

BEFORE THE FAST-TRACK EXPERT CONSENTING PANEL

IN THE MATTER

of an application for approvals under section 42 of
the Fast-track Approvals Act 2024

AND

IN THE MATTER

of Delmore, a project listed in Schedule 2 to the
Fast-track Approvals Act 2024

MEMORANDUM OF COUNSEL FOR THE APPLICANT WITH RESPONSE TO COMMENTS

5 June 2026

MAY IT PLEASE THE PANEL

1. INTRODUCTION

- 1.1 This memorandum addresses the legal issues arising in comments to the Panel under ss 53 of the Fast-track Approvals Act 2024 (“**FTAA**” or “**Act**”) about the application for approvals for the Delmore project. The Delmore project is a listed project under the FTAA.
- 1.2 Section 2 identifies which version of the FTAA applies to the Panel’s decision.
- 1.3 Section 3 addresses two issues raised by the Panel relating to the scope of the application.
- 1.4 Section 4 provides an overview of the legislative framework for making decisions under the FTAA on approvals ordinarily sought under the Resource Management Act 1991 (“**RMA**”). This is included so that the interpretation of the FTAA underpinning the applicant’s responses to the legal issues arising in comments to the Panel is clear.
- 1.5 Some of the provisions addressed in Section 4 also apply to the archaeological authority approval included in the application (ordinarily sought under the Heritage New Zealand Pouhere Taonga Act 2014). However, because both Heritage New Zealand Pouhere Taonga and Auckland Council (“**the Council**”) support a decision granting that approval, the archaeological authority approval is not addressed in this memorandum.
- 1.6 Section 5 provides an assessment of the application against the legislative framework described in Section 4 and, as part of this, addresses the issues in contention before the Panel.
- 1.7 A conclusion and summary are provided in Section 6.
- 1.8 This memorandum does not address:
 - a. The correct interpretation and application of s 84A FTAA and how s 84A FTAA has informed the applicant’s proposed conditions of consent relating to water and wastewater servicing. This is addressed in the letter prepared by Ellis Gould. In summary, Ellis Gould considers:
 - Section 84 A FTAA clarifies and arguably extends the Panel’s ability to impose conditions regarding infrastructure capacity on fast-track applications. Section 84A was introduced specifically to provide a solution to the contextual issues arising in relation to the Delmore project.
 - The proposed conditions which anticipate the applicant providing for infrastructure through a range of mechanisms in order to be responsive to context (including the ability to identify a final mechanism at different stages of development or transfer from one mechanism to another) are both lawful and appropriate in terms of the FTAA.

This memorandum does address how s 84A FTAA has informed the applicant's proposed conditions of consent relating to the portion of the Designation 14108/NOR6 road running between the site's eastern boundary and where Grand Drive current terminates. It doing so it relies in part on the legal analysis in the Ellis Gould letter, and so it is important both documents are read together.

- b. Issues relating to the Residents Society and how this is provided for in the proposed conditions of consent. This is addressed in the memorandum prepared by Alexander Dorrington. In summary, Alexander Dorrington considers that the proposed Society structure, and how its various responsibilities are provided for in the proposed conditions, is fit for purpose and the best structure for the Delmore project.

- 1.9 The Ellis Gould letter is provided in **Attachment 1** to this memorandum, and the Alexander Dorrington memorandum is provided in **Attachment 2**.

2. APPLICABLE VERSION OF THE FTAA

- 2.1 The FTAA came into force on 24 December 2024.¹ It was subsequently amended by the Fast-track Approvals Amendment Act 2025 ("**Amendment Act**") which was introduced after the draft decision on the first Delmore application was released and the application subsequently withdrawn.² As explained in the Ellis Gould letter and also noted in footnote 23 below, it is evident from discussion in the House that changes made to the FTAA to introduce s 84A and to amend Schedule 2 FTAA were specifically made to address matters raised in the draft Delmore decision.
- 2.2 Some of the Amendment Act's changes came into force on 17 December 2025 and others came into force on 31 March 2026.³ The extent to which the changes coming into force on each commencement date apply to a particular substantive application is specified in Part 2 Schedule 1 FTAA.
- 2.3 The Delmore application was lodged with the EPA on 12 January 2026, between the first and second commencement dates, with processing currently on-going. Consequently, the version of the FTAA that applies is that with the amendments made on the first commencement date and new ss 68A, 68B, and amended s 88 included.^{4 5}
- 2.4 This means that, for the purposes of making its decision, the Panel can refer to the FTAA as it looks today, because all changes made by the Amendment Act to provisions

¹ FTAA, s 2

² The draft decision was issued 29 August 2025 and the Amendment Act was introduced 3 November 2025

³ Amendment Act, s 2

⁴ Introduced by ss 37 and 42 Amendment Act and providing for the ability for the Minister to enable an applicant to reduce the scope of a substantive application that is before a panel (ss 68A and 68B) and issue, service and publication of the panel's decision (s 88)

⁵ FTAA, Schedule 1 Part 2 cl 7

relevant to deciding the approvals sought for the Delmore project apply to the Panel's decision.

3. SCOPE

- 3.1 The Panel raised two issues relating to the scope of the application during the introductory meeting with the applicant. The first was whether there was jurisdiction to include the small commercial superlot proposed for the Delmore Stage 2 area. The second was whether the total number of houses aligned with the description of the Delmore project in Schedule 2.

Commercial superlot

- 3.2 The applicant's position is that the commercial superlot can lawfully be included in the Delmore Stage 2 area.
- 3.3 This is because the applicant was able to lodge one substantive application for the project for which it is the authorised person in Schedule 2.⁶ For listed projects, "the project" means "the project as described in Schedule 2"⁷ and (emphasis added):⁸

(a) means, -

(i) in relation to a listed project, the project as described in Schedule 2:

...

(b) [and] includes any activity that is involved in, or that supports and is subsidiary to, a project referred to in paragraph (a)

- 3.4 Delmore is described in Schedule 2 as a project to (emphasis added):

Subdivide land and develop approximately 1,250 residential dwellings and associated features such as parks, including delivery of the State Highway 1 Grand Drive interchange and Wainui area connection

- 3.5 The commercial superlot is an "associated feature" that "supports and is subsidiary too" developing the Delmore site for residential purposes. It was introduced by the applicant prior to lodging the application in response to feedback from the Council that a small commercial hub was desirable to support the homes on the outer edge of the Delmore Stage 2 area because of the distance between those homes and existing commercial hubs to the east.
- 3.6 As explained below, including the commercial superlot does not compromise or take precedence over delivering the "approximately 1250 residential dwellings" described in Schedule 2 FTAA. It is a secondary, supporting, and associated feature of the

⁶ FTAA, s 42(1)

⁷ FTAA, s 4(1)

⁸ Ibid

residential component of the proposed Delmore masterplan⁹ and the Delmore project as described in Schedule 2.¹⁰

