Jeremy Brabant
BARRISTER
ENVIRONMENTAL LAW

Level 7, 50 Albert Street
Auckland Central

PO Box 1502, Shortland St
Auckland, New Zealand

M. 021 494 506
E. jeremy@brabant.co.nz

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Environmental Protection Authority
Ashbourne Expert Consenting Panel

Attention: Panel Chair - Sue Simons
by email

Dear Sue

FTAA-2507-1087 - Ashbourne Project – Legal Advice on National Policy Statement for Highly Productive Land and Other Matters

1. I refer to your instructions to provide legal advice on matters arising from the Expert Panel's (**Panel**) consideration of the Ashbourne Project's[1] consent application (**Application**) lodged under the Fast-track Approvals Act 2024 (**FTAA**).

2. The Panel seeks advice regarding the application of the National Policy Statement for Highly Productive Land 2022[2] (**NPS-HPL**) and specific matters relating to its consideration and decision-making on the Project.

Context – The Proposal

3. The Application was lodged with the Environmental Protection Authority (**EPA**) on 23 July 2025 and deemed complete on 13 August 2025.

[1] The Project seeks approval of a proposed residential and retirement development of 530 new homes and 250 retirement units in Matamata, along with associated commercial development and infrastructure, and two new solar farms (**Project**).
[2] Amended August 2024.

4. The Project site is approximately 125ha comprised of numerous land titles located approximately 1.8km southwest of Matamata (**Site**). Details of the Site and Project are described in the AEE.

5. In summary, as lodged the Project includes:

   (a) A residential development, associated earthworks and subdivision, comprising approximately 530 residential units, public open space and a neighbourhood centre comprising commercial activities.

   (b) A multi-functional greenway including active transit nodes, development infrastructure and stormwater management devices.

   (c) A retirement development and earthworks comprising approximately 250 units, an associated hospital, and additional supporting facilities.

   (d) Two solar farms, covering approximately 13 hectares and 25 hectares respectively, with associated vegetation planting and earthworks and associated infrastructure with the potential to provide up to 52,000 megawatt-hours per year, sufficient to power 8,000 homes.

6. The proposed solar farm land will continue to be used for agricultural purposes (agrivoltaic use) as the proposed layout and height of the solar panels allows that rural use to occur.

7. The Panel's questions arise out of comments received from Matamata-Piako District Council[3] (**MPDC**) and Matamata Development Limited's (**Applicant**) subsequent response.[4] I have reviewed both sets of material.

Questions

8. The Panel has asked:

   (a) **Question 1:** The extent to which the Applicant's land productivity assessments are applicable given the Environment Court's decision in *Blue Grass*. Does the FTAA provide a pathway to put aside what appears to be the current RMA position that a

[3] Comments package dated 11 November 2025.
[4] Response package dated 18 November 2025.

site-specific soil report cannot be used as a means of avoiding the directions in the NPS-HPL?

(b) **Question 2:** Is the Panel entitled to issue a partial consent and what are the implications regarding whether there will remain net regional benefits?

(c) **Question 3:** What weight should be given to out of sequence development?

(d) **Question 4:** What is the relevance of the PDA's being prepared to address infrastructure funding. Do they need to be completed before the Decision issues, or could they be a condition precedent?

Question 1

The extent to which the Applicant's land productivity assessments are applicable given the Environment Court's decision in Blue Grass. In other words, does the FTAA provide a pathway to put aside what appears to be the current RMA position that a site-specific soil report cannot be used as a means of avoiding the directions in the NPS-HPL.

9. It is clear from the text of the NPS – HPL and the subsequent interpretation in *Blue Grass*[5] that a site-specific land productivity assessment or soil report cannot be used as a method to avoid the application of the transitional definition of "highly productive land" or the application of the NPS-HPL to land identified as being highly productive at the date of commencement of that instrument.[6] *Blue Grass* remains good law. Nothing in the FTAA changes that position.

10. The NPS – HPL defines "highly productive land" as:[7]

> **highly productive land** means land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement and clause 3.5(6) for when land is rezoned and therefore ceases to be highly productive land)

11. Clause 3.5(7) provides:

[5] *Blue Grass Limited v Dunedin City Council* [2024] NZEnvC 83.
[6] 22 October 2022.
[7] Clause 1.3.

