

Before the Panel appointed under the Fast-track
Approvals Act 2024

Under the	Fast-track Approvals Act 2024
In the matter	of Mt Welcome, Pukerua Bay
By	Pukerua Property Group Limited Partnership

MEMORANDUM OF COUNSEL ON BEHALF OF PORIRUA CITY COUNCIL

2 September 2026



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MAY IT PLEASE THE PANEL

Introduction

1. This memorandum is filed on behalf of Porirua City Council (**PCC**) in response to the Panel's third question in Minute 15, which was as follows:¹

... whether [the Panel has] jurisdiction to impose conditions either directly or indirectly requiring a redesign of the project over the applicant's objection, or whether [the Panel's] only option, assuming one or more of the preconditions in section 85 of the FTAA are met, is to decline the approvals sought.

2. This question was preceded by the following context:²

The third line of inquiry arises from the stance of a number of parties in their comments, suggesting that aspects of the project plan be redesigned. Suggestions that additional wetland offsetting or roadside raingardens are required for instance, if accepted, would require that additional areas be identified, land allocated potentially excluding other identified uses, and the relevant works designed. Another example is the urban design input of Mr Wenden on behalf of Porirua City Council suggesting, among other things, relocation of two proposed parks on the Lucas Block, but there are many others. The applicant has accepted some suggestions and rejected others.

Summary

3. The Panel has a broad power to impose conditions under the Fast-track Approvals Act 2024 (**FTAA**). Whether a change to an application is lawfully within the scope of the decision-maker's condition setting power has been discussed by the courts in decisions made under the Resource Management Act 1991 (**RMA**) in a variety of different contexts.

¹ Minute 15 at [5].

² Minute 15 at [4].

4. Whether a change to an application is within the scope of the condition setting power requires a judgement on the facts of the case.³ Two principles about whether a change is permissible as a condition are:⁴
- (a) The degree of change. Does the matter become a different application?
 - (b) Prejudice to other parties or the public.
5. Neither the RMA nor the FTAA expressly prevent the Panel from imposing conditions that require the Applicant, either directly or indirectly, to spatially redesign or rearrange aspects of the project to address identified adverse effects. Instead, aspects of section 220 of the RMA expressly contemplate that outcome. It is open to a decision maker to impose conditions on a resource consent that alter the approach that the consent holder proposes to take to implementing the proposed activity.
6. Whether a particular change the Panel is minded to make is able to be achieved through imposing a condition will depend on the nature of that change. That said, given the broad nature of the activities sought to be enabled by the resource consents in the Application, there will be various effects on the environment that could properly be addressed by consent conditions that could amend the design and detail of the proposed activity. It is respectfully submitted that the two examples provided in Minute 15 are likely to be within the scope of the Panel's condition setting power.

The power to set conditions

7. The framework for the Panel's decision making is set out in Subpart 3 of Part 2 to the FTAA. A basic overview of these provisions has previously been addressed in the memorandum of counsel on behalf of PCC dated 31 July 2026 (**Comment Memorandum**) that accompanied PCC's section 53

³ See *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).

⁴ *Sustainable Ventures Limited v Tasman District Council* [2012] NZEnvC 235 at [32].

comments. Where possible, this memorandum endeavours does not repeat that overview.

8. Under section 81 of the FTAA, for each approval sought the Panel may:
- (a) grant the approval and set **any conditions** to be imposed on the approval; or
 - (b) decline the approval.

Section 85 then provides for the circumstances in which the Panel may decline any approval.

9. The setting of conditions for resource consents by the Panel is governed by sections 83 to 84A, and clause 18 of Schedule 5. Clause 18 of Schedule 5 provides that the provisions of Parts 6, 9 and 10 of the RMA that are relevant to setting conditions continue to apply to the Panel with all necessary modifications. This includes sections 108, 108AA and 220 of the RMA.

10. Section 108(1) provides a broad discretion to grant consent subject to “any condition that the consent authority considers appropriate” subject to other provisions, standards and regulations providing otherwise. Section 108(2) provides a non-exhaustive list of conditions that a resource consent may include. This list includes:⁵

a condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided

11. Section 108AA(1) limits the general discretion in section 108. It states that conditions must not be included unless:

⁵ Section 108(2)(c).

