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

AND

IN THE MATTER of an application for approvals by Vineway Limited 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**)

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

Dated: 25 June 2025

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LAWYERS

1. INTRODUCTION

1.1 We act for Auckland Council (encompassing Healthy Waters), as well as Council Controlled Organisations (**CCOs**) Auckland Transport (**AT**) and Watercare Services Limited (**Watercare**) (collectively the **Council family**), in relation to the substantive application for the Delmore project (**Application**) by Vineway Limited (**Applicant**) under the Fast-track Approvals Act 2024 (**FTAA**).

1.2 This memorandum is provided in response to Minute 3 inviting comments on the Application, issued by the Panel on 26 May 2025 pursuant to section 53 of the FTAA.

1.3 The structure of this memorandum is as follows:

(a) An executive summary;

(b) The legal framework, including an explanation of the framework for decision-making under the FTAA;

(c) The outcome of the Council family's assessment of the Application to date; and

(d) Conclusions and recommendations arising from that assessment.

2. EXECUTIVE SUMMARY

Process

2.1 Since the Panel Convener Conference on 30 April 2025, the Council family has engaged with the Applicant in relation to its Application. Broadly, this has involved:

(a) A number of meetings and site visits.

(b) The provision by the Council family to the Applicant of a number of initial review memoranda (copied to the Panel), with the aim of providing early indications of the Council's initial areas of focus and concern, and to highlight information gaps.

(c) In response, the Applicant has also provided some amended Application documentation to the Council.

2.2 In relation to paragraph 2.1(c) above, it was agreed with the Applicant that the Council family would, in its 25 June comments, take into account updates received from the Applicant by 12 June 2025. It was also agreed that the Council family would ***not*** be able to take into account anything received after that date and still meet the 25 June 2025 deadline for providing comments.

2.3 This approach was necessary given the volume and complexity of material involved, and the limited capacity of the relevant specialists to review further updated material in the time available.

2.4 The Applicant has provided some additional material post-12 June 2025 and has foreshadowed further material being provided by 2 July 2025. The Panel may wish to consider exercising its power under section 67 of the FTAA to request further assessment by the Council family of this updated material.

Summary of Council Family Assessment

2.5 The full details of the Council family's comprehensive assessment are contained in the planning memorandum prepared by Dylan Pope, Claire Gray, Rosie Stoney and Dave Paul dated 25 June 2025 (**Planning Memo**), and the technical specialist reports annexed to the Planning Memo. A very brief summary of the outcome of this assessment is provided below (also see **Section 4** of this memorandum for further detail).

2.6 Under the FTAA, the Panel must apply a specific decision-making framework that:

(a) Gives greatest weight to the FTAA's purpose of facilitating infrastructure and development projects with significant regional or national benefits;

(b) Incorporates Resource Management Act 1991 (**RMA**) provisions in Parts 2, 6, and 10 of the RMA (including e.g. sections 104 and 104B, 105 to 107, 108 to 109 and 220);

(c) Requires evidence-based assessment of claimed regional benefits, including net economic benefits. The listing of a project under the FTAA does not pre-determine the extent of regional or national benefits, and the Panel must independently assess whether the project actually delivers the claimed benefits.

2.7 Under section 85 of the FTAA, in summary, the Panel may decline an approval sought in a substantive application where the adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits (after taking into account potential conditions and modifications to the proposal). We address this 'proportionality test' in greater detail in **Section 3** below when discussing the legal framework.

2.8 As noted in **Section D** of the Planning Memo, the Council family's assessment has identified **eleven** adverse impacts meeting the section 85(3) FTAA threshold, individually and collectively (i.e. where the adverse impacts are significantly significant to be out of proportion to any regional benefits, even after taking into account mitigation etc), broadly relating to the following issues / topics:

(a) No / inadequate proposal for water supply servicing;

(b) Viability of wastewater servicing;

(c) Design and metrics of the Neighbourhood Parks;

(d) Delivery and alignment of Notice of Requirement 6 (**NoR 6**);

(e) Inadequate provision of collector roads, and general road hierarchy, and potential need for further interim upgrades to address transport effects;

(f) High car dependency and fragmented urban form;

(g) Potential ecological effects;

(h) Sedimentation effects;

(i) Adequacy of the Structure Plan;

(j) Impact on planned investment and infrastructure provision; and

(k) Uncertainty of infrastructure delivery and servicing.

2.9 Importantly, the Planning Memo signals in **Section D** that, in identifying these 'headline issues', there is the clear potential for other material / adverse impacts to be identified subsequently, as a result of further information and

assessment of the Application. The example of potential groundwater impacts on wetlands is offered in the Planning Memo in this regard.

2.10 The following critical infrastructure deficits are particularly noteworthy:

(a) Water Supply – There is no viable connection to public water supply until 2038+ and no alternative private water supply proposed by the Applicant.[1] This creates significant development feasibility concerns, which arguably cannot be resolved through conditions, without frustrating the grant of consent.

(b) Wastewater Capacity – Public network connections are unavailable until 2050+. Connection before this timeframe would jeopardise existing live-zoned areas and create significant adverse impacts on sequenced growth.[2] It is not clear whether a viable permanent private wastewater solution exists.

(c) Transport infrastructure – The delivery of a portion only of the NoR 6 Road means that the benefits of a functional arterial road are not realised. The formation of only part of NoR 6, combined with the proposed alignment deviation, not only undermines transport outcomes but also creates potentially significant cost implications for AT and the Council. Beca signal in their report[3] that further interim upgrades to the network may be needed, if the Application is approved. Due to inadequate transport infrastructure, the Application will result in adverse transport effects including safety risks, inefficiencies at the SH1 interchange, car dependency, and unplanned cost burdens.

2.11 The Council family's assessment also identifies material issues with urban form and connectivity concerning:

(a) A lack collector roads which are essential for public transport connectivity.

(b) High numbers of cul-de-sacs creating a car-dominated development.

[1] See Watercare's comments for further analysis, Annexure 7 to Planning Memo.
[2] Ibid.
[3] Attached to Auckland Transport's comments, Annexure 20 to Planning Memo.

(c) A fragmented street network with reinforcing car dependency.

2.12 For these reasons (and others), the Council family's assessment is that the Application does not contribute to a well-functioning urban environment.

2.13 The assessment also highlights ecological and environmental concerns and information gaps, including (merely by way of example):

(a) A lack of site-specific fauna and flora surveys which are expected for a proposal of this scale;

(b) Inadequate stream morphology assessment;

(c) Missing geomorphic risk assessment for riparian setbacks;

(d) Insufficient wetland impact analysis from groundwater diversion; and

(e) The lack of an Adaptive Management Plan (**AMP**) for sedimentation and earthworks, which is fundamental and necessary, given the extent and duration of the earthworks activity within the receiving environment containing wetlands and streams.

2.14 There are also material deficiencies identified with respect to parks and open spaces, with the Stage 1 park not meeting the minimum 3,000m² requirement and the Stage 2 park having limited utility due to steep topography.

2.15 In terms of the regional benefits claimed by the Applicant (economic/housing, transport/infrastructure, and ecological), the Council family's assessment concludes:

(a) The Applicant's claimed economic benefits are overstated and not supported by a robust net-benefit analysis. For example, the scale of housing supply proposed (assessed as only 1.1-1.4% of annual regional growth) is modest relative to regional demand and does not meet a regionally significant threshold. The proposal's economic benefits have been assessed by Council economist James Stewart,[4] whose addendum has been peer reviewed by consultant economist Dr Richard Meade.[5]

[4] Annexure 2 to Planning Memo.
[5] Annexure 3 to Planning Memo.