> (7) Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:
>
> (a) is
>
> (i) zoned general rural or rural production; and
>
> (ii) LUC 1, 2, or 3 land; but
>
> (b) is not:
>
> (i) identified for future urban development; or
>
> (ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

12. The implication of *Blue Grass* is that a site-specific soil survey or productivity report cannot be used to re-categorise whether land is properly regarded as LUC 1, 2 or 3.[8]

13. As it happens, in any event the Landsystems detailed on-site assessment lodged in this matter confirms that the Site contains predominantly LUC 1, 2 and 3 soils.[9]

14. Consequently at face value the Applicant would not appear to be greatly assisted by the conclusions of its site-specific soil report (that much of the Site's rurally zoned land contains predominately LUC 1 and 2 soils) but that is a matter for the Panel to consider to the extent it takes that report into account. In that respect, the Landsystems report could assist in the Panel's assessment of adverse impacts and the Site's real world soil constraints.

15. It is my view that:

(a) The FTAA does not provide an alternative pathway to "put aside" the position in *Blue Grass* as:

(i) The Court's interpretation of cl 3.5(7) equally applies to consent applications applied for under the RMA and FTAA as the required interpretation relates to the NPS-HPL instrument itself, rather than the relevant consenting process in play.

(ii) The legislative regime under which an applicant applies does not amend the provisions of the NPS-HPL (or the interpretation of those provisions) or render them irrelevant.

[8] Land Use Capability (**LUC**) class is determined by the New Zealand Land Resource Inventory (**NZLRI**) as of 17 October 2022.
[9] AEE, Appendix 1L Land Use Capability Classification Assessment, Appendix 2 Dominant LUC Map.

16. Consequent on those findings, it is not open to a consent applicant under the FTAA to use site-specific soil reports as a mechanism to avoid being captured by the NPS-HPL's transitional definition.

17. The assessment of the NPS – HPL in the context of this Project ultimately falls to be assessed by the Panel in the context of its s 81 consideration of the Application. That engages a weighting exercise which requires the greatest weight to be given to the FTAA's purpose. It does not enable the NPS – HPL to simply be disregarded.

18. To round out the above, while the FTAA does not provide a pathway to simply put aside the implications of *Blue Grass* and therefore the engagement of the NPS-HPL, the FTAA could provide a way forward through or past the directives of the NPS-HPL if, where effective conflict arises between the NPS-HPL and the purpose of the FTAA, the greatest weight is given to the purpose of the FTAA.

19. It is also the case that the NPS – HPL does not make the proposed activities prohibited and is only one of a range of matters to be considered.

Question 2

You will be aware that there are essentially 4 silos of activities being sought across the Applicant's site – 2 solar farms, medium/high density residential and a retirement village. Is the Panel entitled to issue a partial consent and what are the implications regarding whether there will remain net regional benefits?

20. I interpret the reference to a "partial consent" to mean grant of consent to an amended proposition which is less than the entirety of the original project proposed.

21. In my opinion the Panel is entitled to issue a partial consent provided that the remaining activities can demonstrate the necessary degree of regional or national benefit. However there is a specific process by which such an outcome may arise to the extent it is 'initiated' by the Panel as opposed to offered by the Applicant without direction, invitation or prompting.

Section 69 - Process

22. Section 69 sets out the mechanics for when a Panel has determined that it must decline an approval sought (which may be one of a number of approvals sought or all approvals). It includes reference to a process for inviting an Applicant to amend a proposal.

23. In full, s 69 provides:

> (1) This section applies if a panel—
>
> (a) proposes to decline an approval under section 81; and
>
> (b) has not previously invited the applicant to make a proposal under subsection (2)(b).
>
> (2) The panel must direct the EPA to—
>
> (a) provide the applicant with a copy of its draft decision document for every approval sought in the substantive application; and
>
> (b) invite the applicant to—
>
> (i) propose conditions on, or modifications to, any of the approvals sought; or
>
> (ii) withdraw the part of the substantive application that seeks any of the approvals sought.
>
> (3) A proposal under subsection (2)(b) must—
>
> (a) be for the purpose of addressing the reasons for which the approval referred to in subsection (1) is proposed to be declined; and
>
> (b) be within the scope of the substantive application.
>
> (4) An invitation for a proposal under subsection (2)(b) must include the date set by the panel by which the proposal must be received by the EPA.

