BEFORE THE FAST-TRACK EXPERT PANEL

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

AND

IN THE MATTER of an application by Winton Land Limited under section 42 seeking approval for the Sunfield project (FTAA-2503-1039)

MEMORANDUM OF COUNSEL FOR THE AUCKLAND COUNCIL FAMILY IN RESPONSE TO MINUTE 17

Dated: 11 December 2025

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LAWYERS

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 This memorandum is filed on behalf of the Council family in response to Minute 17 dated 2 December 2025, which seeks legal submissions on the validity of the Applicant's stormwater, wastewater and water supply conditions.

1.2 The Council family addresses:

(a) **Section 3**: Whether capacity issues / inability to connect to public water and wastewater infrastructure are consenting issues (the Applicant having raised this as an issue);

(b) **Section 4**: Watercare's policy position on servicing land outside the Rural Urban Boundary (**RUB**), and a response to Maven's recent memorandum on capacity attached to the Applicant's legal submissions;

(c) **Section 5**:

(i) The Panel's five legal questions regarding conditions; and

(ii) Briefly, the Fast-track Approvals Amendment Bill and proposed section 84A (noting that the Panel is likely to seek further submissions on this in due course).

1.3 Minute 17 poses five legal questions concerning the validity of conditions requiring connections to reticulated stormwater, wastewater, and water supply networks prior to occupation. Stormwater matters / conditions were the subject of a separate hearing on 10 December 2025 and are being addressed through separate directions issued by the Panel at the conclusion of that hearing. This memorandum therefore focuses on wastewater and water supply matters. However, the legal principles explored in this memorandum (e.g. concerning conditions precedent) are equally applicable to stormwater matters should the Panel determine that similar conditions are required to address aspects of the stormwater management concerns raised.

2. EXECUTIVE SUMMARY

2.1 The Council family's position is straightforward: there are two significant obstacles preventing Sunfield from being serviced for water and wastewater – Watercare's Board-approved policy not to service land outside the RUB (which remains in effect), and genuine infrastructure capacity constraints as addressed in **Section 4** below.

2.2 Veolia Water Services (ANZ) Pty Ltd (**Veolia**), which operates the local water and wastewater networks in the relevant area under a franchise agreement with Watercare, follows Watercare's governing approach and policy framework. Veolia makes the decisions on connections to the local networks, but operates within Watercare's strategic and policy framework. Accordingly, we are instructed that Watercare's policy is determinative of whether connections will be permitted.

2.3 Expert conferencing was conducted on a basis expressly excluding this policy position and the need to service live-zoned land, and the Joint Witness Statements (**JWSs**) establish that even on this basis, there are significant capacity shortfalls. The reality is that servicing Sunfield would have detrimental impacts on the network and on servicing existing live zoned areas.

2.4 The Applicant maintains that capacity issues and the inability to connect is the "developer's risk" and "not a consenting issue". As addressed in more detail in **Section 3** below, this position is incorrect. It is trite that the provision/ adequacy of infrastructure and any infrastructure deficiencies are consenting matters. Beyond that, *Pinehaven Orchards Ltd v South Wairarapa District Council* – discussed below – rejected similar arguments.[1]

2.5 There is no basis to conclude that either obstacle referred to above will be overcome. Conditions – even conditions precedent – are inappropriate and ineffective in these circumstances.

2.6 The Applicant's 8 December submissions attach an unsolicited memorandum from Maven Associates, and fairness requires a response. The Council family's response, identifying various omissions, is provided in **Section 4**.

[1] *Pinehaven Orchards Ltd v South Wairarapa District Council*, W54/2006.

2.7 The Council family's primary position is that consent should be declined. However, if the Panel grants consent despite these concerns, robust conditions precedent would be essential to prevent **any development and / or subdivision** unless and until public water and wastewater servicing and capacity is confirmed by Watercare / Veolia.