Total number of residential dwellings

- 3.7 The applicant's position is that the number of residential dwellings provided for in the proposed Delmore masterplan meets the Schedule 2 project description to "Subdivide land and develop approximately 1,250 residential dwellings".
- 3.8 The reference to "approximately 1,250 residential dwellings" contemplates a measure of flexibility in terms of the number of houses ultimately provided, both upward and downward. The inclusion of the term "approximately" reflects the reality that lot numbers will change during detailed design and as adjustments are made to respond to comments on an application, which is what has happened here.
- 3.9 The proposed Delmore masterplan provides for between 1187 and 1208 residential dwellings¹¹ and a residential superlot located at the lower part of the Delmore project Stage 2 area with capacity to provide for a further 30-40 residential dwellings (approximately).¹²
- 3.10 This means that, at the lower end, the proposed Delmore masterplan provides for 1217 residential dwellings, which is only 33 residential dwellings less than the "approximately" 1250 figure in the Schedule 2 description. At the upper end it provides for 1248 residential dwellings, which is only 2 residential dwellings less than the "approximately" 1250 figure. Those are reasonable and acceptable differences given the inclusion of the term "approximately" in the Schedule 2 description; it was always anticipated and provided for that some movement down or up might occur as part of detailed design. The total figures of 1217 and 1248 provided for by the proposed Delmore masterplan are therefore sufficiently "near to the actual"¹³ to the 1250 figure to meet the project description in Schedule 2.
- 3.11 A difference in residential dwellings of 2-33 from the approximate 1250 does not impact the extent or significance of the Delmore project's benefits; it is still a residential development of equivalently significant scale with significant regional benefits as explained in section 5 below.

⁹ See definition of subsidiary in Pocket Oxford Dictionary 4 Ed, pg 835 "serving to help or supplement, not of primary importance, supplementary"

¹⁰ In the same way as the encapsulation shell for contaminated soil for which approvals were sought in the application for the Maitahi development, despite this no being expressly referred to in the Schedule 2 description. In that case the Panel, chaired by Hon Lyn Stevens CNZM KC found that this cell supported the remediation parts of the project and thus was an activity that fell within part (b) of the definition of "project" at [164]

¹¹ The difference depending on whether the park in the Delmore Stage 1 area is acquired and if the on-site wastewater and water supply plants need to be developed. If the Delmore Stage 1 park is acquired but the plants need to be developed, then the overall number is 1199 residential lots. If the Delmore Stage 1 park is not acquired and the plants are not needed the overall number of lots is 1208.

¹² Refer to **Attachment 3** to this memorandum

¹³ See definition of "approximate" Pocket Oxford Dictionary 4th Ed pg 34

- 3.12 Delivering some residential dwellings by superlot is a lawful method of reaching the approximate 1250 figure because the Delmore project is still to “Subdivide land and develop approximately 1250 residential dwellings”, it is just achieving this in different ways. This is consistent with the conclusions reached by the panel in the Homestead Bay decision.
- 3.13 In this case it is also an appropriate method. The superlot approach for the southern part of the Delmore project Stage 2 area has been chosen because of its benefits for urban form. It means that the area can be designed and developed at the same time as detailed design of the neighbouring, lower portion of the Designation 14108/NOR6 road (which the applicant has committed to delivering but for which land still needs to be acquired). This is intended to ensure compatibility between housing and roading infrastructure and to enable density to be maximised.

Summary

- 3.14 In summary, the applicant has sought approvals for “the project as described in Schedule 2” and there is no jurisdictional impediment to the Panel considering and deciding the application.

4. OVERVIEW OF FTAA STATUTORY FRAMEWORK

- 4.1 The starting point for the Panel’s decision is s 81(1) FTAA:

- (1) A panel must, for each approval sought in a substantive application, decide whether to:
 - a. grant the approval and set any conditions to be imposed on the approval; or
 - b. decline the approval.

- 4.2 Section 81(2) then sets out what the Panel is required to do for the purpose of making that decision and deciding any conditions. It provides an index directing the Panel to the various statutory provisions that contain the information it must consider, the framework for making its decision, and the limits applying to its decision.

- (2) For the purpose of making the decision, the panel—
 - (aaa) must, if the substantive application relates to an unlisted project, consider the Minister’s reasons for accepting the referral application that are stated in the notice given by the responsible agency under section 28(1):
 - (aab) must consider a relevant Government policy statement:
 - (a) must consider the substantive application and any advice, report, comment, or other information received by the panel under section 51, 52, 53, 55, 58, 67, 68, 69, 70, 72, or 90:
 - (b) must apply the applicable clauses set out in subsection (3) (see those clauses in relation to the weight to be given to the purpose of this Act when making the decision):
 - (c) must comply with section 82, if applicable:
 - (d) must comply with section 83 in setting conditions:
 - (e) may impose conditions under section 84:
 - (ea) may impose conditions under section 84A:

(f) may decline the approval only in accordance with section 85.

4.3 Section 81(2)(b) and the clauses to which it relates comprise the first component of the framework for the Panel's decision, stating matters the Panel must take into account and how. For resource consent approvals ordinarily sought under the RMA the "applicable clauses" are clauses 17-23 of Schedule 5, with clause 17 being the clause central to the Panel's decision. It states:

- the panel must take into account, giving the greatest weight to paragraph (a),-
- (a) the purpose of this Act; and
- (b) the provisions of Parts 2, 3, 6, 8 to 10 of the Resource Management Act that direct decision making on an application for resource consent, (but excluding s 104D of that Act); and
- (c) the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.

4.4 When considering the matters in clause 17 the Panel is required to first consider each of the relevant considerations in the applicable clauses, uninfluenced by the purpose of the FTAA, before secondly weighing those factors in accordance with the prescribed hierarchy, giving the greatest weight to facilitating significant regional or national benefits. That approach is supported by the Court of Appeal's decision in *Enterprise Miramar Peninsula Incorporated v Wellington City Council*.¹⁴ It has been applied in the majority of other FTAA Panel decisions to date.¹⁵

4.11 When taking the purpose of the FTAA into account under clause 17 the Panel "must consider the extent of the project's regional or national benefits".¹⁶ This is a factual question based on evidence and informed by judgement.¹⁷ The extent of regional benefits is context-dependent: what constitutes a significant benefit may differ from one region to the next. Panels have looked to the criteria in s 22 FTAA for guidance.¹⁸ Panels have also equated the term significant with concepts and terms like "sufficiently great or important to be worthy of attention" and "noteworthy", as opposed to "game changing".¹⁹ As the Waihi panel observed, it is unlikely that any single residential development would have game changing benefits, particularly in larger regions.²⁰ Indeed, looking at the scale and size of the residential development-related listed projects in Schedule 2, an interpretation of significant that required

¹⁴ *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 [52]-[53], [59]. In *Enterprise Miramar* the Court of Appeal considered the correct interpretation and application of the decision-making criteria in the Housing Accords and Special Housing Area Act 2013. Although the weighting hierarchy was different in that statute, the decision-making provision was the same in that it required decision-makers to take into account a list of matters and then weigh them in accordance with statutory direction about how the weighting exercise should be undertaken.

¹⁵ See for example Bledisloe Wharf decision, Waihi Gold decision, Taranaki VTM draft decision

¹⁶ FTAA, s 81(4)

¹⁷ The FTAA does not define what constitutes a significant regional or national benefit, nor does it define the terms "significant" or "benefit(s)".

¹⁸ See for example Maitahi decision at [515]

¹⁹ See for example Maitahi decision at [516]; Taranaki VTM draft decision at [81], Ayrburn Screen Hub decision at [155]; Kings Quarry Expansion decision at [154]; Pound Road Industrial Development decision at [638] and [794]; Ryans Road Industrial Development decision at [95]; Sunfield decision at [459]; Tekapo Power Scheme at [339]; Waihi decision at [843].

