

UNDER the Fast Track Approvals Act 2024 ("**the FTAA**")

IN THE MATTER of a substantive application by CDL Land NZ Ltd for approvals under the FTAA for a referred project, Middle Road

**FIRST MEMORANDUM ON BEHALF OF THE APPLICANT
OVERVIEW & KEY LEGAL ISSUES**

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1. INTRODUCTION AND SUMMARY

- 1.1 CDL Land NZ Ltd (“**CDL**” or “**the Applicant**”) seeks approvals under the Fast Track Approvals Act 2024 (“**FTAA**”) for subdivision, land use and infrastructure works for a master-planned residential development providing 317 residential lots with supporting infrastructure in Havelock North (“**Project**”). The Project is a referred project. Approvals are required under the Resource Management Act 1991 (“**RMA**”) and the Heritage New Zealand Pouhere Taonga Act 2014 (“**Heritage Act**”).
- 1.2 The Project will provide significant housing, social and economic benefits, helping address an identified housing shortfall while generating substantial investment, employment and economic activity within the Hawke's Bay region.
- 1.3 The FTAA establishes a distinct decision-making framework intended to facilitate projects that provide significant regional or national benefits. While the Panel must take into account relevant RMA considerations, planning instruments and policy statements, those matters are not determinative. The Panel is required to give greatest weight to the purpose of the FTAA and may only decline the Project where adverse impacts are sufficiently significant to be out of proportion to the Project's benefits.
- 1.4 Through consultation undertaken to date, the issues understood to remain in dispute are relatively narrow and principally relate to: (a) the loss of highly productive land and the relevance of the NPS-HPL; and (b) potential reverse sensitivity effects.
- 1.5 The evidence demonstrates that the site's productive capacity is constrained by flooding, drainage, water availability and its increasingly urbanised context, with the quantified consequences of the loss of productive land being relatively modest, even after taking into account intangible values. Potential reverse sensitivity effects are similarly expected to be minor having regard to

the actual context, likely future land use outcomes and the mitigation proposed.

- 1.6 While the final form of aspects of water and wastewater servicing remain subject to confirmation, proposed conditions will ensure the necessary infrastructure is available before development can proceed.
- 1.7 For the reasons set out below, the Project represents an appropriate and logical urban expansion of Havelock North, delivers significant regional benefits consistent with the purpose of the FTAA and should be approved subject to conditions proposed in the application.

2. STRUCTURE

- 2.1 This memorandum is structured as follows:

- (a) An overview of the Project, site and Applicant.
- (b) Approvals sought.
- (c) The decision-making framework applying to the Application.
- (d) Key matters that CDL anticipates will require consideration by the Panel, being:
 - (i) Issue 1 – Completeness and scope;
 - (ii) Issue 2 – Highly productive land and the National Policy Statement for Highly Productive Land (“**NPSHPL**”);
 - (iii) Issue 3 – Reverse sensitivity; and
 - (iv) Issue 4 – Conditions, namely:
 - A. The use of conditions precedent; and
 - B. The use of no-complaints covenants.

3. OVERVIEW OF THE PROJECT, SITE AND APPLICANT

- 3.1 The planning report contains a detailed overview of the Project, site and approvals sought. This section provides a high-level summary to give context to the discussion that follows.

The Project

- 3.2 The Project will facilitate a comprehensively planned residential development of approximately 317 lots, providing a range of lot sizes supported by integrated transport, three waters infrastructure and open space networks, including the retention and enhancement of the Herehere Stream corridor.
- 3.3 The Project will comprise two phases of development. The first will realise the residential subdivision of the land (including delivery of supporting infrastructure and public assets) and will be delivered by CDL. The second will deliver the residential built form (including construction, parking, landscaping and fencing on individual lots) and will be delivered by CDL's build partners/future lot owners.
- 3.4 As the site is currently zoned Plains Production zone in the District Plan which does not provide for urban residential development, resource consents are sought as part of this Application that apply (via land use consent conditions and consent notices) the relevant activities and development standards from either the Havelock North General Residential Zone provisions or the Havelock North Medium Density Residential Zone provisions, together with project-specific requirements. This aligns with the approach adopted for the Arataki FTAA development.¹

The Site

- 3.5 The 30.6 ha site at 92, 108, 148 Middle Road and 139 Te Aute Road ("**Site**") is located on the southwestern edge of Havelock North, approximately 900m from the town centre. While it is currently used for rural residential and grazing purposes and has a Plains Production zoning, it is surrounded on three sides

¹ Approved Development of 171 lots on plains production zoned land at 86, 108, and 122 Arataki Road, Havelock North, Hastings, Hawke's Bay by CDL - Fast-Track Reference FTAA-2506-1083

by urbanised land and the entirety of the block represents a logical and appropriate bookend to the suburban residential context of Havelock North.