3. CAPACITY ISSUES / INABILITY TO CONNECT AS CONSENTING ISSUES

3.1 Paragraph 3 of Minute 17 sets the scene by referring to paragraph 5.7 of the Applicant's memorandum of counsel dated 15 October 2025, in which the Applicant correctly accepts the Council family's previous legal submissions that a resource consent decision cannot, through conditions or otherwise, compel Watercare to provide new connections, commit funding for infrastructure, or accept the vesting of assets. Relevant case law is outlined in the Council's legal memo dated 4 August 2025.[2]

3.2 Along similar lines, the Courts have also been very clear that conditions impose obligations on consent holders, not on third parties or Councils. In *Sun & Liu v Hutt City Council*, the Environment Court confirmed:[3]

(a) If a consent holder chooses to rely on a consent granted to it, it is the person who gives effect to the consent;

(b) A condition of consent cannot bind a third party;

(c) It is the consent holder who must comply with the conditions of its resource consent;

(d) The Council is not so bound.

3.3 It appears clear that the FTAA Amendment Bill will not alter this position. Indeed, the Select Committee report expressly states[4] that the following is to be clarified in the Bill (and the Amendment Paper issued yesterday, 10 December, reflects this[5]):

> **Clarify that conditions can only be placed on the approval holder**—Clause 46 would insert new section 84A, which would enable

[2] Memorandum of Counsel for Auckland Council, Auckland Transport, and Watercare Services Limited, 4 August 2025. Refer e.g. to section 4 of that memo.
[3] *Sun & Liu v Hutt City Council* [2025] NZEnvC 151, at [16].
[4] Report of the Environment Committee on the Fast-track Approvals Amendment Bill, page 11.
[5] The Amendment Paper proposes a new section 84A(3): "To avoid doubt, a condition set under this section may impose an obligation on the applicant only".

> a panel to impose a condition to ensure that the infrastructure in the project area, or that a project will rely on, will be made adequate. The Government intends to clarify that these conditions could only be placed on the approval holder, not on third-party infrastructure providers. *(See departmental report pp 53–56.)*

3.4 However, the Applicant maintains that capacity issues / the inability to connect are not consenting issues at all. It is important for the Council to address this issue briefly, before turning to the Panel's specific questions about conditions.

The Applicant's Position

3.5 The Panel notes that following conferencing, *"there remains a difference in position as between the Applicant and the Council in relation to the availability of potable water supply and capacity within the wastewater network to service the development."* [6]

3.6 The Applicant's position, as set out at paragraph 5.7 of its 15 October memorandum and repeated in counsel's 8 December memorandum, appears to be that capacity concerns and inability to connect to a public system constitutes the developer's risk with proceeding and is not a consenting issue.

3.7 The Applicant acknowledges[7] that if Watercare maintains its position of not allowing Sunfield to connect, *"the Applicant will not be able to implement the consent until such time as Watercare's position changes".* Despite this acknowledgment, the Applicant maintains this is merely "developer's risk" and not a consenting matter.

The Applicant's position is incorrect

3.8 The Council family respectfully submits that the Applicant's characterisation is incorrect. The Council family's position is that a lack of capacity / inability to connect to a public system is plainly a consenting issue.

3.9 First, it is trite that the provision / adequacy of infrastructure and any infrastructure deficiencies are consenting matters. Merely by way of example, both Chapters E38 (Subdivision – Urban) and E39 (Subdivision – Rural) address infrastructure supporting subdivision and development, and

[6] Minute 17, paragraph 2.
[7] At paragraph 3.6 of its 8 December memorandum.

the need for it to be provided for *"to be in place at the time of subdivision or development"*.[8]

3.10 Beyond that, the Environment Court's decision in *Pinehaven Orchards Ltd v South Wairarapa District Council* rejected similar arguments.[9] *Pinehaven* involved a 14-lot residential subdivision of 1.8 hectares of rurally-zoned land on the edge of Greytown. The Council, as infrastructure asset owner, advised that it would not permit the proposed subdivision to be connected to its water supply and wastewater infrastructure due to a policy decision that Greytown should extend in another direction.

3.11 The applicant in *Pinehaven* argued:[10]

(a) There was no specific prohibition in the district plan on the connections;

(b) Whether the Council ultimately permits connections is *"a property rights issue, not a resource-management issue"*; and

(c) If subdivision consent were granted but could not be exercised because connections were not permitted, that would be determined by judicial review *"if it ever got that far."*

3.12 The Court rejected these arguments. The Court stated:[11]

> … although in considering the appeal we are obliged to have regard to the other matters directed by law, in the event the outcome turns on the residential lots to be created not having water and sewage connections.