- (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;
 - (v) an infrastructure design solution; or
- (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

- 12.** Section 220 provides further clarity in relation to the nature of conditions that may be included in a subdivision consent. Section 220 does not limit the general scope under section 108, but provides further specific examples of the sorts of conditions that can be imposed on subdivision consents.
- 13.** Further to the above, section 2 of the RMA defines conditions to include “terms, standards, restrictions, and prohibitions”.
- 14.** Taken together, these provisions provide broad but not unfettered scope in relation to the nature of conditions that may be set by a consenting authority under the RMA, and therefore, by a panel under the FTAA. The core restriction under the RMA is that any condition must be directly connected to an adverse effect of the activity on the environment, or an applicable rule or standard.⁶ Under the FTAA, conditions must be no more onerous than necessary to address the reason for which it is set.⁷ As discussed further below, case law has further developed the boundaries of the condition setting power under the RMA.

⁶ Section 108AA(1)(b).

⁷ FTAA, s 83.

15. The purpose of the FTAA is also relevant to the Panel’s condition setting function.⁸ The purpose of the FTAA is “to facilitate the delivery of infrastructure and development projects with significant regional or national benefits”.⁹ In some circumstances, it may be that including conditions to address adverse effects (without the applicant’s agreement) could enable a project to be delivered that would otherwise be declined.

Distinction between fundamental changes to the activity proposed and consent conditions

16. There is a body of case law about the distinction between conditions of consent and changes to the underlying activity proposed through a consent application. Much of the case law is in the context of section 127 of the RMA, which provides an ability for consent holders to apply to a consent authority to amend or cancel consent conditions after a consent has been granted. The context for the decisions on section 127 is readily apparent – an application to amend a condition cannot result in a different activity to the one consented, otherwise it would represent a fresh application by a side wind.

Sustainable Ventures Limited v Tasman District Council

17. The Environment Court’s decision in *Sustainable Ventures Limited v Tasman District Council* is a helpful example of a situation where Council imposed conditions that went beyond the scope of the original application.¹⁰
18. The proposed activity included an apartment complex, commercial activity, two lot-subdivision and unit title subdivision, and associated discharges and coastal protection works at Pakawau in Golden Bay.¹¹ The appropriate coastal protection for the proposed development was an important issue

⁸ Clause 17(1) requires a panel to give the greatest weight to the purpose of the FTAA when considering a consent application, including conditions in accordance with clause 18.

⁹ FTAA, s 3.

¹⁰ *Sustainable Ventures Ltd v Tasman District Council* [2012] NZEnvC 235.

¹¹ At [2].

for the proposal, as it had coastal frontage and the area was subject to coastal erosion.¹²

19. The Council imposed a group of conditions that adopted a 'Coast Care Programme' to manage the coastal hazard.¹³ The conditions required the establishment of a dune restoration plan with sand entrapment, dune replenishment and extensive related planting.¹⁴
20. The applicant's proposal included a fundamentally different approach to protecting the development by improving the existing rock wall protection structure.¹⁵ It expressly considered and discarded the Coast Care Programme option.¹⁶ The Court observed that the Coast Care option "was a rejected option and did not form part of SVL's proposal which (significantly) did not contain any assessment of the effects of coast care".¹⁷
21. The question before the Court was whether it was open to the Council to impose the Coast Care Programme conditions.¹⁸ The Court found that the Coast Care Conditions were beyond the scope of the Council's permissible amendments through conditions.¹⁹ The Court observed that if the hearings commissioner reached the conclusion that consent ought not be granted unless it incorporated such conditions, then the appropriate course of action was to decline the application.²⁰
22. The Court stepped through its analysis from paragraph [28] of the judgment. After citing the broad wording of section 108(1), the Court observed that:²¹

¹² At [5] and [10].

¹³ At [5]–[7].

¹⁴ At [5]–[7].

¹⁵ At [16].

¹⁶ At [11]–[16].

¹⁷ At [16].

¹⁸ At [17].

¹⁹ At [23]–[25].

²⁰ At [26].

²¹ At [29].

consent conditions imposed by consent authorities (and the Court) commonly change aspects of an applicant's proposal or put restrictions on that proposal, frequently in the face of opposition by the applicant. As a general proposition, it is a function of conditions to mitigate the effects of proposed activities and s 108(1) authorises that.