3.6 In recognition of its locational attributes, the Site has long been considered for urbanisation in strategic planning documents:

- (a) The eastern part of the Site was included as a 'reserve greenfield growth area'² in the Heretaunga Plains Urban Development Strategy 2017 ("**HPUDS**");³
- (b) The Independent Hearings Panel recommended the entirety of the Site for inclusion within the 2025 Future Development Strategy ("**FDS**") on the basis that:⁴
 - (i) The land's productive capacity was constrained by its high flood susceptibility and water table.⁵
 - (ii) Excluding the Site would contribute to a shortfall in Hastings' long-term housing development capacity.⁶
 - (iii) Compared with alternative locations, the Middle Road Site was preferred because it constitutes a logical extension of the existing urban area, being bounded by residential development on three sides, readily serviced by existing infrastructure, good transport accessibility and capable of establishing a clear and defensible urban edge along Gilpin Road.⁷
- (c) Despite the Panel's recommendation, HDC and HBRC resolved to exclude the Site from the final FDS, while Napier City Council resolved to retain it.⁸ This has resulted in the unusual position of a single Future

² "Reserve areas will act as replacements, and may also be advanced if there is a rapid and significant change in growth demand, or retirement village needs cannot reasonably be met within the preferred greenfields areas."

³ This is a strategic planning document prepared by Hastings District Council, Napier City Council and Hawke's Bay Regional Council, which has now been replaced by the FDS. See extent at p.67 [HPUDS 2017](#).

⁴ [Recommendations of the Independent Hearings Panel to the Future Development Joint Committee on the Napier-Hastings Future Development Strategy, 9 May 2025](#) at paras 2(i), 44 and 125. The Panel relied on and referred to the FDS advisors' recommendation and reasons as set out in the [Report for Hearings Panel](#) at 10.3.7.

⁵ FDS advisors' [Report for Hearings Panel](#) at 10.3.7.2.

⁶ FDS advisors' [Report for Hearings Panel](#) at 10.3.7.2.

⁷ FDS advisors' [Report for Hearings Panel](#) at 10.3.7.2 (p.103).

⁸ See explanatory document: '[Differing Partner Council positions on several New Greenfield Development Areas](#)'.

Development Strategy containing differing partner council positions on the Site.

- 3.7 Overall, the above demonstrates a longstanding recognition, including by the independent FDS process, of the strategic merits of the Site for accommodating urban growth and contributing to Hawkes Bay's future housing capacity. The divergence between the partner councils does not arise from disagreement as to those benefits, but rather from differing views as to the weight to be afforded to the competing considerations (i.e.: housing supply vs productive capacity). In that context, we submit the Panel's recommendation, and the reasons supporting it, remain a relevant indication that the Site represents a logical and appropriate location for future residential development.
- 3.8 The FTAA offers an opportunity to develop such sites in advance of a zoning change and such an approach is consistent with the policy direction in the NPS-UD.⁹

The Applicant

- 3.9 The Applicant is an experienced residential land development company with a strong track record of delivering quality residential developments in the Hawke's Bay region, including:
- (a) Northwood, Hastings (226 lots) – completed;
 - (b) Brookfields, Havelock North (62 lots) – completed;
 - (c) Iona, Havelock North (341 lots) – currently under construction; and
 - (d) Arataki, Havelock North (171 lots) – with construction anticipated to commence in Q3 2026.
- 3.10 The Applicant has both the capability and incentive to deliver the Project. It is also subject to Overseas Investment Office conditions, which require the timely and active development of the land. Those obligations provide

⁹ [Arataki Fast Decision](#) at para 91.

confidence that the Project and its associated benefits are not merely speculative but are likely to be realised in practice, and in a timely manner.

Benefits

- 3.11 The Project will deliver regionally significant housing, economic and social benefits by providing capacity for approximately 317 dwellings in a market facing an identified long-term housing shortfall of around 330 dwellings. It will increase housing supply, choice and affordability by providing a wider range of housing opportunities in a highly accessible location adjacent to the existing Havelock North urban area. As a comprehensively planned urban expansion, the Project will efficiently utilise and extend existing infrastructure networks while delivering integrated transport, three waters, stormwater and open space outcomes. It will also generate significant economic benefits, including *net*¹⁰ benefits of approximately \$277 million of investment, \$90 million in GDP, \$43 million in wages and salaries, and around 697 FTE-years of employment during construction. The economic assessment concludes that the economic benefits significantly outweigh any forgone rural production.

4. APPROVALS SOUGHT

- 4.1 CDL seeks the following approvals to enable the Project:
- (a) Resource consents required in accordance with sections 9, 11, 14 and 15 of the RMA, including resource consents required under rule and regulations in the:
 - (i) Heretaunga Hastings District Plan (“**HDP**”);
 - (ii) Hawkes Bay Regional Resource Management Plan (“**HBRP**”);
and
 - (iii) National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (“**NES-CS**”).