24. Section 69(2)(b) appears to potentially apply in two ways:

(a) It is certain by reference to s 69(1) that if a Panel proposes to decline an approval under s 81 it must direct the EPA in accordance with subsection (2) to (inter-alia) invite the applicant to propose conditions on, or modifications to, any of the approvals sought or withdraw the part of the substantive application that seeks any of the approvals sought.

(b) Perhaps it also appears the applicant may be "invited" to make a proposal under subsection (2)(b) to make amendments to the proposal earlier in the process before s 69 is engaged (albeit presumably at a stage when the Panel has come to a preliminary determination that amendments are necessary in order for consent to be granted) given the words "has not previously invited" [my emphasis] – but for reasons identified below I have concluded that is not what the subsection intends.

25. Commencing with the first point, s 69 is engaged if a panel proposes to decline an approval under s 81. The term "approval" is defined by the FTAA as having the same meaning as in s 42(4) which expressly includes a resource consent that would otherwise be applied for under the RMA.[10] Therefore, if a panel decides to decline an "approval", that does not necessarily result in an outcome where the entire project[11] must also be declined.

[10] FTAA, s 42(4)(a).

[11] Defined as meaning (relevantly) in relation to an unlisted project which has been referred, the project as described in the notice under s 28.

26. A panel has a mandatory obligation, if it proposes to decline an approval, to direct the EPA to provide the applicant with a copy of the draft decision document and invite them to "propose conditions on, or modifications to, any of the approvals sought" or to withdraw the part of the substantive application that seeks any of the approvals sought. In layman's terms, the FTAA bakes in an opportunity for an applicant to make changes to the proposal with a view to resolving concerns the Panel have identified in its draft decision, thereby navigating a route to grant of consent.

27. The ability to make amendments is subject to some limitations set out in subsection (3). There is an express opportunity for an applicant to amend a proposal to address any shortcomings provided that:[12]

    (a) Any modifications to an approval are for the purpose of addressing the reasons the panel recommends decline; and

    (b) Any modifications are within the scope of the substantive application.

28. While the opportunity in s 69(2) is constrained, it is an opportunity nonetheless to give an applicant a chance to advance its proposal in a modified form. Alternatively, an applicant may wish to withdraw its applications for approvals for which a panel had recommended decline.

29. If an applicant chooses to modify an approval, it must do so within the panel's stipulated timeframe.[13]

30. Turning to the second point, what is less clear is whether an invitation under (2)(b) can be made earlier, prior to the Panel determining to decline an approval under section 81. I mention this because s 69(1)(b) starts with the words "has not previously invited". Those words potentially identified a scenario where a panel has invited a proposal under subsection (2)(b) earlier in time not necessarily related to its determination under s81, and not necessarily in the context of s69(1) being engaged. However I have formed the view that this is not the meaning of that wording.

31. Although s 69(1)(b) starts with the words "has not previously invited", it carries on to specifically reference "a proposal under subsection (2)(b)". Subsection (2)(b) is only engaged by subsection (1) and is subject to the criteria in subsection (3). Subsection (3)(a) specifically

[12] In accordance with FTAA, s 69(3).

[13] FTAA s 69(4) provides that the panel must set a date by which the proposal must be received by the EPA. It does not set a minimum timeframe.

provides that a proposal under subsection (2)(b) must be for the purpose of addressing the reasons for which the approval is proposed to be declined, cross referencing subsection (1). Pulling that together, I understand the wording in question to mean that the opportunity afforded under s 69(2)(b) is a one off opportunity. In other words if a panel proposes to decline an approval under s 81 and has not previously invited the applicant to make a proposal under subsection (2)(b), then the applicant is provided with the opportunity to make such a proposal. When the Panel then undertakes its further is of "(taking account of a proposal which has been made proposing modifications or withdrawals, or a position where the invitation to do so has been declined), a finding at that point that it will decline the approval under s 81 does not trigger a further opportunity under s 69(2)(b).