3.13 The Court held that it had to assess any actual or potential effects on the environment of allowing the subdivision with no connections:[12]

> The Council's case was unequivocal that it will not permit new dwellings on the residential lots that would be created by the subdivision to be connected to its water-supply and sewerage services. We have no basis for finding otherwise. It would be unrealistic for us to fail to consider the adverse potential effects on the environment of allowing the subdivision with no connections.

3.14 Without connections, on-site sewage disposal would be required. The Court found this *"would have significant adverse effects on the environment of*

[8] See e.g. Objectives E38.2(4) and E39.2(4).
[9] *Pinehaven Orchards Ltd v South Wairarapa District Council*, W54/2006.
[10] Ibid, at [10].
[11] Ibid, at [3].
[12] Ibid, at [38].

contamination of groundwater which is used to augment the urban water supply."[13]

3.15 The Court declined consent.[14] Importantly, the Court confirmed:[15]

> Although in deciding the appeal, the Court has the same power as a council against whose decision the appeal is brought, that is limited to the council's power as consent authority under the Resource Management Act. The Court does not have the power that a council has as owner of water-supply and wastewater infrastructure to decide what connections may be made to those services, or what properties are to be served by them. …

3.16 The Court further stated:[16]

> … we acknowledge that the Court has no power to overrule the Council's policy that connections for the proposed residential lots would not be permitted; nor to direct the Council to expend public funds in improving the capacity of the wastewater system by eliminating storm-water infiltration.

Application to Sunfield

3.17 Of relevance to Sunfield, the Court in *Pinehaven* clearly viewed the inability to connect to public infrastructure as a consenting issue – and not simply the "developer's risk". While an RMA case, the position is no different in a FTAA context.

3.18 As the Panel observed at paragraph 5 of Minute 17: *"It is unlikely that this development can proceed without the provision of potable water and capacity within the wastewater network to service it. …"*

3.19 The Applicant's reference to Engineering Plan Approval processes respectfully misses the point that the Panel must satisfy itself that the proposed development can be serviced, and not leave this to chance. As the Applicant acknowledges,[17] Watercare's decisions to *"approve Engineering Plan Approvals and to certify the works… are not RMA decisions, but rather decisions as asset owner."*

3.20 The Applicant's submissions essentially ignore the clearly relevant policy position against servicing the development beyond the RUB.

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[13] Ibid, at [56].
[14] Ibid, at [141].
[15] Ibid, at [2].
[16] Ibid, at [50].
[17] At paragraph 3.5 of its 8 December memorandum.

3.21 Setting those matters to one side, the evidence establishes that even if Watercare were to depart from its policy position (which it has not), contrary to Maven's memorandum attached to the Applicant's legal submissions, capacity constraints ***do*** exist and significant upgrades would be required.

4. CONFIRMATION OF WATERCARE'S POLICY POSITION AND RESPONSE TO MAVEN MEMORANDUM

4.1 To assist the Panel, this section briefly addresses:

(a) Watercare's Board-approved policy position in relation to not servicing land beyond the RUB (which remains in effect), and confirms Veolia's position in this regard; and

(b) Provides a brief response to:

(i) The Applicant's submission that the outcome of expert witness conferencing was unclear;[18] and

(ii) Maven's unsolicited memorandum attached to the Applicant's submissions.

Board-Approved Policy

4.2 Watercare has a Board-approved policy not to service land outside the RUB. This is a strategic corporate decision not merely an administrative preference.

4.3 As directed by the Panel, the conferencing was expressly conducted on the basis that this policy consideration, as well as the need to consider supplying live-zoned land, should be set to one side, while expressly recording that these are still live issues.[19]

4.4 While expert conferencing was conducted consistent with this direction, it is appropriate to confirm that Watercare has not changed its position of opposition to the proposal, and that:

(a) Watercare's policy remains in effect; and

[18] 8 December memo, paragraph 2.4.
[19] Minute 13, paragraphs 10 and 12, and footnote 2.