¹⁰ Gross benefits of \$277 million of investment, \$92 million in GDP, \$44 million in wages and salaries, and around 735 FTE-years of employment during construction and more than \$23 million in annual household expenditure.

Overall, the activity status for the consents sought is non-complying.

- (b) An approval under the Heritage Act for potential modification or disturbance of archaeological sites identified within the Site.

4.2 No approvals are required under the Wildlife Act 1953.

5. STATUTORY FRAMEWORK

Applicable version of the FTAA

5.1 The FTAA came into force on 24 December 2024.¹¹ It was subsequently amended by the Fast-track Approvals Amendment Act 2025 (“**Amendment Act**”) which included (relevantly) the changes to introduce section 84A FTAA regarding imposition of conditions precedent regarding infrastructure. These amendments are all now in force¹² and apply to consideration of the substantive application.

5.2 The FTAA has also recently been amended by the Planning Act 2025, however, those amendments do not affect the Expert Panel’s consideration of the Project. The substantive application is being lodged before the transition date,¹³ and therefore must be processed and determined under the FTAA and the RMA as in force at the date of lodgement.¹⁴ Consequently, subsequent amendments to the RMA, including changes to section 104, are not applicable.

Overview of FTAA Statutory Framework

5.3 The purpose of the FTAA is “*to facilitate the delivery of infrastructure and development projects that provide significant regional or national benefits*”.¹⁵ It establishes a separate, and distinct, statutory framework for obtaining approvals under the RMA where a project will deliver significant regional or national benefits.

¹¹ Section 2, FTAA.

¹² Some of the Amendment Act’s changes came into force on 17 December 2025 and others came into force on 31 March 2026. See clause 8 of Schedule 1 which confirms that the FTAA as in force on the second commencement date (31 March 2026) applies in respect of an application lodged after that.

¹³ 30 October 2026, being 1 month after the Act received Royal Assent.

¹⁴ Clause 19, Schedule 1 FTAA.

¹⁵ Section 2, FTAA.

- 5.4 The FTAA framework envisages approval of regionally or nationally significant projects even where they may not have been anticipated under a relevant planning document and such a consent may have warranted decline under the RMA.¹⁶
- 5.5 As noted by the High Court in *Ngati Kuku Hapu Trust v EPA* [2025] NZHC 2453 (emphasis added):

“In enacting the FTA, Parliament made a deliberate decision to de-emphasise factors which might militate against approval. For example, the cabinet minute which approved the inclusion of the 149 listed projects noted it was the Government’s intention to establish a consenting and permitting process that “makes it substantially easier for projects to be approved than the status quo, with a high bar needing to be reached for a panel to decline a project”. The premium the FTA places on speed and the reduced emphasis on cultural and environmental considerations.”

Decisions on approvals

- 5.6 The starting point for the FTAA assessment is section 81(1) FTAA. A Panel must, for each approval, decide whether to grant the approval (and set any conditions) or decline the approval.
- 5.7 Section 81(2) then sets out what the Panel is required to do for the purpose of making that decision and deciding any conditions. This involves (relevantly for this project):
- (a) Directing the Panel to consider:
 - (i) The Minister’s reasons for accepting the referral application.¹⁷
 - (ii) 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 90.¹⁸
 - (b) Requiring the Panel to apply:

¹⁶ See [Maitahi](#) decision dated 18 September 2025, at [51] regarding Parliamentary intention.

¹⁷ Section 81(2)(aaa) FTAA.

¹⁸ Section 81(2)(a) FTAA.

- (i) Clauses 17 to 22 of Schedule 5 when considering the RMA approvals (including any conditions imposed on that approval); and
- (ii) Clauses 4 and 5 of Schedule 8 when considering the Heritage Act approval.

What and how that is to be done is discussed below.

- (c) Confirming that the Panel may impose conditions under section 84 to recognise or protect a relevant Treaty settlement¹⁹ or under section 84A in relation to infrastructure.
- (d) Limiting the Panel's decision in the following ways:
 - (i) Requiring compliance with section 82 (re Treaty settlements);²⁰
 - (ii) Requiring compliance with section 83 (discussed below) in setting conditions;
 - (iii) Only enabling the Panel to decline an approval in accordance with section 85 (discussed below).

Statutory Weighting

5.8 In undertaking the assessment required by section 81(2)(b) FTAA, the Panel must “take into account” the identified matters in the decision-making criteria set out in the Schedules for each approval, but in all instances, give greatest weight to the purpose of the FTAA, being “*to facilitate the delivery of infrastructure and development projects with significant regional or national benefits*”.²¹

¹⁹ One Treaty settlement (Heretaunga Tamatea Claims Settlement Act 2018) applies in the area covered by the Project. **NB:** Section 84 also enables conditions in relation to recognised customary rights, however, there are no protected customary rights that relate to the Site.