Amended proposal and benefits

32. As above, s 69 opens the door to an amended proposal through modifications to any of the approvals sought and/or withdrawal of parts of the substantive application. Accordingly I have formed the view that the Panel can consider and grant consent to what the question describes as a "partial consent".

33. The final part of the question refers to "whether there will remain net regional benefits". Leaving to one side whether the proper assessment is of "net" benefits (and how those benefits are assessed and characterised), the answer to this part of the question is simply to say that is a matter for assessment in the context of the proposal as modified/amended.

34. A panel must, for each approval sought decide whether to grant the approval or decline the approval.[14] That obligation applies to a panel considering an approval/proposal which has been modified under s 69(2) as s 81(2)(a) provides that for the purpose of making the decision, the panel must consider the substantive application and any other advice, report, comment, or other information received by the panel under s 69.

35. Section 81(2)(b) then requires a panel to apply the applicable clauses set out in subsection (3) which includes relevantly clauses 17 – 22 of Schedule 5 to the FTAA.

36. Section 81(4) states "When taking the purpose of this Act into account under a clause referred to in subsection (3), the panel must consider the extent of the project's regional or national benefits".

[14] FTAA, s 81(1).

Question 3

What weight should be given to out of sequence development?

37. The mere fact that the proposed development might be "out of sequence" is in a strict sense neither here nor there. There is the ability to apply for consent and persuade a panel that a particular proposal may be appropriate notwithstanding it is “out of sequence”.

38. If the question is understood to relate specifically to timing, it is correct to say that an issue may arise by reference to relevant plan provisions if those engage with sequencing in some manner. The Panel might consider whether any inconsistency of timing in and of itself is problematic. If the ambit of the question extends to “out of sequence” as a term encompassing the notion of a particular type of development being “unplanned”, then consideration of consistency with the relevant plan provisions will also arise.

39. However in my view the real potential concern to be addressed relates to effects. Managing effects is after all the ultimate purpose of seeking to manage sequencing. The question of effects is fact specific and one for the Panel to address.

40. For example, in this matter, as a generalisation I understand that MPDC assert that the 'out of sequence' aspect would create adverse effects if matters such as Private Developer Agreements (**PDA**) are not resolved (because there is no current planned intention by MPDC to connect infrastructure to the Site with the consequence that no financial provision is in place for that outcome to be achieved). Even if a PDA is resolved, I understand MPDC suggest there still might be residual effects. This would be a question of fact for the Panel as to the degree of effect that results and would require evidence from both parties on this point – the Applicant to address whether potential effects are suitably dealt with, and MPDC to establish that potential adverse effects will arise (if it is seeking to rely on this point) rather than simply asserting that a change in timing might have this effect.

41. Thus in my opinion, the issue arising is the <u>implications</u> of any development being “out of sequence” - the weighting the Panel attach to those implications (most likely being specific potential effects) is both fact dependent and determined by assessment in accordance with s 81 FTAA.

Question 4

What is the relevance of the PDA's being prepared to address infrastructure funding. Do they need to be completed before our Decision issues or to be a condition precedent?

42. Given all the public infrastructure required is not funded (as I understand it), it appears PDAs are critical to resolving funding shortfalls. If the Panel determined that infrastructure funding needed to be resolved or suitably secured in order for consent to be granted (which is a matter to be determined by the Panel having considered the evidence before it), then either the PDAs need to be completed before the Decision issues or a condition precedent put in place.

43. A completed PDA requires no further discussion.

44. Turning to the condition precedent proposition, that would reflect a scenario where the parties do not need to have completed and signed binding PDAs before the Panel issues its decision, on the basis that a condition proposed provided suitable certainty that the outcome of complying with that condition would address PDA and funding issues arising, and further that the condition itself was lawful.

45. I understand there is an agreement in principle between MPDC[15] and the Applicant[16] that the use of PDAs could be used to mitigate adverse infrastructure impacts of the Project.