²⁰ Waihi decision at [843]

game changing benefits would likely render the FTAA process redundant. That cannot be what Parliament intended.

- 4.12 The changes made to Schedule 2 by the Amendment Act clarified the bounds of the Panel’s assessment by confirming that listed projects are projects “with significant regional or national benefits”. This change was expressly introduced to ensure that if a panel asks the high-level question ‘does a listed project have significant regional or national benefits’ the answer is yes.²¹
- 4.13 When taking the RMA provisions that direct decision-making into account, the Panel must undertake an assessment of the application against those provisions as it would under the RMA, but with the modifications made by the FTAA in place (e.g. no s 104D assessment; provisions that would require decline under the RMA do not have that effect under the FTAA). This requires “a fair appraisal of the objectives and policies [of applicable planning instruments] read as a whole” and, if this appraisal leads to a finding the application is not consistent with the applicable RMA planning instruments, an assessment of whether the application nevertheless justifies “a genuine on-the-merits-exception” to avoid subverting the integrity of the policy or plan overall.²²
- 4.14 The Panel must decline an approval if any of the mandatory decline factors in s 85(1) or (2) apply, which includes whether granting the approval would be inconsistent with the obligations arising under existing Treaty settlements or with customary rights recognised under the Marine and Coastal Area (Takutai Moana) Act 2011.²³ The Council and applicant agree none of these factors apply to the Delmore project.²⁴

²¹ See *Hansard* first reading Hon Chris Bishop: “The member makes a good point, and this is actually, I think, quite important. Clause 55, the Schedule 2 amendments? This is a direct response to the Delmore decision, which was a project; it was a housing development, from memory, where the panel—so Delmore was a listed project. It was a Schedule 2 project, and the panel and Delmore—I’m paraphrasing—said, “just because a project is listed in the schedule doesn’t mean it necessarily has significant regional or national benefits”. That was the intention of listing that in the schedule, and without getting into the panel’s reasoning, somewhere along the line, listing it in the schedule got lost sight of. So, regardless of the rights or wrongs of that, this is a response to that and makes it clear that Schedule 2 projects have significant regional or national benefits. Now, the extent of those regional or national benefits is clearly an issue for the panel to weigh up in the decision making with the adverse effects, but the sort of a priori threshold question ‘Does it have significant regional or national benefits?’—if the amendment is agreed to—then the answer will be ‘Yes’”.

²² *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [79]-[80], [109]-[110]

²³ FTAA, ss 7 and 85(1)(b). There has been some discussion in context of other fast-track applications about whether this applies to panels give s 7(2) which says that this obligation “does not apply to a court or a person exercising a judicial power or performing a judicial function or duty”. The applicant considers it does apply to panel to the reasons set out in the Taranaki VTM draft decision at [219]-[224]

²⁴ For completeness, it is noted that the applicant has undertaken a thorough assessment of the application against the Treaty settlements applying to the Delmore site, with input from iwi. This is provided in **Appendix 8 to the AEE**. Based on that assessment it considers that the Delmore project is consistent with those settlements. As noted in relation to conditions, although Kaipara Moana has raised some concerns with potential environmental impacts of the Delmore project, it has not

4.15 The Panel only has discretion to decide to decline an approval if, in complying with s 81(2), it forms the view that there are 1 or more adverse impacts in relation to the approval sought; and 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 any modifications made by the applicant or conditions that the panel may set to address to those adverse impacts.²⁵ Adverse impact means “any matter considered by the panel in complying with section 81(2) that weighs against granting the approval.”²⁶ A panel may not form the view that an adverse impact meets that threshold “solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2)”.²⁷

4.16 Although there is no caselaw on the meaning of “out of proportion” in the context of s 81(2), guidance about what this proportionality assessment requires can be found in decisions relating to interpretation and application of s 107 Sentencing Act 2002. Section 107 says:

The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

4.17 The leading judgement on the meaning of this test and what it requires of decision-makers is *R v Hughes*.²⁸ In *Hughes* the Court of Appeal found that determining whether conviction would be “out of all proportion to” the gravity of the offence, was “a matter of fact requiring judicial assessment” it was “not a matter of discretion”.²⁹ The Court only has discretion to grant a discharge without conviction if the “out of all proportion” threshold is met.³⁰ Although the Court of Appeal did not consider using synonyms or qualifiers for “out of all proportion” were necessary because “the test is the test”,³¹ in the High Court decision appealed against, Gendall J framed the “out of all proportion” element of the test as meaning the consequences of conviction need to be “*outweighing to a large extent*”³² and that this was “very stiff test”.³³ The Court of Appeal considered Gendall J’s overall assessment to be logical and reasoned and they agreed with the conclusion he reached.³⁴ The test in s 107 is analogous to that in s 85 FTAA. It also requires an assessment of proportionality but with language that indicates this is not an even ‘does one a little more

identified it as being inconsistent with its Treaty settlement. This aligns with the applicant’s analysis. Kaipara Moana’s comments are addressed in Appendix 9 to the Response to Comments letter

²⁵ FTAA, s 85(3)

²⁶ FTAA, s 85(5)

²⁷ FTAA, s 85(4)

²⁸ *R v Hughes* [2008] NZCA 546

²⁹ At [11]

³⁰ Ibid

³¹ *Hughes* at [23]

³² *Hughes* at [67]

³³ *Hughes* at [69]

³⁴ *Hughes* at [84]

or a little less than the other’ proportionality exercise. Rather, exceptional circumstances are required for the test to be met.

- 4.51 Drawing the threads together, s 85 requires the Panel to look at the benefits and adverse impacts it has identified on the information before it, and make an evidence-based judgement about whether adverse impacts are sufficiently significant to be out of proportion to (or outweighing to a large extent) benefits, even when benefits are given more inherent weight³⁵. That is, and is intended to be, a “high bar”³⁶ and a stiff test.
- 4.52 A degree of adverse impact is thus “hard baked” into the FTAA decision-making framework.³⁷ Projects with adverse impacts or significant adverse impacts must be approved if those impacts are less than the project’s benefits or even if the impacts exceed the benefits but not to the point where they are “out of proportion” to the benefits. Even where a project’s adverse impacts are found to be out of proportion to its benefits there is still a discretion to grant the application; panels “may” decline an approval in that situation.

5. ASSESSMENT OF THE DELMORE PROJECT AGAINST STATUTORY FRAMEWORK AND RESPONSE TO ISSUES IN CONTENTION

- 5.1 This section begins with addressing the Delmore project’s significant benefits. It then addresses alleged adverse impacts, followed by the RMA assessment under clause 17 of Schedule 5, and then the proposed conditions of consent. It finishes by addressing the assessment required by s 85 FTAA. For each it provides short summary of the applicant’s position and then addresses the related legal issues in contention.

Regionally significant benefits

- 5.2 Because the Delmore project is a “listed project”, the starting point is that it has regionally or nationally significant benefits.
- 5.3 Submissions in the material provided by the Council and others commenting on the application that the Delmore project does not have any regionally or nationally significant benefit are therefore wrong in law, disregard the recent statutory amendments discussed above, and should be given no weight by the Panel.³⁸
- 5.4 Other comments put the “extent” (nature, scope, and degree) of the Delmore project’s significant benefits in contention.
- 5.5 The applicant says that these submissions reflect an incorrect understanding of the analysis required by the FTAA to determine the extent of significant economic benefits, and a failure to properly distinguish between, and then consider, the Delmore project’s other significant benefits.