²⁰ One Treaty settlement (Heretaunga Tamatea Claims Settlement Act 2018) applies in the area covered by the Project. The other obligations in section 82 FTAA do not apply because the Marine and Coastal Area (Takutai Moana) Act 2011 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 are not relevant.

²¹ Clause 17 of Schedule 5 FTAA (RMA Approvals); Clause 4 of Schedule 8 FTAA (Heritage Approvals).

- 5.9 Previous decisions have applied an evaluative framework that requires the Panel to:²²
- (a) First consider each of the relevant matters in the applicable clauses, uninfluenced by the purpose of the FTAA;
 - (b) Before standing back and undertaking an overall weighting assessment (or evaluative judgment).
- 5.10 While the Panel must weigh the matters in accordance with the prescribed hierarchy, that does not allow the Panel to simply list them and set them aside. To “take [something] into account” requires a decision maker to directly consider the identified matters and give them genuine consideration, rather than mere lip service.²³ However, having done so, the decision maker retains a discretion as to the weight to be afforded to it and may ultimately choose to reject it.²⁴
- 5.11 In short, the weighting exercise does not change the nature or magnitude of any adverse effect but informs the weight to be given to competing considerations as part of that overall evaluative judgment. As to how that may play out in practice, the Haldon Solar Expert Panel observed:²⁵

“Reconciling competing provisions is less problematic under the FTAA since the FTAA contains an explicit statutory hierarchy, as already explained above. Were we to find that there are competing directive provisions in the RMA instruments, that would be a good reason to find that the purpose of the FTAA deserves more weight in our clause 17 evaluation”

Significant Regional Benefits

- 5.12 When taking the purpose of the FTAA into account under clause 17, Schedule 5 for RMA Approvals or clause 4, Schedule 8 for Heritage Act approvals the Expert Panel “*must consider the extent of the project’s regional or national benefits*”.²⁶

²² See for example [Bledisloe Wharf](#) decision, [Waihi](#) decision, [Taranaki VTM](#) draft decision citing *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 at [41], [52]-[53] in relation to the directive in the Housing Accords and Special Housing Areas Act 2013.

²³ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [169] as cited with approval in the Bledisloe Wharf decision.

²⁴ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, (2015) 19 ELRNZ 163 at [63].

²⁵ [Haldon Solar](#) decision at [516].

²⁶ Section 81(4), FTAA.

- 5.13 The FTAA does not define what constitutes a significant regional or national benefit, nor does it define the terms “significant” or “benefit(s)”. Section 22 FTAA provides a ‘flavour’ or ‘guide’ to what might be considered a benefit, but ultimately this is a factual question based on evidence and informed by judgement.²⁷
- 5.14 As to what these benefits are and how they are assessed, Expert Panels have:
- (a) Found the level of benefits is context-dependent, in that what constitutes a significant benefit may differ from one region to the next.²⁸
 - (b) 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”.²⁹ As the *Waihi* Expert Panel observed, it is unlikely that any single residential development would have game changing benefits, particularly in larger regions.³⁰ Rather, it is an indication of scale.³¹
 - (c) Recognised that there are multiple dimensions of benefit - economic, housing, cultural, social and environmental outcomes may all contribute to regional or national significance,³² and that these do not need to be quantified in monetary terms³³ or in a precise way.³⁴
 - (d) Found that where economic benefits are relied upon, economic disbenefits should be allowed for.³⁵ However, a full cost benefit analysis is not required.³⁶ There is no requirement for adverse environmental impacts to be monetized and directly factored into

²⁷ See for example [Maitahi](#) decision at [515], [529] and [530]; [Bledisloe Wharf](#) decision at [285]; [Milldale](#) decision at [187]; [Drury](#) decision at [271]; [Taranaki VTM](#) draft decision at [82]; [Delmore](#) decision at [74].

²⁸ See for example [Delmore](#) decision at [75].

²⁹ See for example [Maitahi](#) decision at [516]; [Taranaki VTM](#) 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]; [Delmore](#) decision at [76].

³⁰ [Waihi](#) decision at [843].

³¹ [Waihi](#) decision at [843].

³² [Sunfield](#) decision at [534]; [Haldon Solar](#) decision at [538].

³³ [Waihi](#) decision at [786]; [Maitahi](#) decision at [528]; [Bledisloe Wharf](#) decision at [293]; [Rangitooonui](#) decision at [280]; [Sunfield](#) decision at [539].

³⁴ [Haldon Solar](#) decision at [549].

³⁵ [Waihi](#) decision at [784]; [Sunfield](#) decision at [526]; [Taranaki VTM](#) draft decision at [92].

³⁶ [Haldon Solar](#) decision at [535].

economic benefit assessment.³⁷ To do otherwise risks ‘double counting’ of disbenefits as part of the proportionality assessment required under section 85 FTAA.