23. The Court discussed the extent of permissible amendments to a proposal with reference to the *Estate Homes* Supreme Court decision, which was a case about permissible amendments by an applicant to a consent application between council and Environment hearings.²² The Court ultimately found that the issues for determining whether a change is permissible can be summarised as:²³

- (a) The degree of change. Does the matter become a different application?
- (b) Prejudice to other parties or the public.

24. The Court cited the following passage from the High Court's decision in *Atkins v Napier City Council* as further helpful guidance:²⁴

I consider the test, as developed by the Environment Court and Court of Appeal through a series of cases, is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is **significantly different in its scope or ambit** from that originally applied for and notified (if notification was required) in terms of:

- the scale or intensity of the proposed activity
- the altered character or effects/impacts of the proposal.

Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and

²² At [29]–[32].

²³ At [32].

²⁴ At [33] citing *Atkins v Napier City Council* [2009] NZRMA 429 at [20] and [21].

notified, is a means of applying or analysing the test. But it is not the test itself.

[our emphasis]

25. While the Court had sympathy for the reasons why the Coast Care Programme had been included, it found that the proposal was not of the same scale or intensity as that proposed by the applicant.²⁵ The Court observed that there was a large difference in the extent of the earthworks required between the two proposals (approximately 1,400m² for the applicant's rock wall proposal, and in the order of 3,500m² for the Coast Care Conditions).²⁶
26. The Court observed "there are even more significant issues" that arise from the different character and effect between the two proposals, which could have implications for other properties along the Pakawau Coast.²⁷ The applicant's approach would align with other protection works undertaken by neighbouring properties along the coastline, whereas the Coast Care Programme would result in retreat to the existing coastline.²⁸ The approach would have had significant implications for neighbouring properties, and the Court found that different submissions may have been made if they knew coastal retreat was an option included in the application.²⁹
27. A further difficulty was that the Coast Care Proposal may require the applicant to obtain another resource consent for the increased earthworks, meaning that it might not be able to exercise the consent it had been granted.³⁰

²⁵ At [35].

²⁶ At [36]–[37].

²⁷ At [38].

²⁸ At [39].

²⁹ At [40]–[43].

³⁰ At [45]–[46].

- 28.** Section 127 of the RMA allows for applications to change or cancel the conditions of a resource consent that has already been granted. Guidance can be drawn from the decisions that discuss the extent of the section 127 power. Similar themes emerge to those discussed in *Sustainable Ventures Limited v Tasman District Council*. These are briefly discussed below for completeness.
- 29.** In *Body Corporate 97010 v Auckland City Council* the Court of Appeal addressed the distinction between a change to a consent condition that may be made under section 127, and a change to the consent itself, which may not.³¹
- 30.** The Court held that a resource consent is granted in respect of an activity or use, whereas a condition is a qualification to the consent for that particular use.³² However, the Court acknowledged that:³³
- what is a condition may not be clear cut and will often, as the Judge recognised, be a matter of fact and degree. In differentiating between them the consent authority need not give a literal reading to the particular wording of the original consent.
- 31.** In this regard, the distinction between a change to a condition, and a change to the consent itself, is a question of fact and degree, in which the overall substance of the consent is to be considered.³⁴
- 32.** Although the Court favoured substance over form, it considered that the exercise remained one of distinguishing between the activity which a

³¹ *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA) at [24]–[57].

³² At [44].

³³ At [45].

³⁴ See also at [50].

consent enables, and the conditions that attach to that consent, by holding that.³⁵

It is preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation. An activity may have been approved at a relatively high level of generality which, subject to stipulated conditions, may be capable of being conducted in different ways.