³⁵ As required by FTAA, clause 17 of Schedule 5

³⁶ Proactive release cabinet minute and papers, 2 April 2025, from cabinet meeting 10 December 2024 pg 10

³⁷ Maitahi panel decision at [95]

³⁸ For example, Council comments, covering planning memorandum at [222]

Issue in contention - whether economic benefits have been correctly assessed and whether the Delmore project will deliver significant economic benefits (s 22(2)(a)(iv))

- 5.6 The Council's economist agrees "with the general approach that the applicant's economic expert has chosen, a cost-benefit analysis framework",³⁹ but then goes on to raise various issues with NZIER's assessment. NZIER has provided a technical response to these issues in **Appendix 8 A02 to the Response to Comment letter** explaining why the Council's comments do not change NZIER's conclusion that the Delmore project will result in significant economic benefits for the Auckland region. Insight Economics has peer reviewed NZIER's response and agrees with NZIER's comments. Insight Economics has also undertaken a peer review of NZIER's initial report and has similarly concluded that the Delmore project will have significant regional economic benefits.⁴⁰
- 5.7 However, the Council's comments raise a legal question about the type of analysis required to identify and assess economic benefits under the FTAA. The Council considers that the only acceptable approach is a computable general equilibrium (CGE) analysis using the social cost-benefit analysis (CBA) framework, that essentially monetises all benefits and all costs and weighs them.⁴¹ In contrast, NZIER has (simply put) taken pure economic benefits and weighed them against commensurate economic costs to reach an overall economic benefit figure.
- 5.8 The applicant says that while the Council's approach is an allowable method for assessing economic benefits for FTAA purposes, it is not a mandatory method, and NZIER's method is both allowable and indeed preferable given the wider statutory framework.⁴²
- 5.9 First, s 22 FTAA, which provides a guide for what constitutes a regionally or nationally significant benefit, simply refers to "economic benefits". It does not refer to a specific type of cost benefit analysis, or a specific type of analysis at all. This suggests that any method for assessing economic benefits is allowable, with the pros and cons of a particular method informing the factual finding on the extent of economic benefits.
- 5.10 Second, economic benefits and costs (impacts) are one type of benefit and impact that the Panel must weigh to reach its decision. For 'pure' economic matters this is most effectively done as part of an economic cost benefit analysis. However, environmental, social, and cultural matters may best be considered on a qualitative basis, as separate benefits or adverse impacts, and there is no legal error in assessing them in this way. Indeed, monetising environmental, social, and cultural costs and

³⁹ Council comments, Annexure 2 section 4.0 point 3

⁴⁰ Peer review provided in Appendix 8 A02 Attachment 1 to the Response to Comments letter

⁴¹ Based on summary of the Council's position in the economics response to comments in Appendix 8 A02 Response to Comments letter in section 1.2

⁴² It is also noted, as Insight Economics has explained, that CGE analysis is not a perfect model, and would not provide a materially better analysis, see peer review provided in Appendix 8 A02 Attachment 1 to the Response to Comments letter

taking those into in the assessment of economic benefits, gives rise to a risk of double-counting if they are then weighed separately as adverse impacts under s 85.

- 5.11 This interpretation is consistent within the findings of the Supreme Court in *Trans-Tasman Resources Limited v Environmental Protection Authority*.⁴³ In that case, the Court was tasked with deciding if the decision-making committee had erred in its assessment of “economic benefits” under s 59 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (“EEZ Act”).
- 5.12 The committee had considered economic benefits and commensurate economic costs to reach a finding on economic benefits, but left environmental, social, and cultural matters to be considered separately under other limbs of s 59. The Supreme Court agreed with the Court of Appeal that this was not an error of law, rather “It was consistent with the scheme of the EEZ Act, and open to the DMC, to have regard to these matters on a qualitative basis.” In reaching that finding both the Supreme Court and Court of Appeal considered there was “force” in the argument that including these costs in an economic benefits assessment risked them being double-counted.⁴⁴
- 5.13 Those findings are directly applicable to the FTAA context and were followed in essence in the Waihi Gold decision⁴⁵ and the Taranaki VTM draft decision⁴⁶. The same requirement to consider “economic benefits” applies under the FTAA and EEZ Act, and decision-makers under the FTAA are similarly required to take into account a broad range of matters and weigh them to reach a decision.⁴⁷

Issue in contention: whether the Delmore project will have other regionally significant benefits

- 5.14 The Council’s overarching planning memorandum states that in the Council’s assessment, the applicant’s assessment of the Delmore project’s significant regional benefits is “overstated” and “should be treated with caution”.⁴⁸
- 5.15 However, with respect to the Council, that conclusion is proffered based on a brief analysis of the Delmore project’s benefits that does not reflect proper consideration of s 22 FTAA (as a guide to scope and nature of potential benefits).

Section 22(a)(iii) – the Delmore project will deliver new regionally significant infrastructure

- 5.16 The Council planning memorandum and its policy comments⁴⁹ both express the view that the portion of the Designation 14108/NOR6 road running from the Delmore site’s

⁴³ *Trans-Tasman Resources Limited v Environmental Protection Authority* [2021] NZSC 127

⁴⁴ *Trans-Tasman Resources* at [195]

⁴⁵ See for example [784], [786], [792], [847]

⁴⁶ See [91]-[93]

⁴⁷ It is noted that several panel decisions to date have adopted an approach that a full CBA is not require including by way of example Waihi Gold, Homestead Bay, Sunfield

⁴⁸ Council’s comments, overarching planning memorandum at [222]

⁴⁹ Refer to Appendix 9 A04 to the Response to Comments letter for the relevant comment

eastern boundary to Upper Orewa Road/Russell Road is not regionally significant infrastructure.

- 5.17 The applicant has approached the question of whether this portion of the road is regionally significant as a technical one and has relied on the opinion of Commute Transportation Consultants which is that providing this portion of road does provide a regionally significant benefit.⁵⁰
- 5.18 Auckland Transport and the Council's traffic engineer have not disputed this conclusion. The most directly relevant comment made by Auckland Transport is that this constitutes "a significant portion of the arterial road".⁵¹
- 5.19 Comments from Auckland Council and AV Jennings raised whether the applicant can also deliver the part of the Designation 14108/NOR6 road running from the Delmore site's eastern boundary to where Grand Drive currently terminates to the west. The answer to this is yes and a condition is proposed that says the applicant must construct this extension.⁵²
- 5.20 The applicant's proposed condition uses as its starting point the condition recommended by Auckland Transport in its comments to the Panel relating to this matter. However, instead of saying the consent holder needs to provide evidence this extension is constructed, the condition proposed by the applicant says the extension will be constructed by the consent holder.
- 5.21 This proposed condition squarely within the lawful use of s 84A (relying on Ellis Gould's analysis); it is (to use the words of s 84A) a condition that ensures the infrastructure the Delmore project will rely on is made adequate to support the Delmore project.
- 5.22 The proposed condition is also appropriate in relation to this extension because the vast majority of the land required to construct the extension has vested in Auckland Transport as road reserve;⁵³ a small triangle remains to be acquired which is on AV Jennings' land, but AV Jennings has advised that it is willing to provide this for a "peppercorn" fee and the applicant is actively pursuing this with AV Jennings;⁵⁴ the land is subject to a designation which limits the extent of further approvals required to enable construction and acts to earmark the land for use as an arterial road; and the applicant is working closely with the Auckland Urban Development Office and Auckland Transport to confirm a funding agreement which will include provisions relating to delivery of the extension. When viewed against that background it is becomes evident that the proposed condition is consistent with the approach

⁵⁰ AEE, Appendix 24 section 3.2

⁵¹ Council's comments, Annexure 21 section 6.0 para 6.1

⁵² Appendix 2 Response to Comments letter Section 3 subdivision consent, part 3.1.3, condition 5: "Prior to the issue of a section 224(c) certificate for the first stage of the subdivision that is developed, the Consent Holder must construct access to the site from the termination point of Grand Drive in the location shown on the drawing prepared by Terra Studio, titled "Traffic Upgrades Plan", drawing reference "A-RFI-1-20", Rev B."