(b) Watercare's experts' view is that it is necessary, as part of prudent water and wastewater management planning, to consider (among other matters) the need to supply live-zoned land.

4.5 Again, in terms of *Pinehaven*, Watercare's policy is a directly relevant consideration for the Panel.

Veolia's Position

4.6 Veolia operates the water and wastewater networks in the relevant area under a franchise agreement with Watercare.

4.7 Veolia was consulted in the preparation of this memorandum, and confirms that it follows Watercare's governing approach and policy framework. Decisions on connections to the local wastewater and water supply networks ultimately sit with Veolia for the Application site, but Veolia operates within Watercare's strategic and policy framework.

4.8 Accordingly, we are instructed that Watercare's policy not to service land outside the RUB is essentially determinative of Veolia's position on whether connections will be permitted.

Applicant's submissions and Maven's memorandum

4.9 The Applicant characterises the outcome of conferencing as unclear.

4.10 The Council family takes a different view. The JWSs are as clear as they can be given the limitations in play (e.g. the absence of required modelling, as noted by Watercare's experts, genuine technical disagreements among experts etc). It is submitted that the Panel should continue to rely on the JWSs, and the earlier reports and 'will say' statements filed prior to conferencing (which form part of the record).

4.11 The Applicant's submissions attach an unsolicited memorandum from Maven on capacity. As a matter of fairness, this requires a response. Rather than file a further document, the Council family considers it more efficient to address the Maven memorandum in these submissions. The response below is provided with input from Watercare's experts who participated in conferencing.

4.12 Maven's memorandum contains material inaccuracies and omissions:

(a) First, it makes no reference to the fundamental basis on which conferencing was conducted (the Panel's express direction to exclude Watercare's policy position and consideration of supply to live-zoned land). This is highlighted because, by omitting this critical context, the Maven memorandum may create the misleading impression that the discussion in the JWSs represents Watercare's assessment ***taking into account*** those matters (which is not the case).

(b) **Wastewater capacity**: Maven's memo asserts that there is current capacity for 500 DUE, and that wastewater upgrades planned and funded for completion by 2029 will "provide capacity to service the full Sunfield development", particularly if a low-pressure sewer system is used. However, the Watercare experts in the wastewater JWS did not confirm any such capacity. The JWS for wastewater records the Watercare experts' views that:

(i) While the planned Hingaia diversion (2029) could enable growth including "the 70L/s from the FUZ land part of the current development," longer-term upgrades to the southern interceptor would be required "for the whole development" and "these are not currently programmed nor understood." [20]

(ii) Watercare's experts advised that, while capacity is unlikely to be zero, "there is no number at this stage regarding a hypothetical scenario" and "no number can be provided until modelling is completed".[21]

(iii) To understand the required upgrades, Watercare would need "18-24 months to undertake detailed modelling, optioneering and concept design" with construction and commissioning taking "anywhere in the range of 5-8 years".[22]

(iv) These upgrades to the southern interceptor "are not planned nor funded" and there is "currently no time frame for upgrading the southern interceptor".[23]

[20] Wastewater JWS, Question B.
[21] Wastewater JWS, Question C(3).
[22] Wastewater JWS, Question C(b).
[23] Wastewater JWS, Questions C(1) and C(2).

(c) **Water capacity**: Maven's memo states that Watercare "confirmed" current capacity for 500 DUE and that water supply upgrades planned and funded for completion by 2031 will "provide capacity to service the full Sunfield development," suggesting a clear, committed pathway to full servicing. In contrast, the Watercare experts in the JWS emphasised that:

(i) There is limited capacity available in the Takanini 2 water main and Airfield Road Bulk Supply Point until upgrades occur.[24]

(ii) On the basis directed by Minute 13 (***without*** reference to supplying live-zoned land and Takanini FUZ areas): There would be capacity for both FUZ and Rural areas with planned upgrades. *"However, Watercare would then have insufficient capacity to service the balance of the Takanini FUZ areas. Watercare would need to implement upgrades that are unplanned technically and financially to ensure the balance of the FUZ areas can be serviced in line with the FDS timing."*[25]