(b) The partial provision of NoR 6 is not considered a regional benefit for several reasons:[6]

(i) The arterial road cannot function as intended until it is fully constructed. The partial road would only serve the development site itself rather than providing any broader network connectivity and efficiency benefits.

(ii) The proposed alignment deviates from the Supporting Growth Alliance (**SGA**) concept design, potentially requiring more expensive dual stream crossings and steeper gradients, while also shifting outside the Applicant's land ownership, which would force Auckland Transport to bear additional land acquisition costs.

(iii) Without the complete connection to Upper Ōrewa Road and the wider arterial network, the partial NoR 6 fails to deliver the regional transport benefits relied upon to support the application, essentially creating a local access road rather than the envisaged strategic transport corridor.

(c) There are various information gaps in the Applicant's ecological assessments. In any event, the Council's terrestrial ecologist, Rue Statham, concludes that the Applicant's proposed *"terrestrial and freshwater enhancement is not locally, regionally or nationally significant"*.[7]

2.16 The Council family's comprehensive assessment concludes that adverse impacts substantially outweigh regional benefits, even accounting for proposed mitigation measures. The recommendation in the Planning Memo is to **decline** the Application. This recommendation aligns with the FTAA's purpose, which is to enable significantly beneficial projects, not those where adverse impacts are so significant as to outweigh benefits.

2.17 Initial comments on draft conditions have been provided in the Planning Memo and annexed specialist reports. This is without prejudice to the

[6] See AT's comments, Annexure 20 to Planning Memo.
[7] Annexure 23 to Planning Memo, paragraph 7.12.

Council family's ability to comment further should the Panel circulate draft conditions under section 70 of the FTAA.

3. THE LEGAL FRAMEWORK

3.1 This section of our memorandum addresses the FTAA decision-making framework (and does not address pre-lodgement provisions of the FTAA).

3.2 It also touches on several other matters of law, some derived from case law under the RMA, of relevance to the Panel's deliberations (under the subheading "**Other legal considerations**").

FTAA legal framework

3.3 The purpose of the FTAA *"is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits"*.[8]

3.4 The FTAA sets out the legal framework for obtaining approval of both listed and referred projects.

3.5 Delmore is a listed project and is described Schedule 2 of the FTAA as follows:[9]

Authorised person	Project name	Project description	Approximate geographical location
Vineway Limited	Delmore	Subdivide land and develop approximately 1,250 residential dwellings and associated features such as parks, including delivery of the State Highway 1 Grand Drive interchange and Wainui area connection	109 hectares at 88, 130, and 132 Upper Orewa Road, and 53A, 53B, and 55 Russell Road, Orewa

3.6 Subpart 3 of Part 2 of the FTAA deals with a Panel's consideration of a substantive application for an approval.

3.7 Section 40 states that the process for obtaining the approval under the FTAA *"applies instead of the process for obtaining any corresponding approval under a specified Act"*.

[8] FTAA, s 3.
[9] FTAA, Schedule 2.

3.8 The specified Acts, relevant to this Application, are the Resource Management Act 1991 (**RMA**) and the Heritage New Zealand Pouhere Taonga Act 2014 (**HNZPTA**).

3.9 Pursuant to section 42(4)(a) and (i) of the FTAA, the Delmore Application seeks the following approvals:[10]

(a) a resource consent that would otherwise be applied for under the RMA; and

(b) an archaeological authority that would otherwise be applied for under the HNZPTA.

3.10 The Council family's comments focus on the approvals required under the RMA (i.e. resource consents).

Decisions on approvals sought in substantive application

3.11 The provisions in the main body of the FTAA concerned with "Panel decisions" and "Decision documents" are located in sections 79 to 89.

3.12 Section 81(1) of the FTAA requires the Panel to decide whether, for each approval sought in a substantive application, to:

(a) grant the approval and set any conditions to be imposed on the approval; or

(b) decline the approval.

3.13 For the purpose of making the decision, the Panel:

(a) Must consider the substantive application and any advice, report, comment, or other information received by the Panel under sections 51, 52, 53, 55, 58, 67, 68, 69, 70, 72, or 90;[11]

(b) Must apply the applicable clauses set out in section 81(3) as applicable to the relevant authorisations sought, which in the case of the Delmore Application is sections 81(3)(a) (resource consent) and

[10] Section 7.7 of the AEE notes that, in accordance with clause 5(1)(f) of Schedule 5 of the FTAA, the following approvals may be required, and will be sought separate to the FTAA application:
• Regulation 42 of the Freshwater Fisheries Regulations 1983;
• Road stopping is required under the Section 116 of the Public Works Act;
• Section 176 Approval is required for works within the NoR 6 designation.
[11] FTAA, s 81(2)(a).

(j) (archaeological authority).[12] We address the provisions relevant to resource consents below under the heading "**Assessment of Resource Consent Application**";

(c) Must comply with section 82 (relating to treaty settlements, the Marine and Coastal Area (Takutai Moana) Act 2011, or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019) if applicable;[13]

(d) In terms of conditions:

(i) Must comply with section 83 in setting conditions. [14]

(ii) May impose conditions under section 84 if applicable, to recognise or protect a relevant Treaty settlement and any obligations arising under the Marine and Coastal Area (Takutai Moana) Act 2011 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019:[15]

We address the FTAA provisions applicable to conditions further below under the heading "**Conditions of Consent**".

(e) May decline the approval only in accordance with section 85 of the FTAA.[16] We address the Panel's power to decline consent further below under the heading "**Power to Decline Consent**".

Assessment of Resource Consent Application

3.14 As noted, a resource consent is an approval described in section 42(4)(a) of the FTAA. When considering the Applicant's resource consent application under section 42(4)(a), the Panel is required by sections 81(2)(b) and 81(3)(a) to apply clauses 17 to 22 of Schedule 5 of the FTAA.

Clause 17 – Criteria and other matters for assessment of consent application

3.15 Clause 17(1) of Schedule 5 requires the Panel, for the purposes of section 81, when considering the resource consent application and setting any

[12] FTAA, s 81(2)(b).
[13] FTAA, s 81(2)(c).
[14] FTAA, s 81(2)(d).
[15] FTAA, s 81(2)(e).
[16] FTAA, s 81(2)(f).

conditions in accordance with clause 18,[17] to take into account the following, giving the greatest weight to (a):

(a) the purpose of the FTAA; and

(b) the provisions of Parts 2, 3, 6 and 8 to 10 of the RMA that direct decision making on an application for a resource consent – this includes sections 104 and 104B of the RMA, but section 104D of the RMA (i.e. the 'gateway test' for non-complying activities) is specifically excluded; and

(c) the relevant provisions of any other legislation that directs decision-making under the RMA.

3.16 Accordingly, under clause 17(1), while the fast-track approvals process prescribed in the FTAA applies to the Application instead of the usual RMA consenting process, the FTAA expressly incorporates (or imports) most RMA provisions relevant to the assessment of resource consent applications, with all necessary modifications.[18]

Meaning of "take into account"

3.17 In *Bleakley v Environmental Risk Management Authority* the High Court held that a statutory obligation in the Hazardous Substances and New Organisms Act 1996 to "take into account" a relevant matter indicated an obligation to: [19]

> … consider the factor concerned in the course of making a decision-to weigh it up along with other factors-with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate

3.18 In an RMA context, *New Zealand Transport Agency v Architectural Centre Inc*, the High Court discussed earlier cases and expressed the view that the phrases "shall have regard to" and "take into account" could be regarded as synonymous.[20] The Court said:[21]

> In my view, the expression 'to take into account' is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase 'to take into account' is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board*

[17] Clause 17(1) also refers to clause 19 in relation to conditions. That clause concerns freshwater fisheries activities and is not relevant.
[18] FTAA, Clause 17(6) of Schedule 5
[19] Bleakley v Environmental Risk Management Authority [2001] 3 NZLR 213 (HC) at [72].
[20] New Zealand Transport Agency v Architectural Centre Inc [2015] NZHC 1991, [2015] NZRMA 375.
[21] At [63], citations omitted.