⁵³ AV Jennings comments covering document at [5.3], [5.6(a)]

⁵⁴ AV Jennings comments covering document at [5.6(f)]

commonly taken in consent conditions where the consent holder needs to carry out works on the public road network. Indeed, in this case, the applicant is also proposing to do this in numerous other locations across the network.

- 5.23 To assist the Panel, the three sections of the Designation 14108/NOR6 road the applicant will deliver are shown on **Appendix 7 plan set 3 to the Response to Comments letter**, which also records the conditions relating to delivery of each portion of this regionally significant road.

Section 22(2)(iii) – the Delmore project will increase the supply of housing and address housing needs

- 5.24 The Council’s overarching planning memorandum does not engage with whether the Delmore project will increase the supply of housing and address housing needs, except to the extent to which it cross-references and relies on the Council’s economics comments which essentially say there no benefits are derived from the Delmore project’s homes because a house in 2050 is as good as a house now.⁵⁵
- 5.25 NZIER and Insight Economics have explained why this view is technically flawed.⁵⁶ Put simply, both NZIER and Insight Economics have reached the same conclusion as the panel deciding the Maitahi residential development application:⁵⁷

Given the economic conditions nationally, the willingness of a motivate developer to start project works now is a positive benefit, albeit one that is difficult in monetary terms. Such benefit extends to housing across a range of typologies with additional choice and location features soon to become available to residents. These benefits are material and real.

- 5.26 In this case, the regional conditions put particular importance on the willingness of the applicant as a motivated developer because planning restrictions have impacted the supply of land due to increased cost.⁵⁸ In that context the applicant Vineway is looking to the fast-track process to deliver over 1000 homes, which is, on its face, a project of scale which will make a noteworthy contribution from a single development to Auckland’s housing market.⁵⁹
- 5.27 The National Policy Statement – Urban Development 2020 (updated May 2022) (“**NPSUD**”) (which the Council has not referred to in its assessment of the Delmore project’s benefits) explains that “addressing housing needs” includes providing variety in type, price, and location.⁶⁰
- 5.28 The Delmore masterplan has been designed to ensure there are different layouts (1-2 storey), sizes (3-5 bedroom), and designs (22 standard typologies and 55 bespoke

⁵⁵ Per NZIER summary in Appendix 8 A02 Response to Comments letter section 1.1

⁵⁶ Ibid and section 1.2 row 2, response to point “A2: Disagreement about value of additional housing”

⁵⁷ Maitahi panel decision at [821]

⁵⁸ See Response to Comments letter, Annexure 8 A02 section 1.2 row 2, response to point “A2: Disagreement about value of additional housing”

⁵⁹ It is noted that the panel deciding the Sunfield application placed the greatest weight on benefits associated with the increase in housing supply (1040) dwellings in reaching its conclusion of significant regional benefit. See [539]-[54]

⁶⁰ NPSUD Policy 1(a)(i)

typologies)⁶¹ so that it provides variety to meet the needs of households of different sizes, looking for different price points, and with different accessibility requirements.⁶² In terms of location, the Delmore project is unique by virtue of the heavy influence of nature on the design and layout.⁶³ Residents will reside within urban Auckland, but will be surrounded by native bush.

- 5.29 The NPSUD also assists with understanding the benefits of supplying houses to the market. Objective 2 and policy 1(d) both seek to support and improve affordability by supporting competitive land and development markets. As NZIER has explained, it is expected that introducing the Delmore project's homes to the market will have that effect.⁶⁴

Section 22(2)(vi) – will support development of natural resources and s 22(2)(ix) will address significant environmental issues

- 5.30 In its summary of the Delmore project's benefits the Council's overarching planning memorandum acknowledges that the Delmore project:⁶⁵

...will deliver net ecological and biodiversity benefits that include revegetation planting that would achieve a net gain in riparian and wetland vegetation and habitat and a net gain in vegetation associated with SEA-Ts. This will also include new wetland created at a 3:1 ratio.

- 5.31 Unfortunately, the Council does not go on to consider the extent of those ecological gains in context of the Auckland region, and in terms of the considerations in s 22 FTAA, which include supporting development of a natural resource and addressing significant environmental issues.
- 5.32 The applicant says that the information before the Panel, including the information from the Council's terrestrial ecologist, shows that the ecological gains resulting from the Delmore project provide a significant benefit to Auckland.
- 5.33 First, at the request of the Council, Viridis Environmental Consultants ("Viridis"), assessed the vegetation within the site to determine if any areas meet the criteria in Schedule 3 of the AUP. Those criteria determine if an area is a significant ecological area within the Auckland region.^{66 67}
- 5.34 Viridis concluded that all areas of indigenous-dominant vegetation identified, proposed to be protected, and subject to enhancement planting as part of the Delmore project qualify as significant ecological areas under Schedule 3 of the AUP,⁶⁸ even though they are not mapped as such in the AUP.⁶⁸ This is due to their

⁶¹ For an overview see Response to Comments letter, Appendix 9.1 plan site drawings project summary page

⁶² See generally AEE, Annexure 13 section 5.5 which provides a description and urban design assessment of the Delmore project's homes

⁶³ See AEE, Appendix 13 section 5.4

⁶⁴ AEE, Appendix 15 section 5

⁶⁵ Council comments, overarching planning memorandum at [226d]

⁶⁶ AUP B7.2.2

⁶⁷ See Council comments, Annexure 24 point 3 on page 4 for request and response

⁶⁸ See Response to Comments letter, Appendix 8 A024

contribution to ecological connectivity at a broader scale, not because of their own composition.⁶⁹

- 5.35 The 31.8ha of native vegetation planting proposed as part of the Delmore project has been designed to restore and enhance those areas and return these areas of existing vegetation back to the original WS11 ecosystem (kauri, podocarp, broadleaved forest), “more than doubling the current native dominant cover on site and increasing representation of a forest type that is regionally scarce (Griffiths et al. 2021)”,⁷⁰ with only 16% of the original extent of the WS11 ecosystem persisting regionally.⁷¹
- 5.36 These areas have already been identified as being regionally significant because of their ecological value. Consequently, developing them as a natural resource, must also have a regionally significant benefit.⁷²
- 5.37 Second, as Viridis has explained:

Indigenous biodiversity in Auckland is facing multiple significant environmental issues that have developed over time, including loss and fragmentation of habitat, spread of invasive species and disease, declining water quality, and increasing pressures from climate change (Singers et al. 2017b, Auckland Regional Council 2010). These pressures have driven major reductions in ecosystem extent and condition across the region.