- 33.** Although decided in a different context where the consent in question had already been granted and the applicant subsequently sought for the conditions attached to it to be changed, the approach taken in *Body Corporate 97010* is an available reference point for the distinction between a condition of a consent and the underlying activity authorised by the consent itself.
- 34.** In *Body Corporate 97010*, the resource consent as granted enabled the construction of a single 30-metre-high apartment block on a particular part of a site.³⁶ The changes later sought under section 127 were to enable the construction of two 30-metre-high apartment blocks located on the same foundation, being within the same part of the site where the construction of the singular tower was already enabled under the consent.³⁷ This change resulted in fewer residential apartments and a consequential reduction in the number of parking spaces.³⁸
- 35.** The Court held that that the proposed twin-tower development was a valid application under section 127 because it involved changes to the conditions of the existing consent, rather than a change to the consented activity itself. Although the building's form, layout and number of apartments differed from the original design, the development remained within the approved building envelope and continued to be used for residential apartments.

³⁵ At [46].

³⁶ At [2].

³⁷ At [4].

³⁸ At [4].

Accordingly, the changes were treated as amendments to the consent conditions rather than a new activity requiring a fresh resource consent.³⁹

36. A more recent example can be found in *Stride Holdings Ltd v Auckland Council*.⁴⁰ In this case the High Court considered an application to change consent conditions to allow a retail area to more than double the number of tenancies (from 18 to 39), increase the gross floor area by 2,490m² (approximately 12.7%), add more parking spaces and various other changes.⁴¹ The Court found that such changes were within the scope of section 127 (ie were changes to the conditions and not the consent itself).⁴²

Principles applied to the Application

37. As will be clear from the analysis above, whether any condition the Panel considers imposing is properly a condition, or should be viewed as a modification to the underlying activity itself, will be a question of fact and degree for the Panel with reference to the principles discussed in the case law as summarised in *Sustainable Ventures Limited v Tasman District Council*.
38. Although, as confirmed in *Body Corporate 97010*, the distinction between the activity and its conditions is not as simple as referring to the wording of the consent (or in this case the Application for the relevant consents), the wording of the Application and its conditions nonetheless provide a useful place to start.
39. Comparable to *Body Corporate 97010*, the activity sought has been framed in a broad way. The framing proposed by the Applicant was provided by way of memorandum dated 2 July 2026.⁴³ In relation to the consents

³⁹ At [48].

⁴⁰ *Stride Holdings Ltd v Auckland Council* [2026] NZHC 1358.

⁴¹ At [51].

⁴² At [99].

⁴³ Applicant's Response to Panel Minute 2 dated 2 July 2026.

relevant to PCC's jurisdiction, the Application frames the activities as follows:⁴⁴

Land use (s9)

Land use activities to enable or construct:

- 949 future dwellings;
- A future commercial centre;
- Associated infrastructure, including wastewater (including wastewater storage facilities), stormwater, water reticulation, roading, and pedestrian and cycling trails;
- Landscaping;
- Building platforms, roading, parks and drainage;
- Temporary buildings and structures for construction; and
- A new intersection with State Highway 59.

Soil disturbance and changing the use of contaminated land under the NES-CS.

Subdivision (s11)

Subdivision to enable:

- 949 residential allotments sized between 316m2 to 2386 m2, including balance allotments and lots to vest;
- A future commercial centre;
- Associated infrastructure, including wastewater (including wastewater storage facilities), stormwater, water reticulation, roading, and pedestrian and cycling trails;
- Landscaping; and
- A new intersection with State Highway 59.

Subdivision of contaminated land under the NES-CS.

40. This framing was provided in response to a request from the Panel in Minute 2, for a “concise statement of the activities for which an approval in the nature of a resource consent is sought ... suitable to be placed at the head of proposed conditions”.⁴⁵

⁴⁴ At [4].

⁴⁵ Minute 2 at [4].

41. Although not entirely decisive of the activities for which consents are sought, this description illustrates that the activities in question are relatively broad and include a range of aspects necessary for the overall project. The detailed design of how and where those matters will occur is not provided for in the description of the activity itself, but left to the proposed conditions of the consent which include reference to various plans.