- 5.15 The evidence demonstrates that the Project will deliver significant regional benefits. The nature and extent of those benefits are considered in the planning and economic reports and summarised above.

Criteria for RMA Approvals

- 5.16 For RMA approvals, the Panel is required to take into account relevant provisions of the RMA that direct decision making on an application for resource consent and the relevant provisions of any other legislation that direct decision making under the RMA.
- 5.17 Section 104 RMA, together with the other decision-making sections in Part 2, therefore remains central to the assessment of RMA approvals. As noted above, this assessment must be undertaken initially without reference to the FTAA’s purpose and the weighting exercise required by clause 17 of Schedule 5. There are two importantly qualifications to that usual RMA assessment, however:
- (a) The section 104D RMA ‘gateway test’ for non-complying activities does not apply to consideration of substantive applications under the FTAA. As a result, despite being a non-complying activity, there is no need to demonstrate that the Project’s adverse effects are no more than minor or that the Project is not contrary to the objectives and policies of the Plan.
 - (b) Provisions that would require decline under the RMA do not have that effect under the FTAA.³⁸ They are simply another matter to be taken into account.

³⁷ [Waihi](#) decision at [784].

³⁸ Clause 17(3) and (4), Schedule 5 FTAA.

Conditions

- 5.18 The Panel must impose conditions on the approval for the Project in accordance with the decision-making criteria set out above.³⁹ That limit is circumscribed by section 83 FTAA which precludes the Panel from setting a condition that is more onerous⁴⁰ than necessary to address the reason for which it is set.
- 5.19 In relation to conditions, the FTAA also provides that (relevantly):
- (a) For RMA approvals, the general RMA provisions relating to conditions apply.⁴¹ Other Expert Panels have applied the established RMA case law principles governing consent conditions when assessing substantive applications.⁴²
 - (b) For Heritage Act approvals, the criterion for conditions are set out in clause 5 of Schedule 8 FTAA.
 - (c) The Expert Panel may set conditions to recognise or protect a relevant Treaty settlement.⁴³
 - (d) The imposition of conditions precedent (to ensure that the infrastructure in the project area or other infrastructure the project will rely on is or can be made adequate to support the project) are explicitly authorised.⁴⁴ This is discussed further below.

Ability to decline approvals

- 5.20 The Expert Panel's decision-making function is further circumscribed by section 85 FTAA. A project can only be declined in accordance with that section.

³⁹ Clause 17, Schedule 5 FTAA (RMA Approvals); Clause 4, Schedule 8 FTAA (Heritage Act approvals)

⁴⁰ In considering this section, the [Haldon Solar](#) decision at [125] recorded that the definition of "onerous" used in the New Zealand Oxford dictionary is "burdensome" or involving heavy obligations, and "unduly" involved the concept of disproportionality.

⁴¹ Clause 18, Schedule 5 FTAA.

⁴² See for example [Maitahi](#) decision at [682] – [684]; [Delmore](#) decision at [303]-[304]; [Waihi](#) decision at Part N, [11]-[12].

⁴³ Section 84 FTAA.

⁴⁴ Section 84A FTAA.

- 5.21 Section 85 FTAA specifies circumstances where an approval *must* be declined (e.g.: in relation to an ineligible activity or where the approval would breach obligations relating to Treaty settlements).⁴⁵ None of these situations apply here.
- 5.22 Section 85 FTAA also specifies the circumstances where an approval *may* be declined.⁴⁶ A Panel may (but is not required to) decline an approval if it forms the view that adverse impacts⁴⁷ are “sufficiently significant” to be “out of proportion” to regional or national benefits. In that regard:
- (a) This evaluative assessment is to be undertaken after taking into account any conditions proffered by the Applicant or set by the Panel in relation to any adverse impacts as defined in section 85(5) FTAA, and with reference to the extent of a project’s regional or national benefits as determined under section 81(4) FTAA.⁴⁸
 - (b) Importantly, an Expert 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)*”.⁴⁹
 - (c) All in all, it provides for an overall judgment or balancing approach to be taken to decision making under the FTAA.⁵⁰
- 5.23 Previous FTAA decisions provide little guidance on what “sufficiently significant” and “out of proportion” is, other than noting that “*there is no formula or mathematical calculation that can assist. In the end, it is a judgement, informed by the relevant provisions of the FTAA and the information supplied*”.⁵¹

⁴⁵ Section 85(1)-(2) FTAA.

⁴⁶ Section 85(3) FTAA.

⁴⁷ Adverse impacts were discussed in the [Maitahi](#) decision at [65] and [91].

⁴⁸ [Maitahi](#) decision at [62].

⁴⁹ Section 85(4) FTAA.

⁵⁰ [North West Rapid Transit](#) decision at [820]; [Rangitooponui](#) decision at [316].