- 5.38 The Council has not taken issue with this summation of the significant environmental issue of biodiversity loss and ecological degradation faced by the Auckland region.
- 5.39 As noted above, WS11 ecosystems have been particularly hard hit. Auckland’s wetland ecosystems are in an even worse state, covering only 0.5% of the region which represents a 97% loss since human occupation.⁷³ A key goal of the Delmore project is to return the areas of significant native vegetation within the site back to WS11 ecosystem, as already noted. It will also result in a 3:1 net gain in wetland ecosystems. As Viridis explains, these measures “represent a significant gain in indigenous biodiversity relative to current regional trends and pressures”.
- 5.40 That evidence demonstrates that the Delmore project would provide a significant regional benefit through its contribution to addressing the significant environmental issue of biodiversity loss and ecological degradation in Auckland.

RMA assessment

- 5.41 The Council’s policy planner says the application is “contrary to key objectives and policies of the RPS and the Future Urban Zone as a comprehensive structure plan, in

⁶⁹ Council comments, Annexure 24 point 3 on page 4

⁷⁰ AEE, Annexure 14 at pg 68

⁷¹ AEE, Annexure 14 at pg 67-68

⁷² For completeness, it is also noted restoring and enhancing these areas is consistent with the priority areas for restoration identified in clause 3.21(2) of the National Policy Statement – Indigenous Biodiversity 2023 (“NPSIB”)

⁷³ AEE, Annexure 14 at pg 68

line with the guidance in AUP Appendix 1, and plan change process has not been followed.”⁷⁴ The Council’s strategic planning comments raise similar issues.

Issue in contention: whether the application is contrary to the AUP because a plan change process has not been followed to enable urban, residential development

- 5.42 First, regardless of whether the application is or is not consistent with objective H18.2(4) and other AUP provisions, the FTAA’s framework looks beyond policy inconsistency to actual adverse impacts. It sets aside the concept of non-complying activities and the policy analysis that requires,⁷⁵ it prohibits declining an approval solely on the basis that the adverse impact is inconsistent with or contrary to a provision in a planning document, and it puts RMA considerations second.⁷⁶ The upshot is that the FTAA removes the distinction between FUZ and ‘live zoned land’ and provides an alternative pathway for urban development of FUZ land to a plan change. This is reflected in previous decisions under the FTAA to grant approvals for residential development on land not currently zoned for that purpose.⁷⁷ In this case, the site is ultimately earmarked for urban use. This is not a case where there is a fundamental misalignment between proposed use and the use envisaged by the AUP.
- 5.43 Second, even setting the FTAA context to one side, the Council’s view that the application is contrary to the AUP because there has not been through a plan change process is based on an assessment that contextualises and isolates particular objectives and policies as opposed to reading all applicable objectives and policies as a whole.
- 5.44 The AUP does not apply prohibited activity status to activities enabling urban, residential development in the FUZ.⁷⁸ It therefore appears to contemplate that urban, residential development may occur in FUZ areas without a plan change and that rezoning can, in practice, be achieved via another means.
- 5.45 The Ara Hills development next door is a case in point. It was granted resource consent by the Council in 2017 for comprehensive urban development despite being zoned FUZ because the “substance of the structure planning exercise” had been addressed.⁷⁹ The applicant has similarly undertaken a comprehensive structure planning exercise to inform the Delmore masterplan’s layout and design⁸⁰ which provides for comprehensive urban, residential development of the majority of the site. As Mr Wallace has explained, the concept structure plan lodged with the AEE⁸¹ was prepared in a way appropriate to the size of the site and based on detailed

⁷⁴ Council comments, Annexure 4 section 8.0

⁷⁵ FTAA, cl 17(1)(b) Schedule 5

⁷⁶ FTAA, s 85(4).

⁷⁷ See Arataki decision and Homestead Bay decision

⁷⁸ AEE, section 14.4.3 bullet 3

⁷⁹ Decision on BUN20441333 7 August 2017 at [92], [143ii]

⁸⁰ A technical response to Council’s concern that the structure plan has not been prepared in accordance with Appendix 1 AUP is provided in Appendix 8 A03 to the Response to Comments letter

⁸¹ AEE, Appendix 14

analysis of the nature and current use of the surrounding area and existing strategic planning undertaken for the wider area, and with input from numerous specialist technical consultants and after broad consultation.⁸² It has therefore, in Mr Wallaces view, been prepared in accordance with Appendix 1 of the AUP.⁸³ The thorough process behind the concept structure plan means the Panel can be confident giving it significant weight as evidence that the Delmore development will contribute to a well-functioning urban environment both now and as the wider area develops, and that the application has been prepared in a way consistent with the intent behind the objectives and policies in Chapters B7.2 and H18 AUP.

- 5.46 Barker and Associates has undertaken a comprehensive assessment of environmental effects and of the national, regional, and district objectives and policies in the applicable planning documents applying the *East West Link* approach.⁸⁴ Based on that assessment it has concluded that the application is consistent with each of those planning documents when they are read as a whole.⁸⁵ The Council has not provided a competing analysis.
- 5.47 Third, the masterplanned nature of the application resolves the Council's concern that the FUZ zoning will be problematic.⁸⁶ The application seeks the approvals required for all aspects of developing the site, down to the detail of the homes and the vegetation being planted. The likelihood of a need for further consents in the near future is low, and if it does arise, applications will be assessed against that existing environment. Looking further forward, PC120 provides an opportunity for the underlying zoning to catch up, and the applicant has lodged a submission seeking that outcome.⁸⁷
- 5.48 Fourth, the Council has relied on the High Court judgment *Matvin Group Limited v Auckland Council*⁸⁸ in support of its position.⁸⁹ *Matvin* was decided in context of the Covid-19 fast-track legislation, which had a fundamentally different decision-making framework to the FTAA. The High Court did not reach its decision against a statutory framework like the FTAA's, that prevents declining an application purely based on policy inconsistency, or that requires the outcome of an assessment under s 104 RMA to be taken into account alongside significant benefits, with benefits being given greater weight. In addition, *Matvin* was decided prior to issue of *East West Link*. This means the Court applied the *King Salmon*⁹⁰ approach to interpreting plan provisions, and not the more nuanced *East West Link* approach, and it did not turn its mind to the potential for there to be a genuine exception to directive provisions to promote sustainable management.

⁸² Response to Comments letter, Appendix 8 A03 row at bottom of page 6

⁸³ Ibid

⁸⁴ AEE, Appendix 43 and section 12 of the AEE

⁸⁵ AEE section 14.4.3.

⁸⁶ Council comments, Annexure 4 memorandum at [16]

⁸⁷ I.e. seeking Mixed Housing Suburban Zone

⁸⁸ *Matvin Group Ltd v Auckland Council* [2023] NZHC 2481

⁸⁹ Council comments Annexure 4 at [38]-[41]. Reproduced in the Council comments overarching planning memorandum at [35]

⁹⁰ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2024] NZSC 38

5.49 Consequently, the *Matvin* decision is of limited, if any, assistance to the Panel.

Adverse impacts

5.50 Most of the alleged adverse impacts and information gaps identified by the Council are technical and have been addressed by the appropriate technical specialist in their individual response tables. The applicant has also prepared version of the key issues and information gaps tables in the Council's covering planning memorandum with a reference to where the relevant information can be found.⁹¹ This is included in the Response to Comments Covering letter.