(iii) However, the JWS captures that ***with*** reference to live-zoned land and other Takanini FUZ areas, there is capacity for the Future Urban Zone portion of the site with planned upgrades, but there is "No planned capacity for Rural area."[26]

(iv) Regarding the "planned upgrades" referenced in the JWS table: Watercare's experts advised[27] that two upgrades are required: the Takanini 2 water main upgrade and the Airfield Road BSP upgrade. The Takanini 2 upgrade project is *"planned and sized to support the Takanini FUZ areas"* and is funded in Watercare's Asset Management Plan, with completion anticipated December 2031. However, Watercare noted that *"unplanned allocation of available capacity may have a detrimental impact on Watercare's future ability to service the wider area. (Live zone and FUZ land in the Takanini area)."* Acceleration of the Takanini 2 timeline *"can*

[24] Water JWS, Question A.
[25] Water JWS, Question A, table.
[26] Ibid.
[27] Water JWS, Questions C and C(a).

be considered, noting that trade-offs in the Watercare AMP to other essential works might need to be made".[28]

(v) In the interim (until 2031), the existing infrastructure has remaining capacity for only 600 Development Unit Equivalent, of which "more than 100" are *"already accounted for through Veolia's development tracking process"* and *"the remaining capacity will continue to be eroded over time"*.[29]

(d) **Low pressure sewer**: Maven's memo appears to present the LPS system as a suitable solution. While an LPS system might be technically feasible, Maven's memo does not reflect the concerns expressed by Veolia's and Watercare's experts in relation to such a system. Sanjeev Morar for Veolia states that an LPS should only be considered if a gravity network is demonstrated to be unachievable.[30] Watercare's experts note various challenges with such systems, e.g. odour, high H2S level, corrosion risk etc in the JWS.[31]

4.13 Having noted the above matters in response to Maven's memorandum – which indicate genuine issues relating to capacity – we are instructed to again emphasise that Watercare's Board-approved policy not to service rural zoned land remains in place.

5. RESPONSE TO LEGAL QUESTIONS

5.1 The Panel's questions at paragraph 6 of Minute 17 concern the validity of conditions requiring connections to reticulated stormwater, wastewater, and water supply networks. Stormwater matters were addressed at the hearing on 10 December 2025 and are the subject of separate Panel directions. As noted already, these submissions therefore focus on wastewater and water supply connections, although the principles discussed may be relevant to conditions for stormwater matters also.

5.2 Before addressing the specific questions, it is important to state the Council family's position clearly. There are two fundamental obstacles preventing Sunfield from being serviced: (a) Watercare's Board-approved policy not to service land outside the Rural Urban Boundary, which remains in effect; and

[28] Water JWS, Question C(b).
[29] Water JWS, Question C(c).
[30] Water JWS, Question E.
[31] Water JWS, Questions D and F.

(b) genuine infrastructure capacity constraints, even if Watercare's policy position were set aside. There is no basis to conclude that either obstacle will be overcome. In these circumstances, conditions – even conditions precedent – are inappropriate and ineffective. The Council family's primary position is that consent should be declined, as in *Pinehaven*.

5.3 If, however, the Panel is minded to grant consent despite these concerns, then robust and clearly worded conditions precedent would be essential to prevent **any development and / or subdivision** from proceeding unless and until public water and wastewater servicing and capacity is confirmed by Watercare / Veolia.

5.4 Against the background set out above, the Council family now responds to the five specific legal questions posed at paragraph 6 of Minute 17.

Question 1: Do such conditions require the approval of a third party (i.e., Watercare)?

5.5 Approval from the third-party infrastructure asset owners (Veolia, relying on Watercare's bulk infrastructure) would be required to secure connections to the reticulated networks. Conditions relying on third party approvals are usually unlawful.[32] Conditions can potentially be drafted as conditions precedent to address those concerns, however – as addressed below – there are particular concerns in relation to that approach in the case of Sunfield.

Question 2: Are such conditions sufficiently certain noting that fulfilment of them is not within the Applicant's control?