⁵¹ [Haldon Solar](#) decision at [127].

5.24 That said, other FTAA decisions have considered the term ‘significant’ in the context of regional and national benefit (discussed above). Therefore, we submit the Panel’s task requires consideration of whether something is sufficiently significant (“noteworthy”⁵²) be out of proportion to (or “much bigger”⁵³ than) benefits, even when benefits are given more inherent weight.⁵⁴ That is, and is intended to be, a “high bar”.⁵⁵

5.25 What this means is that a degree of adverse impact is thus acceptable in the context of the FTAA decision-making framework.⁵⁶ A Panel must grant an approval even if residual impacts remain – and even if those residual impacts are significant - provided they are not out of proportion to the benefits.⁵⁷ Put another way, because “out of proportion” is the threshold:

(a) The mere existence of significant adverse effects is not, of itself, sufficient to justify declining an application.

(b) Nor is it enough for the impacts to simply exceed the benefits.

And, even where the threshold for decline is met, the Panel retains a discretion to grant.

5.26 For the reasons outlined below, CDL submits that the circumstances described in section 85(3) FTAA do not and cannot arise in relation to the Project. Any adverse impacts of the Project are limited, and fall well short of outweighing the significant regional benefits that the Project will generate.

6. KEY ISSUES

6.1 Extensive engagement has occurred with the relevant Councils, resulting in a relatively narrow range of outstanding issues between the parties. Engagement has also occurred with mana whenua and neighbouring landowners, and feedback received has been incorporated into the Project's

⁵² Definition applied to the term significant in context of benefits by several Expert Panels, as discussed above at paragraph 6.14(b).

⁵³ Noting that the common meaning of the concept “out of proportion”, which is defined in the Cambridge online dictionary as: “If something is out of proportion, it is much bigger or smaller than it should be when compared to other things”.

⁵⁴ As required by clause 17, Schedule 5 FTAA.

⁵⁵ Proactive release cabinet minute and papers, 2 April 2025, from cabinet meeting 10 December 2024 at p. 10.

⁵⁶ [Maitahi](#) decision at [95].

⁵⁷ [Drury](#) decision at [157]; [Haldon Solar](#) decision at [679].

design. These submissions briefly address the principal issues likely to arise through the substantive process, informed by engagement undertaken to date.

7. ISSUE 1 - COMPLETENESS AND SCOPE

7.1 Pursuant to section 46 FTAA, the EPA must decide whether a substantive application is complete and within scope. We say it is, and can be accepted by the EPA for that purpose, for the following reasons:

- (a) As the authorised persons for the Middle Road referred project, CDL is entitled to lodge a substantive application for the Project under section 42 FTAA.
- (b) CDL is eligible to apply for resource consents for the Project under the RMA and archaeological authorities under the Heritage Act.⁵⁸
- (c) The application complies with the scope of the approvals provided for in section 42(4) FTAA.⁵⁹
- (d) The information requirements in section 43 FTAA for the approvals sought are met, as set out in section 4.4 of the planning report.⁶⁰
- (e) The application does not involve an ineligible activity.⁶¹
- (f) All fees, charges and levies associated with the application will have been paid at the time the EPA considers the application.⁶²
- (g) The application relates “*solely*” to a referred project.⁶³

7.2 In terms of that final point (i.e.: that the application relates solely to a referred project and is therefore in scope):

⁵⁸ Section 42(3)(a) and (4)(a) and (i), FTAA.

⁵⁹ Section 46(2)(a)(i), FTAA.

⁶⁰ Section 46(2)(a)(ii) FTAA.

⁶¹ Sections 5 and 46(2)(c) FTAA.

⁶² Section 46(2)(d) FTAA.

⁶³ Section 46(2)(b) FTAA.

(a) A referred “project” is “the project as described in the notice under section 28”.⁶⁴

(b) The project description contained in the section 28 notice is as follows:

The project is to establish a master-planned residential development within a project area of up to 33.7 hectares to deliver approximately 300 to 350 residential lots (to enable future housing construction) including supporting infrastructure (roading, three waters services, stormwater management) and riparian enhancement.

The project area is located at 80–148 Middle Road and 139 Te Aute Road, Havelock North, in the Hawke’s Bay Region.

The applicant seeks the following approvals via the fast-track approvals process to authorise the project, including some approvals sought at this stage on a precautionary basis, subject to further investigations prior to any substantive application:

a. resource consents under the Resource Management Act 1991 (RMA) as described in section 42(4)(a) of the Act

b. archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014 as described in section 42(4)(i) of the Act.

Comment: The substantive application is consistent with the project description set out above. It seeks RMA and Heritage Act approvals for 317 residential lots, supporting infrastructure (roading, three waters services, stormwater management) and riparian enhancement of the Herehere Stream at 92, 108, 148 and 139 Te Aute Road, Havelock North.