5.51 The alleged adverse impact that raises a legal question flows from the Council's view that in the absence of a plan change the site should not be developed and has been put by the Council in several different ways. It boils down to the Delmore project being "out of sequence" with the Auckland Future Development Strategy 2023-2053 ("FDS") and the contention that this has adverse impacts because public infrastructure is, or may be, inadequate to support it, and the Council might have to redirect funding or capacity it has currently allocated to "live zoned land and sequenced growth".⁹²

Issue in contention: whether urban development of the Delmore site before other FUZ land is inconsistent with the FDS and will therefore have adverse infrastructure and funding impacts

5.52 The applicant accepts that developing the Delmore site now is "out of sequence" with (ahead of) the timing for developing the site indicated in Appendix 7 FDS, which is 2050+.

5.53 However, its position is that this does not mean developing the Delmore site now is inconsistent with the FDS and, in any event, the Delmore project will not have undue adverse impacts on infrastructure capacity and financing.

5.54 First, future development strategies like the FDS were never intended to be a determinative document from which no divergence was allowed.

5.55 According to clause 3.17 NPSUD, the FDS is only something the Council must "have regard to" when preparing or changing the AUP. This can be contrasted with how the Council must treat other documents when preparing or changing the AUP, for example, national policy statements which must be given effect to,⁹³ or water conservation orders which it must not be inconsistent with.⁹⁴ The NPSUD does not require the FDS to be considered when deciding a resource consent application under

⁹¹ Council comments, overarching planning memorandum at [228] and [229]

⁹² See Council comments, overarching planning memorandum at [18], [22], [25], [31], [132], [219], [228] row 6; Council comments, Annexures 1, 3, and 11

⁹³ RMA, ss 62(3), 67(3), 75(3). Meaning "implement": *Environmental Defence Society Inc v New Zealand King Salmon Co* [2024] NZSC 38 at [77]

⁹⁴ E.g. RMA, ss 62(3)

the RMA or any other statute, although a decision-maker may decide to consider the FDS as “any other relevant matter” under s 104(1)(c) RMA but is not required to.

- 5.56 The greater discretion afforded to decision-makers in terms of when and how the FDS is considered in planning decisions reflects its role as a high-level strategic document that has potential to change frequently. It must be reviewed every 3 years, engaging with the development sector in order to “identify significant future development opportunities and associated infrastructure requirements”.⁹⁵ The FDS is, as Barker and Associates has explained, “meant to be responsive to changes in demand and supply and to market indications highlighting where and in what order growth is possible”.^{96 97} The FDS was not meant to be applied in a black letter way, with unwavering adherence to indicative sequencing dates for developing FUZ land.
- 5.57 Second, the text of the FDS reflects its intended role, even if the Council’s application of it in this case does not.
- 5.58 The FDS contemplates that there may be situations where the “timing and development of [Future Urban Areas] could be brought forward”, and that this will “need to be considered on a case-by-case basis”. The key consideration going into a case-by-case assessment is whether or not there is “a significant impact on the council’s financial position.”⁹⁸ It recognises that “a strategic planning approach that aims for a good degree of certainty but allows for appropriate flexibility (or responsiveness) is required.”⁹⁹
- 5.59 Third, despite this clear direction in the FDS, the Council does not appear to have considered the Delmore project on a case-by-case basis (or at least to have properly considered it) to see if it is an appropriate candidate for delivery earlier than the FDS indicative 2050+ date. Instead, it appears to have looked no further than that date and assumed developing the land earlier will result in significant Council costs because it will mean the Council also has to service FUZ land with an earlier FDS.¹⁰⁰ The Council does not seem to have turned its mind to whether those dates might be shuffled around or removed when the FDS is reviewed given the Delmore site is subject to a proposal for development now, or that the revenue from the Delmore project might be positive.
- 5.60 This is unfortunate because the available information demonstrates that the Delmore project will not have “a significant impact on the council’s financial position” or on infrastructure capacity.

⁹⁵ NPSUD, cl 3.16(2)(a)

⁹⁶ AEE, section 12.5.2

⁹⁷ For completeness it is noted that the Council has just committed to reviewing the FDS against a backdrop of principles agreed with central government that support the location of development being market demand-led, and which recognises the role of greenfield development were developments having a robust, credible, and appropriate plan. See Auckland Deal, Schedule 1 key commitments pgs 7-8

⁹⁸ FDS, pg 45

⁹⁹ FDS, Appendix pg 34-35

¹⁰⁰ Reflected in the Council’s repeated reference to servicing “sequenced development”

- 5.61 In terms of roading infrastructure, the applicant has committed to delivering extensive upgrades across the existing network to ensure it can support the Delmore project. These are summarised in table form in **Appendix 7 plan set 1 Response to Comments letter**.
- 5.62 The applicant has also committed to delivering the entire portion of the Designation 14108/NOR6 road that is entirely new road (i.e. does not fall on top of the existing network). This runs from where Grand Drive currently terminates, just west of SH1, to where the Designation 14108/NOR6 road meets Upper Orewa and Russell Roads. The extent of this portion of road is shown in **Appendix 7 plan set 3 Response to Comments Letter** and additional conditions have been put forward to ensure the applicant's commitment is clear. As a consequence, the Delmore project goes a significant way to delivering the two transport prerequisites identified in the FDS at the applicant's cost.¹⁰¹
- 5.63 In terms of water and wastewater infrastructure, the application includes an on-site option for both. If this is used, there is not a "significant impact on the council's financial position" because Watercare Services Limited's infrastructure is not being used.
- 5.64 The applicant has also sought consent to be able to connect to the public network. The rationale for this is addressed in the Ellis Gould letter.¹⁰² However, in terms of costs to Watercare Services Limited if this eventuates:
- a. Watercare Services Limited has confirmed that the Army Bay Stage 1 upgrade would introduce sufficient capacity for all live zoned land in the catchment and also a generous area of FUZ land, and that there are no technical reasons why it could not service the Delmore site ahead of other land.¹⁰³ Consequently, Watercare Services Limited would not *have* to redirect financing to undertake the second Army Bay upgrade early if it services the Delmore site. It could keep its current investment timeline, just service the FUZ land in the catchment in a different order. This highlights that not servicing the Delmore site means that Watercare Services Limited is effectively banking capacity for other, hypothetical developments, on other FUZ land, in preference to servicing homes that are being put forward by a willing developer now.¹⁰⁴
 - b. Watercare Services Limited has that advised upgrades to the water supply network needed to ensure sufficient capacity to service the entire catchment, including FUZ land currently marked 2050+, are both scheduled to be completed by 2038.¹⁰⁵ As a result, any land that does need to wait to be developed due to a decision to service the Delmore site, does not have to wait for long. Again, the facts show that servicing the Delmore site now would

¹⁰¹ FDS, pg 115

¹⁰² Attachment 1 to this memorandum

¹⁰³ AEE, Annexure 7 pg 76-78 (Minutes pg 2 and 4)

¹⁰⁴ See Response to Comments letter, Appendix 8 A02 for more detailed commentary from NZIER

¹⁰⁵ AEE, Annexure 7 pg 78 -78 (Minutes pg 4)

simply have the potential to result in a short-term re-ordering of development, not a fundamental change in Watercare Services Limited's allocation of financial resources.