46. MPDC has addressed conditions precedent in its Memorandum of Counsel[17], albeit only by reference to what is described as the Firth Street connection. MPDC says the Panel should impose a condition precedent to ensure that defined development does not occur prior to the Firth Street connection being completed,[18] but careful consideration must be given to the practical ability for the condition to be fulfilled.[19] MPDC's position in that respect seems somewhat noncommittal – presumably a requirement for a clear statement from the parties as to the appropriateness of a PDA for the Firth Street connection could be a matter squarely put to them by the Panel. To be fair, MPDC may simply mean that the devil is in the detail and thus proposed condition wording is required before a firm view could be expressed.

[15] MPDC Memo dated 11 November 2025 at [4.30]. Also noting MPDC's concern that notwithstanding developer agreements for this Project, the grant of consent may still result in indirect cost and delay on other infrastructure – Refer MPDC Memo at [5.2](a).
[16] Applicant's Legal Memo dated 18 November 2025 at [16] – [19].
[17] Dated 11 November 2025.
[18] MPDC Memo dated 11 November 2025 at [4.30].
[19] MPDC Memo dated 11 November at [4.33].

47. The Applicant's Legal Memo advises that 3 PDAs are under negotiation with MPDC[20] but does not provide a view on the Applicant's position as to the use of a condition precedent with respect to these.

48. Where PDAs are proposed (and being negotiated), it appears there may be a difference of opinion as to potential residual effects. The Applicant considers that the confirmation of the PDAs will result in an outcome where there is no public cost to providing the necessary infrastructure.[21] MPDC's position is that notwithstanding the PDAs, there could be indirect costs such as delayed development in already zoned areas.[22] The Panel will need to make a finding in that regard.

49. The relevant law with respect to conditions precedent is set out in the MPDC Memo.[23] I do not propose to repeat that in detail apart to note that:

    (a) I agree with MPDC's identification and summary of the relevant legal principles.

    (b) I agree with the MPDC's submission[24] that the relevant RMA caselaw on conditions precedent would equally apply to the FTAA.

50. Any condition precedent with respect to PDAs:

        (i) Will need to accord with the relevant condition precedent principles as identified by MPDC;

        (ii) Must be sufficiently certain in its terms and not unduly rely on third party actions; and

        (iii) Cannot be more onerous than necessary to address the reason for which it is set.[25]

51. As a general statement, in my opinion a PDA could be the subject of a condition precedent provided it complies with the relevant legal principles on the basis that such a condition is

[20] Applicant's Legal Memo dated 18 November 2025 at [16].
[21] Applicant's Legal Memo dated 18 November 2025 at [17].
[22] MPDC Memo dated 11 November 2025 at [5.2](a).
[23] At [4.13] – [4.34].
[24] MPDC Memo dated 18 November 2025 at [4.30].
[25] FTAA, s 83.

required to manage adverse effects on infrastructure. It is difficult to be more precise than that without specific detail of the proposed condition(s).

52. I can say that the effect of the condition must be to defer the ability of the applicant to carry out activities permitted by the consent until the condition is fulfilled, rather than any wording to the effect that until fulfilment of the condition the consent itself is deferred. The former position is conventional – conditions which restrict the ability of the consent holder to action the consent until the condition is fulfilled are routinely applied.

53. Imposing a condition requiring a suitable PDA to be formalised effectively has two possible outcomes, one of which will enable the activities authorised by the consent to proceed and one of which will not (if a suitable PDA is not concluded). In my opinion such a condition is not one which would frustrate the consent, or which is otherwise unreasonable.[26]

54. In my view, it would not be appropriate for the sufficiency of any PDA to be left open to be resolved by the consent authority in the future by reference to any condition precedent involved unless appropriate parameters were identified. The failure to do so could arguably result in an inappropriate delegation of the judicial function, because it is for the Panel to make a finding about whether a PDA would be sufficient to appropriately address potential effects and such a finding will presumably turn upon various matters of detail (which might include say the quantum of contribution, and there may be additional considerations). If a PDA is critical to addressing potential infrastructure effects, I anticipate it will be necessary for any condition proposed to set out minimum parameters which must be achieved (or wording to similar or improved effect).

55. Please advise if I can assist the Panel further.

Yours faithfully

Jeremy Brabant

[26] See commentary on conditions precedent in *Director-General of Conservation v Marlborough District Council* HC Wellington CIV-2003-485-2228, 3 May 2004, at [11] – [32].