> *v Assessment Committee of the Metropolitan Borough of St Marylebone* of paying attention to a matter in the course of an intellectual process'. The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

3.19 This reasoning was accepted and adopted by the High Court in *Taranaki-Whanganui Conservation Board v Environmental Protection Authority*.[22]

3.20 Based on the above case law, the statutory obligation to "take into account" requires the Panel to consider and weigh the specified matter alongside other relevant factors during the decision-making process, while retaining discretion to assign it considerable, moderate, little, or no weight as circumstances warrant.

Relevant purpose provisions – FTAA and RMA purposes

3.21 Two statutory purpose provisions apply to resource consent decision-making under the FTAA:

(a) As already noted, the purpose of the FTAA *"is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits."*[23]

(b) The Panel will be familiar with the sustainable management purpose of RMA, which also applies in light of clause 17(1)(b), albeit with the 'greatest weight' given to the FTAA's purpose.

3.22 We observe that clause 17(2) clarifies how the RMA provisions in clause 17(1) should be applied, specifying that references to "Part 2" of the RMA mean only sections 5, 6, and 7 (i.e. not section 8).[24]

Interpretation of requirement to give "greatest weight" to purpose of FTAA

3.23 Clause 17(1) of Schedule 5 of the FTAA expressly requires that the greatest weight be given to the purpose of the FTAA.

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[22] *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, at [159].
[23] FTAA, s 3.
[24] Clause 17(2) also ensures that effects on Māori land and interests are treated as matters of national importance under section 6(e) where the activity has been determined under section 23, and confirms that relevant Mana Whakahono ā Rohe and joint management agreements must be considered as relevant matters under section 104(1)(c) of the RMA.

3.24 Some guidance as to the application of a decision-making provision that expressly require greater weight to be given to certain matters can be gleaned from case law concerning section 34(1) of the now-repealed Housing Accords and Special Housing Areas Act 2013 (**HASHAA**).

3.25 Section 34(1) of HASHAA framed the hierarchy of matters as follows:

> An authorised agency, when considering an application for resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater or lesser) in the order listed:
>
> (a) the purpose of this Act:
>
> (b) the matters in Part 2 of the Resource Management Act 1991:
>
> (c) any relevant proposed plan:
>
> (d) the other matters that would arise for consideration under –
>
> (i) sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
>
> (ii) any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):
>
> (e) the key urban design qualities expressed in the Ministry for the Environment's *New Zealand Urban Design Protocol (2005)* and any subsequent editions of that document.

3.26 In *Enterprise Miramar Peninsula Incorporated v Wellington City Council*,[25] the Court of Appeal examined the interaction between the consenting frameworks under the HASHAA and the RMA. The *Enterprise Miramar* case arose from Enterprise Miramar Peninsula Incorporated's application for judicial review of Wellington City Council's decision under the HASHAA to grant consent for a significant development in Shelly Bay, Wellington.

3.27 The Court of Appeal held that the plain wording of section 34(1) indicated "*that greatest weight is to be placed on the purpose of HASHAA*…". The Court of Appeal also found that the inclusion of additional considerations in subsections (b)-(e) reflected a deliberate intention by Parliament for decision-makers "*not to rely soley on the purpose of the HASHAA at the expense of due consideration of the matters listed in (b)-(e).*"[26]

[25] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541.
[26] Ibid at [41].

3.28 The Court of Appeal said:[27]

> The scheme and plain text of s 34(1) requires individual assessment of the listed matters prior to the exercise of weighing them in accordance with the prescribed hierarchy. The matters listed in subs 1(b)-(e) cannot properly be weighed alongside the purpose of HASHAA under subs (1)(a) if that purpose has first been used to effectively neutralise the matters listed in subs (1)(b)-(e).

3.29 The principles established in *Enterprise Miramar* should inform the interpretation of clause 17(1) of Schedule 5 of the FTAA, mandating separate consideration of each factor before being weighed in accordance with the prescribed hierarchy. Moreover, weight to be afforded to the purpose of the FTAA should not be such as to neutralise the other relevant decision-making criteria which stem from the RMA.

Extent of project's regional or national benefits

3.30 Section 81(4) of the FTAA requires the Panel to consider the extent of the project's regional or national benefits when taking the purpose of the FTAA into account under clause 17(1)(a) of Schedule 5. As addressed further below under the heading "**Power to Decline Consent**", the project's regional or national benefits are also relevant to any decision by a panel to decline an approval under section 85(3).

3.31 There is no suggestion by the Applicant of the project having national benefits. However, the Applicant contends that the combination of the following benefits will make a *"regionally significant contribution to ensuring Auckland has a well-functioning urban environment"*:[28]

(a) Housing supply, and the delivery of approximately 1,250 dwellings;

(b) Roading infrastructure, and the funding and delivery of a portion of the NoR 6 road;

(c) Ecological enhancement, relating to the protection, restoration and enhancement of land through retention, covenanting, planting and pest plant management, plus creation of new wetland environment; and

[27] Ibid at [53].
[28] AEE, page 10.

(d) Economic benefits stemming from the project's contribution to Auckland's GDP and job creation.

3.32 As addressed further below and in the Planning Memo, the Council family's assessment is that the project's contended benefits are overstated, and do not reach the level of regional significance.

3.33 The Applicant's position appears to be that the regional significance of the project has in effect already been "determined". The Applicant states in a document provided to the Council on 19 June 2025:[29]

> In becoming a listed project, the Government had to be (and was) satisfied Delmore could deliver significant regional benefits. The MFE advice to Minister's *[sic]* on Delmore ahead of it being listed in the FTAA (dated 5 July 2024) identified delivery of regionally or nationally signficiant infrastructure *[sic]* as one of the benefits provided by Delmore. This must refer to the part of the NOR6 road within the development site, because that was what the list application said the project would deliver (pg 12 application form and as shown on site plan). As a result, Vineway Ltd considers it is clear, and already determined, that delivering *[sic]* the section of the NOR6 road within the project boundary is a "regionally significant benefit" to Auckland. …

3.34 The Council disagrees with this analysis:

(a) The fact that a project has been listed under the FTAA on the basis that it may deliver regional or national benefits does not preclude, or diminish the need for, a careful and substantive assessment of whether the project, as proposed in the substantive application, will in fact deliver such benefits.

(b) The Ministry for the Environment's advice[30] 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.

(c) Contrary to the Applicant's apparent position, the initial listing decision is not determinative of this question at the consent stage.

[29] In row 16 of a table entitled "Delmore AC Policy June 19 Further Response" (responding to Dave Paul's memo of 23 May 2025).
[30] https://environment.govt.nz/assets/what-government-is-doing/Fast-track-listed/Delmore/159.12-FTA159-Delmore-Sch-2A-MfE-assessment-form-Stage-1_Redacted.pdf

(d) In this regard, some analogy can be drawn with COVID-19 Recovery (Fast-track Consenting) Act 2020 (**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 (section 4, FTCA).[31]

(e) It therefore remains essential that a Panel interrogate and test the alleged benefits of a project, consistent with its duties under sections 81(4) and 85(3) of the FTAA.