- c. The applicant is also open to financially contributing to Watercare Services Limited's infrastructure upgrades in order to enable the site to be connected to the public network, which Watercare Services Limited knows. It would also cover the costs required to physically connect the Delmore project to the network in the normal way, and connection costs would also be paid in the normal way.

5.65 Fourth, and finally, the FTAA is intended to fast-track development and provide a route for development that is "out of sequence" with documents like the FDS. It is intended to see projects realised ahead of when they would likely be delivered under the ordinary RMA process. Any claimed adverse impacts relating to sequencing must be reviewed through that lens.

5.66 In this case, the only change from the FDS is a reshuffle to the order in which FUZ land around Orewa is developed. Watercare Services Limited would also gain financially from this arrangement.¹⁰⁶ This is not a situation like that before the Sunfield panel where rural zoned land is to be developed for residential purposes, reflecting a fundamental shift on capacity allocation. A reshuffle is not a significant adverse impact; it is simply a reflection of the FDS working as intended and of efficient use of public infrastructure capacity.

Conditions of consent

Issue in contention: should a condition be imposed requiring Vineway to provide an ecological offset for the area of vegetation that will also be an irrigation field for treated wastewater

5.65 In its comments on terrestrial ecology matters the Council has advised it considers a condition should be included requiring identification of a bush area of equivalent size to the area of vegetation proposed to be used as one of the wastewater irrigation fields.¹⁰⁷ This is on the basis that the Council's consultant terrestrial ecologist considers it is "optimistic to assume that a significant failure of the treatment system will not occur".¹⁰⁸ It is not proposed by the Council to manage actual effects as the Council's ecologist agrees that "day-to-day operational effects have been adequately addressed" and "Habitat loss is likely to be negligible".¹⁰⁹

5.66 The applicant does not agree with the Council's proposed condition.

5.67 As Viridis explains, whether the wastewater treatment system would fail, and, if it did, whether this would impact the irrigation field, are technical questions for a

¹⁰⁶ See Response to Comments letter, Appendix 8 A02 IGC analysis

¹⁰⁷ Council comments, Annexure 24 pdf pg 30 table pg 25 point 19

¹⁰⁸ Ibid

¹⁰⁹ Response to Council Comments letter, Appendix 8 A024 point 17

wastewater specialist. APEX Water Ltd has confirmed that the proposal incorporates multiple safeguards against failure, and that any credible failure scenario would most likely occur at the treatment stage, rather than at the irrigation field, with any flows managed so they did not result in uncontrolled discharge.¹¹⁰ In addition, the most common failure with wastewater irrigation systems like this is blockage due to residual solids, however in this case the proposed system includes filtration of less than 0.4 micron which effectively removes this mode of failure.¹¹¹ Monitoring of the area is also required by the proposed conditions,¹¹² so if any issue did arise it would be quickly identified and responded to.

- 5.68 Based on that information, the applicant considers that a condition requiring it to identify and protect an offset site is more onerous than necessary to address the potential, very unlikely, adverse impact that has been identified and therefore cannot be imposed pursuant to s 83 FTAA.¹¹³

Issue in contention: should a condition be imposed requiring Vineway to construct a road to undesignated potential school site

- 5.69 In its comments Auckland Transport has advised it considers a condition of consent should be imposed requiring the applicant to deliver an active mode connection from the site to the location of an “intended school” on “land that is not yet designated”.¹¹⁴
- 5.70 The applicant does not agree with Auckland Transport’s proposed condition.
- 5.71 The proposed condition is inconsistent with standard RMA principles, which also apply in the FTAA context.¹¹⁵ It does not relate to an adverse impact arising from the Delmore project,¹¹⁶ because there is currently no school or even a site designated for a school. It is unreasonable to require the applicant to provide public infrastructure to a facility for which there is no certain delivery date, or which could end up not being delivered at all.¹¹⁷

¹¹⁰ Response to Council Comments letter, Appendix 8 A024 point 17 second column from left and column far right and point 19 far right column

¹¹¹ Response to Council Comments letter, Appendix 8 A024 point 17

¹¹² Response to Council Comments letter, Appendix 2 section 5 wastewater discharge permit, section 7.3.3, conditions 27-30

¹¹³ FTAA, s 83

¹¹⁴ Council comments, Annexure 21 section 6.1 pdf pg 10 and section 9.1 pdf pg 12

¹¹⁵ Clause 18 of Schedule 5 states that when setting conditions, the provisions of Parts 6, 9, and 10 RMA “are relevant to setting conditions on a resource consent apply to the panel, subject to all necessary modification”. This transposes RMA requirements for consent conditions into the FTAA. A similar summary of these requirements has been provided in most panel decision to date. For example see *Rangitoooni decision* at [287]-[291], *Bledisloe Wharf decision* at [305]

¹¹⁶ Conditions must be for a resource management purpose not an ulterior one; fairly and reasonably relate to the development being organised; not be so unreasonable that a reasonable planning authority appreciating its statutory duties could not approve it: *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 (HA), at 739

¹¹⁷ Ibid

6. Assessment under FTAA decision-making provisions and conclusion

- 6.1 The applicant's position remains as set out in the AEE: The Delmore project's benefits are real and will have a material and significant positive effect on the Auckland region. Assessment of the application against the RMA provisions that direct decision-making (applying the most recent Supreme Court jurisprudence) indicates that granting the approvals sought would also be consistent with sustainable management.
- 6.2 All potential adverse environmental impacts have been addressed through project design or proposed conditions of consent, so that they are either no longer adverse or have been minimised to such a degree that they are acceptable and insufficient to be out of proportion to the Delmore project's significant regional benefits. Indeed, the Council and the applicant are on the same page in respect of nearly all technical disciplines and related environmental effects.
- 6.3 This is not a situation like that applying to the Homestead Bay application where the Panel is faced with a proposal to remove and not replace several high value, rare wetlands.¹¹⁸ Rather, the Delmore project will increase the extent of wetlands within the site by a 3:1 ratio, and includes hectares of new native planting. It is not a situation like that applying to the Sunfield application, where the Panel was faced with a proposal to residentially develop rural land which would result in infrastructure capacity being reallocated outside the rural urban boundary. The Delmore project is located on FUZ land and is earmarked for urban, residential use. There is sufficient capacity in the network to support a portion of FUZ land within the catchment area under planned upgrades. However, the applicant has still opted to provide for on-site servicing as the primary servicing option to be safe.¹¹⁹
- 6.4 Consequently, the applicant says that the information before the Panel demonstrates that the Delmore project's significant regional benefits outweigh any adverse impacts, and the application must therefore be granted. Any residual adverse impacts are not at a level that they pass the high test of being sufficiently significant out of proportion to or outweigh to a large extent the Delmore project's regionally significant benefits.¹²⁰



Madeleine C Wright, Counsel for Vineway Ltd

¹¹⁸ Homestead Bay decision at [438]

¹¹⁹ Both the Homestead Bay application and the Sunfields application were granted

¹²⁰ Per *Hughes* as discussed at para 4.51-4.52 above

Attachment 1: Ellis Gould letter

Attachment 2: Alexander Dorrington memorandum

Attachment 3 Indicative utilisation of residential super lot