7.3 For completeness we note that the referral application included two scenarios, one which reflects the proposal before you and one which included the adjoining landholding (“**the McKenna Block**”).⁶⁵ The McKenna block scenario is not being pursued. No scope issues arise in relation to this on the basis that:

(a) The number of lots sought (317) is within the range specified in the referral decision (300 to 350).

⁶⁴ Section 2 FTAA.

⁶⁵ 80–84 Middle Road, Havelock North.

- (b) While, due to the exclusion of the McKenna Block, the project area for the substantive application excludes land parcels identified in the referral decision, that does not give rise to any scope issue:
 - (i) The referral decision acknowledges some approvals are sought on a “*precautionary basis, subject to further investigations prior to any substantive application*”.
 - (ii) The referral application material made clear that there were two possible scenarios, and the supporting reporting assessed the Project on that basis.
 - (iii) The Minister’s decision letter recognised a range of potential dwelling yields, and the benefits assessment that informed the Minister’s decision was based solely on the dwelling yield achievable at the lowest end of that range (i.e.: did not rely on the development capacity generated by inclusion of the McKenna Block).⁶⁶
- (c) The High Court has confirmed that the project description does not establish an inner limit on the scope of a substantive application (for listed projects).⁶⁷

8. ISSUE 2 - LOSS OF HIGHLY PRODUCTIVE SOILS / NPS-HPL

8.1 The Project will have limited adverse impacts. The principal adverse effect (or impact) requiring consideration is the loss of highly productive land. However, for the reasons set out below, those effects are not significant and are certainly not of a scale that could be regarded as being "out of proportion" to the Project's benefits.

8.2 There are two key aspects to this:

- (a) The effects arising from the loss of highly productive land; and

⁶⁶ Noting the MfE information relied upon by the Minister explicitly acknowledged the two scenarios (e.g.: [Mfe Stage 2 Briefing to Minister](#) at p. 10).

⁶⁷ *Jones v The Environmental Protection Authority* [2026] NZHC 1872 at [35].

- (b) The relevance of the National Policy Statement for Highly Productive Land (“**NPS-HPL**”).

Loss of Highly Productive Soils

- 8.3 In relation to the first matter, the productive capacity report identifies a number of constraints to the Site’s productive use. These include soil, drainage and flood-related limitations, existing modification, fragmentation, as well as the influence of surrounding urban and rural-residential land uses. While the Site is currently used for pastoral grazing and a small non-irrigated orchard, the grazing is undertaken largely to maintain the land rather than as a productive farming activity, and the orchard is identified as being under stress. The lack of available water allocation is a significant constraint on higher-value horticultural activities, with no realistic prospect of securing sufficient water in the foreseeable future.
- 8.4 Accordingly, while the Site is identified as productive land, its productive capacity and productive values are relatively limited.
- 8.5 This conclusion is reinforced by the assessment undertaken by Insight Economics, which evaluates the foregone rural production on a Total Economic Value basis, incorporating both market and non-market (e.g.: intangible) economic values. This assesses the loss of rural production as relatively modest, amounting to approximately \$2.2 million in GDP, 41 FTE-years of employment, and \$1.1 million in wages over a 30-year period.⁶⁸ It is submitted that this demonstrates that the effects arising from the loss of the Site for primary production purposes are relatively limited.

⁶⁸ As noted in Appendix C of the Economic Report “*In the TEV framework, economic value is divided into values arising from both the use and non-use of a resource, including possible future use (known as option value). Use values are subdivided into those that flow directly from use, such as food production, and those that flow indirectly, such as the effect of land management on air or water quality. Non-use values include the benefit people gain from knowing a resource exists (existence value), and from preserving it for others now (altruism) and in the future (bequest).*”

The NPS-HPL

- 8.6 Turning to the second matter, the Site's mapping as LUC2 and rural zoning means it meets the interim definition of highly productive land and is thus subject to the NPS-HPL.⁶⁹
- 8.7 The NPS-HPL directs that subdivision, use and development of highly productive land is to be avoided unless one of the specified exceptions applies. In the case of a subdivision and development proposal, the relevant exception is contained in cl 3.10 of the NPS-HPL.
- 8.8 A productive capacity assessment has been undertaken which confirms that the proposal meets the exemption in cl 3.10 NPSHPL. Under that clause, highly productive land may be subdivided, used or developed where the:
- (a) Land is subject to permanent or long term constraints that mean the use of the HPL for land-based primary production is not able to be economically viable⁷⁰ for at least 30 years. "Long term constraint" means a constraint that is likely to last for at least 30 years.
 - (b) Use or development avoids any significant loss of productive capacity of highly productive land in the district and avoids fragmentation of large and geographically cohesive areas of HPL.

The AgFirst report establishes that this is the case, and it is submitted you can and should rely on that assessment which has been comprehensive and robust.