3.35 In practice, the Panel's testing should be evidence-based. For some types of claimed benefits – for example, the suggestion that the project will have regional ecological enhancement benefits, or regional transport benefits arising from the partial construction of the NoR 6 road – the Panel can and should rely on objective ecological and transport evidence and expert assessment to test whether contended benefits will be delivered, in what form, and to what extent – and ultimately whether they are indeed 'regional' in nature.

3.36 Where the claimed benefits are economic, the Panel must also consider whether the alleged benefits represent a net economic contribution or benefit. This requires scrutiny not only of the gross outputs, but also of associated economic costs – which, in a given case, might include for example opportunity costs and displacement effects. Without such a net assessment, benefits risk being overstated, in turn distorting the proportionality exercise required under section 85(3).

3.37 The FTAA is silent on whether regional or national economic benefits are to be assessed on a gross or net basis. The Council submits that the only reasonable approach is that economic benefits should be considered on a net basis. A gross-benefit approach risks perverse outcomes, where projects that may deliver significant gross economic outputs but impose economic costs that outweigh those outputs could nonetheless be elevated under the FTAA's purpose. Parliament cannot have intended that result, absent express language (such as a specific reference to "gross economic

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

benefits"). Mr Stewart is correct when he expresses the view that it is necessary to consider the net position, as *"[t]o interpret it otherwise would depart from basic principles of sound economic analysis"*.[32]

3.38 While he holds different views from Council's economics expert (James Stewart), the Applicant's economics expert, Adam Thompson, agrees that "external costs can occur and need to be considered".[33] Both Mr Stewart and Council's economics peer reviewer, Dr Richard Meade, consider it essential to assess both the economic costs and benefits.

Clause 17(1)(b) – RMA provisions

3.39 As noted, clause 17(1)(b) of Schedule 5 requires the Panel to take into account the provisions of Parts 2, 3, 6, and 8 to 10 of the RMA that direct decision making on an application for a resource consent (but excluding section 104D of the RMA).

3.40 We draw the Panel's attention to clause 17(3) and (4) of Schedule 5 to the FTTA, which applies to any RMA provisions which would **require** the refusal of consent. In relation to such provisions, the Panel must take into account that the provision would normally require an application to be declined, but must not treat the provision as requiring the Panel to decline the application the Panel is considering. Section 107(1) would appear to be an example of such a provision. By contrast, section 106(1) would not (as it uses the language "may refuse" rather than "must refuse").

3.41 The provisions in Parts 2, 6 and 10 of the RMA relevant to this Application encompass:

Part 2, RMA provisions

(a) The provisions of Part 2 of the RMA. As noted above, applying clause 17(2)(a), sections 5, 6 and 7 (but not section 8) are applicable. The statutory planning assessment by Mr Pope, contained in **Section D** of the Council's overarching Planning Memo, addresses sections 5 to 7 of the RMA. He identifies sections 5, 6(c) and 7(b), (c) and (f) as relevant.

[32] Annexure 2 to Planning Memo, Addendum report of James Stewart (Economic) for Council, 25 June 2025, page 3.
[33] Urban Economics memo dated 30 May 2025, page 7.

Part 6, RMA provisions

(b) A number of provisions in Part 6 of the RMA relating to resource consents apply, as outlined briefly below.

(c) First, the usual decision-making considerations under **section 104(1)(a) to (c)** of the RMA, namely:

(i) Any actual and potential effects on the environment of allowing the activity. The Council family's assessment has identified a range of potential adverse effects, some of which can be adequately mitigated, but some of which are assessed as significant and incapable of being avoided, remedied, or mitigated.

(ii) Any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity. Some offsetting is proposed by the Applicant as a response to the loss of wetland area, but is assessed by Council's terrestrial ecologist as inadequate.[34]

(iii) Any relevant provisions of—

- a national environmental standard:
- other regulations:
- a national policy statement:
- a New Zealand coastal policy statement:
- a regional policy statement or proposed regional policy statement:
- a plan or proposed plan; and

[34] Annexure 23 to Planning Memo, paragraph 7.8.

The Council's assessment refers to relevant provisions in applicable national policy statements and the Auckland Unitary Plan.

(iv) Any other matter the consent authority considers relevant and reasonably necessary to determine the application. The Council's Future Development Strategy is an example of such a matter. See the further discussion below in this regard.

(d) **Section 104B**, which relates to decision-making for discretionary and non-complying activity consent applications (the Application is for a non-complying activity overall[35]).

(e) Under **section 105**, the Panel must, in addition to the matters in section 104(1), have regard to:

(i) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and

(ii) the Applicant's reasons for the proposed choice; and

(iii) any possible alternative methods of discharge, including discharge into any other receiving environment.

Council's stormwater memo addresses section 105.[36]

(f) Under **section 106**, the Panel may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that there is a significant risk from natural hazards (section 106(1)(a)), or that sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision (section 106(1)(c)). The Applicant's assessment is that there is no reason to refuse to grant subdivision consent under section 106 of the RMA.[37] In terms of Council's assessment:

(i) Relevant to section 106(1)(a), the Planning Memo notes that there are fundamental information gaps in the Applicant's assessment for the Council to be able to confirm if the

[35] As the AEE records, at section 8.8.
[36] Annexure 17 to Planning Memo
[37] AEE, at section 14.4.1.11.

proposal would satisfy this provision. The Council's stormwater memo[38] similarly notes that, for the purposes of section 106, at this stage natural hazards have not been adequately assessed (geomorphic risks, erosion and flooding aspects).

(ii) Relevant to section 106(1)(c), Auckland Transport's comments dated 23 June record at paragraph 10 that:

> The Project is to gain access via a connection to be formed by an adjacent residential development (as per section 7.4.1.1 of the Applicants AEE). Given the reliance on delivery of this road by a third party, consideration should be had under Section 106 of the Resource Management Act, as to whether sufficient provision will be made for legal and physical access to each allotment.

(g) Under section 107, the Panel cannot grant a discharge permit to authorise the discharge of a contaminant or water into water if after reasonable mixing, the water discharged is likely to give rise to all or any of a number of listed effects in the receiving water. Section 107 is addressed in the Council's stormwater memo, where Mr Meyer signals that section 107 issues could potentially arise if erosion is found to be likely with the T-bar design.[39]

(h) **Sections 108, 108AA, 108A and 109** relating to conditions and bonds / covenants. We address conditions below under the heading "**Conditions of Consent**".

Part 10, RMA provisions

(i) The provisions of Part 10 of the RMA relating to subdivisions also apply.

(j) Of relevance to this Application, we highlight section 220, which identifies specific conditions that may be imposed on subdivision consents (without limiting section 108), as well as section 221 (consent notices) and section 224 (restrictions upon deposit of survey plan), which are likely to be relevant in the event that the Panel decides to approve the Application.

[38] Annexure 17 to Planning Memo.
[39] Ibid.

Conditions of Consent

3.42 As noted, clause 17(1) requires the Panel, when considering setting any conditions in accordance with clause 18, to take into account the provisions listed at subclause (1)(a) to (c), giving the greatest weight to (a).

3.43 Clause 17(1) of Schedule 5 of the FTAA imports Part 6 (Resource Consents) and Part 10 (Subdivision and reclamations) of the RMA. This includes sections 108, 108AA, 108A, 109 and 220 of the RMA.

3.44 In *Waitakere City Council v Estate Homes Ltd*,[40] the Supreme Court held that the power to impose conditions on resource consents under section 108(2) of the RMA was a broadly expressed power, which included, in that case, the requirement to build an arterial road.

