21 RMA.

(b) If there are issues or deficiencies with the plan in respect of which certification is sought, then it is not appropriate to place an arbitrary time limit on how long the Council may take to reach a decision as to certification.

10.9 We also note that the Applicant's conditions do not provide a process in the event that the Council declines to certify a plan. If the Panel is minded to grant consent, then the condition set should provide for this.

Adaptive Management Plan

10.10 The Applicant says the requirement for an AMP is a 'no risk' approach that is more onerous that is needed to achieve the reason for its imposition.[51] This characterisation is not accepted.

10.11 Rather than being a 'no-risk' approach, the Council family's approach acknowledges the risk of adverse sedimentation effects that flows from the scale, extent and duration of earthworks that are proposed, even after application of standard erosion and sediment control measures. The Council is not saying that this risk is intolerable, only that it requires management in the context of the sensitive significant ecological area receiving environment via a tried and tested adaptive management method.

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50 Applicant's legal memorandum at [6.18-6.21]. Note that the condition drafting "Auckland Council must respond to the request within 20 working days, or the management plan is deemed to be certified" is uncertain as to what constitutes a "response" within 20 working days.

51 Applicant's legal memo at [6.26].

10.12 The trigger levels, monitoring and response requirements of an AMP are not an onerous imposition, and as Mr Byrne's memorandum explains this has been successfully applied at the nearby Ara Hills and Milldale developments.

Wainui Road and Upper Orewa Road intersection

10.13 The Applicant opposes a condition requiring it to upgrade the Wainui Road and Upper Orewa Road intersection. The Applicant says that as this intersection is already falling short of required operational standards AT's proposed condition is not "directly connected" to the adverse effects of Delmore on the traffic environment (or any of the other matters in section 108AA(1) RMA) and cannot be imposed.[52]

10.14 This submission is unsustainable where the Proposal will increase the volume of traffic turning right into Upper Orewa Road by 183%, significantly exacerbating the pre-existing issue. The road safety and operational effects associated with this additional traffic are caused by the Proposal and the Applicant should be required to mitigate them.[53] As the Environment Court held in *Laidlaw*[54], while an applicant is not required to resolve existing infrastructure problems, neither should it add significantly to them.

11. CONCLUSION AND RECOMMENDATIONS

11.1 The result of the Council family's comprehensive assessment remains that under the FTAA's section 85(3) proportionality test the Proposal's adverse impacts substantially outweigh any regional benefits. The recommendation in Mr Pope's update planning memorandum dated 28 July 2025 is to **decline** the Application.

11.2 We note that further responses regarding water and wastewater capacity are to be provided by the Applicant and Council by 5 August 2025. It would be appropriate for Watercare to be provided with an opportunity to respond to that.

11.3 Counsel and Mr Pope are available to attend a conference if that would assist the Panel.

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52 Applicant's legal memo at [6.31].
53 PTM memorandum of 18 July 2025, Paragraph 81.
54 *Laidlaw College Inc v Auckland City Council* [2011] NZEnvC 248 at [38].

DATED the 28th day of July 2025

Matt Allan / Rowan Ashton / Michelle Hooper
Counsel for Auckland Council family