Whether the proposed changes could be imposed as conditions

42. The very nature of conditions to any resource consent is that they will either require an activity to take place in accordance with what is proposed (often through an ‘in general accordance condition’) or alter the approach that the consent holder proposes to take to implementing the proposed activity.
43. Neither the RMA nor the FTAA, expressly prevent the Panel from imposing conditions that require the Applicant, either directly or indirectly, to spatially redesign or rearrange aspects of the project to address identified adverse effects. Instead, changes to the layout of a subdivision are expressly contemplated by section 220 of the RMA. For example, a consent authority can impose esplanade reserves or esplanade strips on a subdivision proposal, requiring amendments to the proposed lots.⁴⁶
44. Given the broad nature of the activities sought in the Application, there will be various matters that could properly be addressed by consent conditions that could amend the design and detail of the proposed activity to manage effects on the environment, but remaining consistent with the underlying activity sought in the Application, namely a residential subdivision on the subject site.
45. Whether any particular requirement that the Panel is considering imposing could properly be imposed as a condition, or is more properly a change to

⁴⁶ RMA, s 220(a)–(ac).

the activity and consent itself, will of course depend on the exact nature of that change.

46. The Panel identified two examples of conditions that had been suggested by parties commenting on the Application in Minute 15. These two examples were:

- (a) suggestions that two parks proposed by the Applicant be relocated;⁴⁷ and
- (b) the potential to require additional wetland offsetting or roadside raingardens, which “would require additional areas to be identified, land allocated potentially excluding other identified uses, and the relevant works designed”.⁴⁸

47. It is submitted that both of these examples are matters that could be properly addressed by way of appropriate conditions.

Location of parks

48. The suggestions from PCC’s Urban Design expert, Mr Matthew Wenden, that parks proposed in the Masterplan and Landscape Urban Design Strategy accompanying the Application could be relocated are unlikely to be beyond the Panel’s jurisdiction to manage through consent conditions.⁴⁹

49. Rearranging the location and configuration of parks is not a fundamental or significant change to the proposed activity. It is instead a slightly different way of delivering a modest aspect of the proposed activity. The scale and intensity of the proposed activity would be materially unchanged. If this were an RMA consent application with submission rights, there is a very low chance that a person would submit differently on the proposal if some

⁴⁷ Minute 15 at [4].

⁴⁸ At [4].

⁴⁹ See Minute 15 at [4]; and Matthew Wenden *Technical Review Memorandum Urban Design* at [36]–[37].

changes were made to the arrangement and configuration of the proposed parks.

50. By comparison, any amendments to the location and configuration of the parks are of a far smaller scale than the change to the configurations of the buildings in *Body Corporate 97010* which were within the scope of the power to amend conditions in section 127 of the RMA.

Wetlands and roadside raingardens

51. The issues associated with wetlands and raingardens were discussed in Greater Wellington, Te Runanga a Toa and Tiaki Wai's comments, rather than PCC's comments. PCC defers to those parties on these issues but makes the following observations in case they assist the Panel.

52. Section 220(1)(d) of the RMA provides that in granting a subdivision consent the conditions upon which it may be granted include:⁵⁰

a condition that provision be made to the satisfaction of the territorial authority for the protection of the land or any part thereof, or of any land not forming part of the subdivision, against natural hazards from any source (being, in the case of land not forming part of the subdivision, natural hazards arising or likely to arise as a result of the subdividing of the land the subject of the subdivision consent):

53. In relation to section 220(1)(d), the Environment Court has previously acknowledged that such conditions "must almost always be the requirement for some kind of physical work e.g. planting of trees or grass, construction of a retaining wall, or placement of a stop bank or water-channelling".⁵¹

⁵⁰ See also RMA, s 106(2).

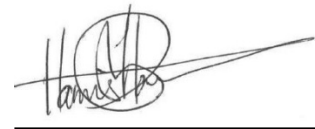
⁵¹ *Lakes District Rural Landowners Society Inc v Queenstown Lakes-District Council* ENC Christchurch C100/2001, 21 June 2001 at [35(d)].

54. As a general proposition, conditions requiring the provision of wetlands or roadside raingardens are within the scope of section 220(1)(d). The activity description provided by the Applicant also already recognises that the activities encompass land use and subdivision to enable the construction of stormwater infrastructure. In this regard, imposing conditions in a manner that required additional wetlands or roadside raingardens to those currently proposed through the plans provided with the Application would not appear to result in a change to the Application itself, assuming that any additional wetlands or roadside raingardens could be provided within the same overall site.

Other potential changes and conditions

55. PCC would be happy to provide further submissions about other changes that the Panel may be considering through conditions, if that would assist the Panel.

Dated: 2 September 2026



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