3.45 Section 108AA(1) of the RMA codifies, in part, the common law requirements for conditions to be valid.[41] Section 108AA(1) states:

> **108AA Requirements for conditions of resource consents**
>
> (1) A consent authority must not include a condition in a resource consent for an activity unless—
>
> (a) the applicant for the resource consent agrees to the condition; or
>
> (b) the condition is directly connected to 1 or more of the following:
>
> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard:
>
> (iii) a wastewater environmental performance standard made under section 138 of the Water Services Act 2021:
>
> (iv) a stormwater environmental performance standard made under section 139A of the Water Services Act 2021; or
>
> (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

[40] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112.
[41] Ibid at [54].

3.46 In addition, conditions must also meet the established common law principles from the *Newbury* test. The *Newbury* requirements, which will be familiar to the Panel, are:[42]

(a) Conditions must be for a planning purpose and not for any ulterior one.

(b) They must fairly and reasonably relate to the development permitted, though this relationship test has been strengthened under section 108AA(1)(b) of the RMA, which requires conditions to be "directly connected" rather than merely "fairly and reasonably" related.

(c) They must not be so unreasonable that no reasonable planning authority could have imposed them.

3.47 For completeness, section 83 of the FTAA states an overarching obligation on the Panel when setting conditions, namely that:

> When exercising a discretion to set a condition under this Act, the panel must not set a condition that is more onerous than necessary to address the reason for which it is set in accordance with the provision of this Act that confers the discretion.

3.48 In reality, we do not consider that the direction in section 83 that conditions should be no more onerous than necessary alters the existing position – the same proportionate approach is expected under standard RMA decision-making.

Conditions precedent

3.49 Based on the Council's assessment to date, should the Panel be minded to grant consent for the Application, use of conditions precedent is likely to be essential to ensure that defined development / subdivision does not occur prior to certain works / upgrades being completed. It is therefore appropriate to briefly address RMA case law on such conditions, which we submit would apply equally to the FTAA context.

3.50 In a consenting context, a condition precedent is a condition "that must be satisfied before a consent-holder can undertake activities authorised by a consent or a designation".[43] In *Westfield (New Zealand) Ltd v Hamilton City*

[42] *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731, as applied in New Zealand by *Waitakere City Council* v Estate Homes Ltd [2007] 2 NZLR 149, at para [66].
[43] *Tram Lease Limited v Auckland Transport* [2015] NZEnvC 137 at [28].

Council, the High Court confirmed that a condition precedent which defers the opportunity for an applicant to embark upon the activity until a third party carries out some independent activity is not invalid.[44]

3.51 A condition precedent is lawful subject to the requirement that it does not:[45]

(a) purport to impose conditions prior to the substantive consent having legal effect;[46]

(b) require the consent holder to do something that it cannot lawfully do;[47]

(c) frustrate the grant of consent;[48]

(d) give rise to undue uncertainty as to the effects of the consented works and whether the mitigation measures proposed can be implemented, and if they are, whether they would be effective.[49]

3.52 In *Hildeman v Waitaki District Council*,[50] the Environment Court considered a land use consent application for a campground and found that increased traffic from the proposed campground would necessitate an intersection upgrade. The Court noted that, while there were existing issues at the intersection, the current low traffic volume did not warrant an upgrade. The Court therefore concluded that, notwithstanding the pre-existing nature of the problem, at least part of the responsibility must lie with the applicant. Although the Court accepted that there are situations where it is appropriate to impose a condition precedent on a resource consent, it ultimately declined the consent, as the Council had refused to commit to the intersection upgrade and the applicant was unable to fund the upgrade on an economically viable basis. The Court said that "*Such a condition would potentially render the grant of consent futile and ought not be imposed.*"[51]

3.53 While conditions precedent are clearly a legally available mechanism, they are not always appropriate in practice. In *Laidlaw College Inc v Auckland City*

[44] *Westfield (New Zealand) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254, at [56].
[45] Ibid.
[46] Ibid, citing *Director-General of Conservation v Marlborough District Council* HC Wellington CIV-2003-485-2228, 3 May 2004, HC, 2004 at [15].
[47] Ibid, citing *Westfield (NZ) v Hamilton City Council* HC Hamilton, CIV-2003-485-000956, 17 March 2004.
[48] Ibid, citing *Hildeman v Waitaki District Council* [2010] NZEnvC 51.
[49] Ibid, citing *Laidlaw College Inc v Auckland City Council* [2011] NZEnvC 248.
[50] *Hildeman v Waitaki District Council* [2010] NZEnvC 51 (*Hildeman* Interim Decision) and *Hildeman v Waitaki District Council* [2010] NZEnvC 194 (*Hildman* Final Decision).
[51] *Hildman* Interim Decision at [83].

Council, the Environment Court noted that the factual situation must support the imposition of such a condition, particularly where third party agreement or assessment is required.[52] The Court emphasised that there must be sufficient certainty that proposed mitigation measures would be effective before a condition precedent can appropriately be imposed. Similarly, as demonstrated in *Hildeman*, a condition precedent should not be imposed where it would potentially render the grant of consent futile due to practical impediments such as lack of funding or third party commitment to necessary works.

3.54 Accordingly, while conditions precedent may be a useful tool in appropriate circumstances, careful consideration must be given to whether the factual matrix supports their use, including whether there is sufficient certainty as to the effectiveness of proposed mitigation and the practical ability to fulfill the condition.

Power to Decline Consent

3.55 Section 85 prescribes circumstances where the Panel "must" (section 85(1)) and "may" (section 85(3)) decline approval.

3.56 The Council's assessment has not identified any reasons why the Application ***must*** be declined in terms of section 85(1) of the FTAA.

3.57 Under section 85(3) of the FTAA, the Panel ***may*** decline an approval where adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits.

3.58 Specifically, subsection (3) provides that the Panel may decline an approval if, in complying with section 81(2), the Panel forms the view that:

> (a) There are 1 or more adverse impacts in relation to the approval sought; and
>
> (b) Those adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the panel has considered under section 81(4), even after taking into account –
>
> (i) any conditions that the panel may set in relation to those adverse impacts; and

[52] *Laidlaw College Inc v Auckland City Council* [2011] NZEnvC 248 at [52].

(ii) any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts.

3.59 Broadly, this 'proportionality test' requires the Panel to consider:

(a) The nature and significance of adverse impacts identified through the section 81(2) process;

(b) The project's regional benefits as assessed under section 81(4) (there being no suggestion of national benefits here);

(c) Whether proposed conditions or applicant modifications could adequately address adverse impacts;

(d) Whether the proportionality threshold is met even after accounting for mitigation measures, compensation etc.

3.60 Should the Panel assess the adverse impacts as being sufficiently significant to be out of proportion to the project's regional benefits, having considered the above matters, the Panel may in its discretion decline the Delmore Application.

3.61 The term "adverse impact" is defined in section 85(5) as meaning *"any matter considered by the panel in complying with section 81(2) that weighs against granting the approval"*. The term is therefore broad, and could encompass (for example) adverse effects on the environment, matters arising from planning instruments, and section 104(1)(c) matters.

3.62 Section 85(4) requires brief comment. The subsection states that a panel *"may not form the view that an adverse impact meets the threshold in subsection (3)(b)* ***solely on the basis*** *that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document"* (emphasis added).

3.63 The provision does not prohibit consideration of inconsistency or contrariness with planning documents – it only prevents reliance on inconsistency alone as sufficient grounds for decline. This suggests Parliament intended that inconsistency remains a relevant consideration. It simply cannot be the ***only*** factor supporting a decline decision.