5.6 The Applicant has referenced conditions 117, 120, 162, and 167-168. The conditions proposed by the Applicant are not sufficiently certain and are inappropriate as a response to the servicing uncertainty, if the Panel is minded to grant consent. Conditions precedent would be essential in that event.

5.7 In *Westfield (New Zealand) Ltd v Hamilton City Council*[33], the High Court noted that conditions attached to a consent will usually be regarded as unreasonable if incapable of performance, but confirmed that *"a condition precedent which defers the opportunity for an applicant to embark upon the*

[32] E.g. *Dart River Safaris Limited v Kemp* [2000] NZRMA 440 (HC).
[33] *Westfield (New Zealand) Ltd v Hamilton City Council*, CIV-2003-485-000953/4/6, 17 March 2004, at [55] and [56].

activity until a third party carries out some independent activity is not invalid". The consent holder cannot undertake the specified activities until the condition precedent is satisfied.

5.8 However, a condition precedent should not frustrate the grant of consent, or render the consent futile.

5.9 For example, in *Hildeman v Waitaki District Council*,[34] the Environment Court considered a land use consent for a campground requiring an intersection upgrade. The Court noted that while there were existing issues at the intersection, increased traffic from the campground would necessitate an upgrade. The Court accepted that conditions precedent can be appropriate in some situations, but ultimately declined consent because the Council had refused to commit to the upgrade and the applicant was unable to fund it on an economically viable basis. The Court stated[35]: *"Such a condition would potentially render the grant of consent futile and ought not be imposed."*

5.10 Applying such considerations to Sunfield, conditions - even conditions precedent - are inappropriate and ineffective as a response to the servicing uncertainty. There are two material obstacles:

(a) Policy position: Watercare has a long-standing Board-approved policy position not to service land outside the RUB. There is no basis to conclude this position will change. Even if in the future the RUB is removed, Watercare will necessarily maintain some form of spatial prioritisation framework to guide which areas will be serviced (and which will not) and when infrastructure investment occurs.

(b) Capacity: As noted in **Section 4** above, based on the best available information there are significant capacity issues.

5.11 There is no basis to conclude that either obstacle will be overcome. Conditions requiring reticulated water and wastewater servicing as a condition precedent would, as in *Hildeman*, "potentially render the grant of consent futile".

[34] *Hildeman v Waitaki District Council* [2010] NZEnvC 51. The Court's final decision is *Hildeman v Waitaki District Council* [2010] NZEnvC 194.
[35] *Hildeman v Waitaki District Council* [2010] NZEnvC 51, at [83].

5.12 The Council family's primary position is that consent should be declined given the fundamental uncertainty about whether the development can be serviced, as in *Pinehaven* and *Hildeman*.

Alternative position

5.13 If, however, the Panel is minded to grant consent despite the concerns raised by the Council family, then robust and clearly worded conditions precedent would be essential. Such conditions should prevent **any development and / or subdivision from occurring** until public water and wastewater servicing and capacity is confirmed by Watercare / Veolia. This approach would at least ensure that subdivision and development does not proceed unless and until the servicing uncertainty is resolved, though the Council family maintains this does not address the more fundamental concern that consent should not be granted in these circumstances.

Question 3: Are those conditions structured as conditions precedent such that the resource consent does not commence until they are fulfilled?

5.14 The Applicant's conditions are not currently structured as conditions precedent. The Applicant acknowledges this and indicates it is *"open to restructuring the conditions such that they operate as conditions precedent and defer the commencement of the consent."*[36]

5.15 There is a legal distinction to note between:

(a) A condition that defers commencement of the consent itself under section 97(1)(b) of the FTAA – while there is a decision to grant, the consent does not come into legal effect until a specified later date; and

(b) A condition precedent formulated on the basis that the consent comes into legal effect immediately, but the consent holder cannot undertake specified activities authorised by the consent until the condition is satisfied.

5.16 Item (b) above represents the typical position: usually a condition precedent defers embarking upon the activity, not the legal commencement of the consent itself. However, it is acknowledged that section 97 enables the

[36] At paragraph 3.8(c) of its 8 December memorandum.