3.64 Where inconsistency with planning provisions is, for instance, coupled with actual adverse impacts (environmental, social, or economic), both factors may legitimately contribute to a decision to decline.

3.65 The Council's assessment (summarised in **Section 4** below and in the Planning Memo) has identified several material adverse impacts that are considered sufficiently significant to be out of proportion to the project's regional benefits (even taking into account mitigation, offsetting etc – and whether or not the Applicant's or Council's assessment of benefits is preferred).

Power to decline in part

3.66 It is well established that, when determining applications for resource consent, the decision-maker has *"the power to grant consent to something less than what is actually being sought"*. [53]

3.67 In the decision of the expert consenting panel concerning an application for a comprehensive care retirement village at Kohimarama, Auckland under the FTCA, the Panel considered the following comments from RMA case law: [54]

> The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. … In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions.

3.68 The Panel then said that it saw:

> … no reason why this approach should not be equally applicable to resource consenting under the FTA provided that the purpose of the FTA is not neglected in the process. For example, there may be instances where s 108 conditions of consent would be unavailable or inappropriate to restrict certain effects that can be remedied by a partial consent which still enables an effective project.

3.69 Therefore, under section 81(1) of the FTAA, the Panel has three options:

(a) grant the full approval (with conditions);

[53] See *Director-General of Conservation v the New Zealand Transport Agency* [2020] NZEnvC 19 at [20].
[54] Amended decision of the Kohimarama Comprehensive Care retirement village expert consenting panel released on 8 June 2021 at [53], citing *Collins v Northland RC* [2013] NZHC 3039 at [26] – [27] and *Haslam v Selwyn District* (1993) 2 NZRMA 628 (PT) at 634.

(b) decline it entirely; or

(c) approve only part of what is sought (with conditions), and decline the remaining parts.

3.70 However, any decision to decline an approval (whether in whole or in part) must be made in accordance with section 85 of the FTAA. Therefore, the Panel must work through the considerations relating to section 85 identified above.

Other legal considerations

3.71 We address, from a legal perspective, a number of discrete legal topics / considerations relevant to the Panel's deliberations, as follows:

(a) Case law and higher order planning instrument provisions confirming that infrastructure issues, including funding impacts, are valid considerations for the Panel;

(b) Similarly, case law confirming that the Courts (and here the Panel) do not have power to direct the executive (i.e. the Council) or any of its agencies as to how they may collect or spend public moneys;

(c) Update the Panel on Court of Appeal authority confirming Watercare's ability *inter alia* to decide what assets would vest in it;

(d) The *vires* of consent conditions which purport to deem certification (it is understood that the Applicant may intend to propose such conditions);

(e) The status of the Council's Future Development Strategy.

Relevance of infrastructure funding and delivery

Policy instruments

3.72 It is trite that the adequacy of infrastructure to support development is a relevant consideration for the Panel. Higher order planning instruments and case law confirms that funding considerations are also relevant matters for the Panel in its deliberations. These matters are addressed in some detail in **Sections B and D** of the Planning Memo, and in the funding and financing

memo of Brigid Duffield and Ian Kloppers (**Annexure 1** to Planning Memorandum).

3.73 The NPS-UD recognises the importance of the integration of infrastructure provision and funding decisions with urban development:

(a) Under Objective 6 which is that local authority decisions on urban development that affect urban environments are (*inter alia*) integrated with infrastructure planning and funding decisions.

(b) Under Policy 1 and the concept of well-functioning urban environments, which includes good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport.

3.74 Several AUP RPS objectives and policies in sections B2 and B3 are of particular relevance:

(a) Objective B2.2.1(1)(c):

> A well-functioning urban environment with a quality compact urban form that enables all of the following: …
>
> (c) better use of existing infrastructure and efficient provision of new infrastructure; …

(b) Objective B2.2.1(5):

> The development of land within the Rural Urban Boundary, towns, and rural and coastal towns and villages:
>
> (a) is integrated with the provision of appropriate infrastructure; …

(c) Policy B2.2.2(7)(c):

> Enable rezoning of land within the Rural Urban Boundary or other land zoned future urban to accommodate urban growth in ways that do all of the following:
>
> …
>
> (c) integrate with the provision of infrastructure; and …

(d) Policy B2.4.2(6):

> Ensure development is adequately serviced by existing infrastructure or is provided with infrastructure prior to or at the same time as residential intensification. …

(e) Objective B3.3.1(1)(b):

> (1) Effective, efficient and safe transport that: ….
>
> (b) integrates with and supports a quality compact urban form; …

(f) Policy B3.3.2(5):

> Improve the integration of land use and transport by:
>
> (a) ensuring transport infrastructure is planned, funded and staged to integrate with urban growth; …

3.75 The explanatory text at B3.5 of the RPS confirms the intention that *"development, especially that associated with growth in greenfield areas, must be integrated and co-ordinated with the provision of infrastructure and the extension of networks"*. These provisions expressly require an 'integrated' approach and are directed at ensuring decision-making on growth and urbanisation is carefully coordinated with transport infrastructure and funding decisions. Regard must be had to these provisions under s 104(1)(b) RMA and clause 17 of Schedule 5 FTAA.

Case law

3.76 The Courts have long recognised that it is bad resource management practice and contrary to the purpose of the RMA to rezone land for development where the necessary infrastructure does not exist and there is no commitment to provide it. This principle applies even where the land that forms part of the plan change would otherwise be generally appropriate for more intensive use but for the lack of provision of necessary infrastructure: *National Investment Trust v Christchurch City Council.*[55]

3.77 The Environment Court in *Foreword Developments Ltd v Napier City Council* held:[56]

> It is bad resource management practice and contrary to the purpose of the Resource Management Act - to promote the sustainable management of natural and physical resources; to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it. In *McIntyre v Tasman District Council* (W 83/94) the Court said:

[55] *National Investment Trust v Christchurch City Council,* C41/2005 at [116].
[56] *Foreworld Developments Ltd v Napier City Council*, W08/2005, at [15].

> *We agree with Mr Robinson that in this case the extension of services such as the sewage system and roading should be carried out in a coordinated progression. We hold that if developments proceed on an ad hoc basis they cannot be sustainably managed by the Council - an aspect which is not commensurate with section 5 of the Act.*

There are similar comments in decisions such as *Prospectus Nominees v Queenstown-Lakes District Council* (C 74/97), *Bell v Central Otago District Council* (C 4/97) and confirmation that the approach is correct in the High Court decision of *Coleman v Tasman District Council* [1999] NZRMA 39.

3.78 While these cases arose in the context of re-zoning proposals and the Application is technically a resource consent, given the scale of Delmore its effect is akin to a re-zoning and the principles set out above are equally applicable. In any event, the Environment Court has held in *Norsho Bulc v Auckland Council* that a proposal causing unnecessary expense to the ratepayers is a lawful basis on which to refuse an application for *resource consent*.[57]

3.79 The Environment Court in *Norsho Bulc* cited with approval the *Coleman v Tasman District Council* decisions which concerned a subdivision application which had been declined based on inadequacy of the surrounding roading infrastructure to cope with the cumulative effects of development in circumstances where there was no funding for upgrades.

3.80 *Coleman* affirmed the principle from *Bell v Central Otago District Council*[58] that courts should not put local authorities in positions where they might be forced to commit funds to infrastructure improvements, recognising that councils have the prerogative to determine funding priorities for public works like roading, which should be achieved at rates with which communities can *"physically and economically cope".*

Expenditure of public money a matter for the Council

3.81 Flowing from the above, there is no duty on a Council to commit funds to works / infrastructure. The Courts have long held that they do not have power

[57] *Norsho Bulc v Auckland Council* (2017) 19 ELRNZ 774, at [93], citing *Coleman v Tasman District Council* EnvC Wellington W67/97, 26 June 1997; upheld on appeal: *Coleman v Tasman District Council* [1999] NZRMA 39 (HC).
[58] *Bell v Central Otago District Council,* C4/97.

to direct the Executive (i.e. the Council) or any of its agencies as to how they may collect or spend public moneys.[59]

3.82 In *National Investment Trust* the Environment Court held that it was *"not for this Court to dictate to the Council when these infrastructural improvements should be made"*[60] (which related to roading and water and sewage infrastructure in that case). As the Court put it in *Foreworld*:

> … decisions about priorities for spending on infrastructure are matters for the Council to decide. … Those sorts of policy decisions are ones for which the Council may be politically accountable, but neither they nor costing calculations are decisions which we have any power to investigate or to rule upon.

3.83 The above statements remain good law as confirmed in *Norsho*. The Applicant may argue that conditions precedent are an appropriate mechanism to address any identified gaps in infrastructure provision and funding. This would represent bad resource management practice and an undesirable outcome as the Court held in *Foreworld*:[61]

> Unmeetable expectations are raised and the Council is put under pressure to spend money it has decided, as a matter of managing the City in an integrated fashion to commit elsewhere. That is the antithesis of the function of integrated management of resources imposed on territorial authorities by the RMA.

Watercare's ability to decline to accept vesting of assets / connections

3.84 The Applicant's AEE anticipates connecting to the Watercare potable water supply[62] and that *"the proposed gravity network, gravity pumpstation and rising mains are to be vested to Watercare."*[63] We emphasise Watercare's discretion with respect to these matters.

3.85 The Court of Appeal's decision in *Thirty Eight Moffat Ltd v Auckland Council and Watercare Services Ltd* concerned Watercare's refusal to accept vesting of a watermain located under a jointly owned access lot (JOAL) in a 22-lot subdivision. Watercare declined to accept vesting, citing its Code of Practice which generally prohibited watermains under private land.[64]

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[59] See e.g. *Norsho Bulc v Auckland Council* (2017) 19 ELRNZ 774, at [88], citing *Bell v Central Otago District Council EnvC Christchurch* C4/97, 24 January 1997 at 8; *Coleman v Tasman District Council* [1999] NZRMA 39 (HC).
[60] C41/2005, at [117].
[61] *Foreworld* at [20].
[62] AEE at 7.4.6.
[63] AEE at 7.5.2.
[64] *Thirty Eight Moffat Ltd v* Auckland *Council and Watercare Services Ltd* [2023] NZCA 107.

3.86 The High Court had held that:[65]

> … **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.** Equally, no one can insist Watercare accept infrastructure as its own; there is no "right" to vest assets in Watercare. Approached another way, Watercare could decline to accept a watermain as part of the public water system - provided, of course, it acted reasonably in doing so - quite apart from the existence of an associated code of practice, let alone bylaw.
>
> [emphasis added]

3.87 In deciding whether or not to accept ownership of infrastructure, Watercare was acting in its own right. It was not exercising legislative power as a delegate of the Council.[66]

3.88 The Court of Appeal dismissed the subsequent appeal. It found that Watercare was empowered, as owner and operator of the water supply network, to decline to accept vesting of the watermain under the lane.[67] Further:

(a) Like any other company that owns and operates network infrastructure, it is free to decide whether or not to accept the transfer of an asset and the grant of an easement.[68]

(b) Arguments concerning Watercare's bylaw were rejected, the Court finding that, even absent the bylaw, Watercare would have precisely the same ability to decline to accept ownership of infrastructure that did not comply with its own internal codes of practice.[69]

3.89 These findings of the Court of Appeal are particularly relevant in light of Watercare's advice that it may refuse water and wastewater connections for the Delmore Project in accordance with its policies and under the Water Supply and Wastewater Bylaw 2015.[70]

3.90 The ratio in *Thirty Eight Moffat* appears equally applicable to other network utility owners and operators and bodies corporate who retain a discretion

[65] *Thirty Eight Moffat Ltd v Auckland Council and Watercare Services Ltd* [2021] NZHC 2978, at [40].
[66] Ibid, at [59]-[61].
[67] Ibid at [79].
[68] Ibid at [61].
[69] Ibid at [64].
[70] Annexure 7 to Planning Memo.

(acting reasonably) to decline to accept vesting of land or assets. Given the out of sequence nature of this Application, if it is granted then that scenario may well come to pass, e.g. parks or stormwater assets are not accepted for acquisition or vesting. As such, conditions of consent should include a contingency for this, making provision for potential private ownership and maintenance of land and assets which are proposed to vest.

***Vires* of conditions purporting to 'deem' certification**

3.91 It is understood the Applicant may intend to seek the imposition of conditions providing that if Council has not certified a plan or document (for instance) within a certain number of days, Council shall be deemed to have certified the relevant plan or document.

3.92 Such conditions are unlawful:

(a) In *Meridian Energy Ltd v Wellington City Council*,[71] Meridian sought conditions that if it did not hear back from the Council as to the approval of a management plan within a specified timeframe then the management plan would be deemed to be approved. The Court held that *"this approach is not sound environmental management (or we suspect good project management), and we do not accept Meridian's approach"*.[72]

(b) Subsequently, in *New Zealand Transport Agency – Waka Kotahi*, the Environment Court did not see any reason to depart from the findings in *Meridian Energy* and it directed the parties to delete conditions providing for 'deemed certification' of management plans.[73]

Status of Council's Future Development Strategy

3.93 The relevance of planning instruments such as the AUP and NPS-UD to the Panel's decision-making is clear. It may be helpful to briefly address the status of the Future Development Strategy (**FDS**). Section B of the Council's Planning Memo discusses strategic planning matters, with a particular focus on the FDS.

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

3.94 In short:

(a) The FDS is an important growth document required by subpart 3 of Part 3 of the NPS-UD.

(b) The FDS was prepared using the special consultative procedure in section 83 of the LGA.

(c) The purpose of an FDS is *inter alia* to *"assist the integration of planning decisions under the Act with infrastructure planning and funding decisions"* (clause 3.13(1)(b)).

(d) The FDS is a relevant consideration to "have regard to" under section 104(1)(c) of the RMA. In this regard, we note that the Environment Court has previously confirmed[74] that similar documents – the Future Urban Land Supply Strategy and Auckland Plan – are relevant under section 104(1)(c).

(e) The meaning of the phrase "have regard to" has been considered in a number of RMA cases. It requires the decision-maker to give genuine attention and thought to the matter / document, and apply such weight as is considered to be appropriate.[75]

4. OUTCOME OF COUNCIL FAMILY ASSESSMENT TO DATE

4.1 The Council family has undertaken a review and assessment of the Application, including updated information received from the Applicant by 12 June 2025, which is recorded in the Planning Memo and the technical specialist reports annexed. Rather than repeating that assessment here, we briefly summarise for the Panel the key findings and information gaps.

4.2 A number of adverse impacts have been identified in the Council's reporting, which either can be addressed adequately through conditions of consent, or which are not sufficiently significant to be considered to outweigh the project's benefits.

4.3 However, the Council's assessment has identified the following adverse impacts meeting the section 85(3) threshold, individually and collectively (i.e.