Panel to defer commencement of any consent granted. Having acknowledged that, it is undesirable that planning permissions should subsist unimplemented for indefinite periods of time. The following oft-cited passage from the decision in *Katz v Auckland City Council* is apposite:[37]

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in the light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. …

5.17 In any event, the Council family's position remains that conditions precedent – even if properly structured – are inappropriate and ineffective given Watercare's policy position and the infrastructure constraints addressed in the JWSs and in **Section 4** above. For example, conditions precedent cannot create infrastructure capacity that does not exist, cannot override Watercare's Board-approved policy etc.

Question 4: Are the conditions offered on an "Augier" basis?

5.18 The Applicant states it *"is willing to offer [the conditions] on an Augier basis."*[38]

5.19 While the Applicant's willingness to offer *Augier* conditions provides some assistance in terms of ensuring the lawfulness of any condition, it does not address the substantive concerns about whether these conditions can achieve their intended purpose or whether consent should be granted at all in circumstances where servicing is so uncertain.

Question 5: Are the conditions otherwise lawfully valid, and can the Panel impose them on this application?

5.20 As addressed above, the Council family is concerned that the Applicant's conditions as drafted are ineffective and inappropriate. Even if restructured

[37] *Katz v Auckland City Council* (1987) 12 NZTPA 211 at p 213.
[38] At paragraph 3.8(d) of its 8 December memorandum,

as conditions precedent and offered on an *Augier* basis, the conditions cannot overcome two fundamental problems:

(a) Watercare's policy position; and

(b) Genuine infrastructure capacity constraints.

5.21 The Panel has the power under the FTAA to impose conditions, but conditions must be lawful, certain, and capable of being fulfilled. In the present case, the Council family submits that conditions cannot adequately address the servicing uncertainty – arising from both policy position and genuine capacity constraints – and that the appropriate response is to decline consent.

The Fast-track Approvals Amendment Bill

5.22 The Applicant refers[39] to the Fast-track Approvals Amendment Bill, which proposes to introduce section 84A enabling panels to impose conditions ensuring infrastructure "is or will be made adequate" (the recent Amendment Paper proposes that this reads "is or **can** be made adequate"). The Applicant notes the Departmental Report's statement that the policy intent is to *"facilitate the provision of subsequent infrastructure, by allowing the applicant and the relevant local authority or infrastructure provider to negotiate an agreement later (after approvals are granted)."*

5.23 This does not assist the Applicant:

(a) The Departmental Report makes clear[40] the intent was *"not to disrupt existing case law and provide a power to the Panel to impose a legal obligation or costs on a third-party".* As noted, the Select Committee has confirmed that the Government intends to clarify that conditions could only be placed on the approval holder, not on third-party infrastructure providers. The Amendment Paper reflects this.

(b) The Amendment Bill does not alter the fundamental legal position: conditions cannot compel Watercare to provide connections or override its Board-approved policy.

[39] At paragraph 3.9 of its 8 December memorandum.
[40] At paragraph 194.

(c) Moreover, to the extent that the Panel has regard to the Departmental Report, the apparent intent assumes a willing infrastructure provider prepared to negotiate. That assumption does not hold here, where Watercare maintains its policy position and the infrastructure capacity does not exist. Approving Sunfield on the assumption infrastructure "will / can be made adequate" through future negotiation would not represent sound planning.

5.24 It is noted that the Applicant itself submitted on the Amendment Bill, seeking amendments that would have required infrastructure providers to make infrastructure available to projects and prevented the adequacy of infrastructure from being considered an adverse impact.[41] The Select Committee did not accept this approach. Instead, as noted above, the Select Committee report and Amendment Paper clarify that conditions can only bind approval holders, not third-party infrastructure providers.

5.25 At the conclusion of the hearing on 10 December 2025, the Panel indicated that it is likely to seek further legal submissions from the Applicant and Council family on proposed section 84A in the Bill, and that for the time being the process must continue on the basis of the FTAA as it stands. The Council family will address the Panel further on the Bill and proposed section 84A in accordance with the Panel's foreshadowed directions.

DATED the 11th day of December 2025

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

[41] Winton's submission: FTAA Bill Submission