[74] *Albert Road Investments Ltd v Auckland Council* [2018] NZEnvC 102, at [64].
[75] *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

where the adverse impacts are significantly significant to be out of proportion to any regional benefits, even after taking into account mitigation etc):

(a) No / inadequate proposal for water supply servicing - The absence of a clear proposal for water supply servicing is a key infrastructure deficit, creating significant uncertainty as to the feasibility of development, and concerns (if consent is granted) as to potential public health risks for the future community.

(b) Viability of wastewater servicing - Watercare has assessed the capacity of the existing and planned bulk infrastructure required to support the proposal ahead of the 2050+ timing in the Future Development Strategy and confirm that the earliest connections could be provided without precluding development of the existing live zoned areas and sequenced growth would be from 2050+. It is not yet clear whether there is viable long-term private wastewater solution, which (if there is no such solution) is a potentially significant adverse impact.

(c) Design and metrics of the Neighbourhood Parks - The design of the Neighbourhood Park in Stage 2 has limited utility noting the steep topography of part of the park land. In respect to the Stage 1 Neighbourhood Park, the area does not meet open space provisions (3,000m² minimum); and limited details have been provided in the application and Applicant responses in terms of the key metrics. The site-specific measures need to be met while accommodating a high level of useability for the land. If these key metrics are not met, it would be considered to have adverse effects on the wider and regional open space provision and future communities open space needs. In addition, it is doubtful that Council would acquire such spaces, and provision would need to be made for private ownership and maintenance.

(d) Partial delivery and realignment of NoR 6 - The proposal will deliver only a portion of the NoR 6. This is not considered a regionally significant benefit as it would only serve the development site and provide no efficiency or wider arterial corridor benefits. The benefits contended by the Applicant could only be considered regionally beneficial if the entire NoR 6 Connection between Milldale and Grand Drive Ōrewa corridor were to be delivered. The arterial road cannot

operate with its intended function (as an arterial corridor supporting urban growth and improving access) until it is fully constructed and does not have any regional benefit until it can operate as an arterial corridor. The formation of only part of NoR 6, combined with the proposed alignment deviation, not only undermines transport outcomes but also creates potentially significant cost implications for Auckland Transport and the Council.

(e) Inadequate provision of collector road, and general road hierarchy, and potential need for further interim upgrades to address transport effects - The proposal does not provide an appropriate road hierarchy with the one arterial road (NoR 6) and 28 local roads. No collector roads are proposed to accommodate buses and enable appropriate bus transport connections and connectivity for the proposal. The proposal has poor connectivity (vehicular and pedestrian/cyclist) both within the site and with surrounding rural and urban areas. The contributes to poor connectivity, car dependency and lack of public transport opportunities which are considered to be significant. Beca has also noted the potential need for further interim upgrades to the road network to provide safe and efficient access for the development, i.e. road widening, footpath/cycle paths, intersection upgrades etc.

(f) High car dependency and fragmented urban form - The proposed site and road layout, with a high number of cul-de-sacs, contributes to poor connectivity and a fragmented urban form that reinforces a car-dominated movement network. These poor urban design outcomes are considered to be significant and the proposal does not contribute to a well-functioning urban environment.

(g) Potential ecological effects - There are a number of key information gaps in the Application with respect to ecological effects. These information gaps mean adverse terrestrial and freshwater ecology effects are not able to be fully assessed. Consequently it is not possible to determine whether the measures proposed by the Applicant are appropriate to mitigate or avoid these effects.

(h) Sedimentation effects - An AMP is considered necessary, given the extent and duration of the earthworks activity within the receiving

environment that contains wetlands and streams, to ensure that adverse sedimentation effects are appropriately mitigated and managed. The Applicant is opposed to this mechanism.

(i) Adequacy of Structure Plan - The absence of a properly prepared Structure Plan creates a potential ad-hoc / piece-meal approach to future development of the wider area and integration with other land including Ara Hills, poor quality outcomes and a non-integrated approach for the delivery/ coordination of infrastructure, and roading which are considered to be significant.

(j) Impacts on planned investment and infrastructure provision - Bringing forward the timing of the proposed development would come at the expense of the delivery of other developments and is not possible without displacing planned investment and infrastructure service provision in existing live zoned areas and sequenced areas. There are significant infrastructure funding and financing gaps for the application and no agreements are in place to confirm the scope of proposed infrastructure and ongoing operational expenditure. The impact of displaced development, planned investment, infrastructure service provision, and significant funding and financing gaps are considered to be significant.

(k) Uncertainty of infrastructure delivery and servicing – The absence of resolved water supply, wastewater and transport infrastructure delivery and servicing creates significant uncertainty and risk that, if the Application is approved, interim solutions may be required. There is insufficient certainty that Council will not bear (or be placed under pressure to bear) the short, medium or long term operational and capital costs, which Council is not in a position to absorb. The impact of this uncertainty is considered to be significant.

4.4 As the Planning Memo notes (see the table in Section D, "**Key Information Gaps**"), and the specialist reports discuss in more detail, key information gaps remain with respect to a range of topics, including:

(a) Geomorphic Risk Assessment to inform the adequacy or otherwise of the proposed riparian setbacks.

(b) Parks – including detailed neighbourhood park metrics, update scheme plans, retaining wall plans, interface details, canopy closure, service line depths, public access easements, drainage reserve elements, and updated landscape plans.

(c) Wetlands – hydrological assessment, dewatering and groundwater diversion effects, and wetland off-set calculations.

(d) Stream morphology assessment.

(e) Retaining walls in terms of geotechnical and other detail.

(f) The Reverse Osmosis (RO) Waste Stream associated with the WWTP and the details of wastewater irrigation field within the covenant bush area.

(g) The Structure Plan, which lacks a detailed and integrated approach with other FUZ.

(h) Site-specific fauna and flora surveys, assessment of Significant Ecological Areas, and Ecological Effects associated with the NoR6 road realignment.

(i) Covenant / habitat management and restrictions on domestic pets.

(j) Robust cost/benefit analysis as part of the economic assessment.

(k) Overland flowpath assessment relating to roading, culvert assessment and flood modelling.

(l) Design details for the upgrade of Upper Orewa Road and Road 17/ Upper Orewa Road Sight Distance.

(m) Lighting and design plans for shared driveways, vehicle tracking plans, and details of mobility parking and loading.

(n) Draft Management Plans.

4.5 The Planning Memo explains the nature of the deficiency with respect to each of these items, its significance and impact for decision-making, and the risk or uncertainty which results from each information gap.

4.6 We emphasise that further information in relation to these matters has the clear potential to identify further adverse impacts of significance to the proportionality test under section 85(3) FTAA.

5. CONCLUSION AND RECOMMENDATIONS

5.1 As matters stand on 25 June 2025, the result of the Council family's comprehensive assessment is that under the FTAA's section 85(3) proportionality test the proposal's adverse impacts substantially outweigh any regional benefits (even accounting for proposed mitigation measures etc).

5.2 The recommendation in the Planning Memo is to **decline** the Application.

5.3 The Applicant has provided some additional material post-12 June 2025 and has foreshadowed further material being provided by 2 July 2025. The Panel may wish to consider exercising its power under section 67 of the FTAA to request further assessment by the Council family on updated material. The Council family comments have also identified a range of important information gaps, and the Panel may also wish to consider exercising its power under section 67 in relation to those matters.

5.4 The potential for such further information processes raises issues of sequencing and fairness to the parties, and considerations with respect to the statutory timeframes under which the Panel must operate. Counsel and Council family representatives would be available to attend a conference with the Panel to address procedural matters if that were of assistance.

DATED the 25th day of June 2025

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