- 8.9 However, even if there are differing views as to whether the proposal satisfies the requirements of Policy 3.10 of the NPS-HPL, that issue should not be viewed in isolation and cannot be determinative of the outcome in the FTAA context. This is on the basis that:

⁶⁹ While parts of the Site were identified in the HPUDS as suitable for future urban development, the HPUDS did not identify the Site as suitable for commencing urban development within the ten-year period required by the definition of land "identified for future urban development" as at September 2022. As a result, the exemption in clause 3.5(7)(b) does not apply and the Site remains highly productive land for the purposes of the NPS-HPL.

⁷⁰ The Environment Court has suggested that this involves being able to support the owner, see *Hopkins v Waikato District Council* [2025] NZEnvC 34 at [78].

- (a) The NPS-HPL is one of the matters to which regard must be had under section 104 RMA. The conclusions reached under the NPS-HPL therefore inform the outcome of the RMA assessment required by clause 17(1)(b) of Schedule 5 FTAA. However, even in a conventional RMA assessment, inconsistency with the NPS-HPL would not necessarily be determinative of the outcome for a resource consent, but would instead be weighed alongside all other relevant considerations.⁷¹
- (b) The FTAA adds a further layer to that analysis:
 - (i) Firstly, the relevance of policy inconsistency when assessing RMA approvals is more limited in the FTAA framework (as discussed above).⁷²
 - (ii) Secondly, the outcome of that RMA assessment is itself only one of the matters which the Panel must take into account⁷³ in its overall assessment under the FTAA, with greatest weight being given to the purpose of the FTAA.
 - (iii) Finally, section 85 makes clear that the Panel cannot conclude that an adverse impact is sufficiently significant to justify decline solely because it is inconsistent with, or contrary to, a planning document that the Panel is required to consider.

8.10 In our submission, the FTAA framework means that the primary focus should be on the significance of the actual adverse impacts (or effects) arising from the proposal, rather than on the extent of its policy inconsistency (whether it be the NPS-HPL or the objectives and policies contained in the HBRP and HDP). In other words, the consequence of the loss of productive land should

⁷¹ *A and J Bartrom Trust v Thames-Coromandel District Council* [2025] NZEnvC 70 at [55]; *Gray v Dunedin City Council* [2023] NZEnvC 45 at [202].

⁷² Unlike the RMA, the FTAA does not include a policy gateway equivalent to section 104D, and clause 17(3) expressly provides that a provision which would otherwise require an application to be declined must not be treated as having that effect. Rather, any inconsistency with the NPS-HPL is simply one relevant consideration to be weighed in the Panel's overall assessment.

⁷³ Clause 17(1), Schedule 5 FTAA.

be assessed having regard to the actual productive value of the Site, rather than solely its classification as highly productive land.

Overall Comment – Productive Soils

- 8.11 Having regard to both the constraints identified in the Productive Capacity Assessment and the economic evidence, the loss of highly productive land associated with the Project is not significant in the context of the Site and is certainly not of a scale that could be regarded as being out of proportion to the Project's benefits. In light of those conclusions, any perceived inconsistency with the NPS-HPL should not be determinative.
- 8.12 For completeness, we note that the issue of urbanisation of highly productive land has been addressed by two Expert Panels so far (*Sunfield* and *Ashbourne*). Each Panel has taken a slightly different approach, and both decisions are currently subject to appeal. That said:
- (a) The *Ashbourne* Expert Panel appeared to adopt an approach that places significant emphasis on consistency with the relevant provisions of the NPS-HPL. To the extent that approach could be interpreted as requiring policy compliance before a proposal can proceed, we respectfully submit that caution should be exercised in applying it in the FTAA context. For the reasons set out above, in our submission, policy inconsistency does not displace the requirement to assess the actual effects of a proposal and weigh those effects against its benefits under the FTAA. Furthermore, *Ashbourne* arose in a different factual context, including a project comprising multiple components, not all of which involved highly productive land.
 - (b) In contrast, the *Sunfield* Expert Panel assessed both the loss of highly productive land and the proposal's consistency with the NPS-HPL. While it concluded that the proposal would result in the loss of highly productive land and was contrary to the NPS-HPL, it nonetheless found that those effects were not sufficiently significant to be out of proportion to the project's regional and national benefits. In doing so, the Panel focused on the actual effects arising from the loss of the land and assessed those effects within the overall FTAA framework.

- 8.13 We submit that the approach adopted in *Sunfield* is the more persuasive. It recognises that the loss of highly productive land and consistency with the NPS-HPL are relevant considerations, but treats them as inputs into the broader FTAA assessment rather than as determinative considerations in their own right.

9. ISSUE 3 - REVERSE SENSITIVITY

- 9.1 It is also understood that the Council considers the potential for reverse sensitivity effects to be an adverse impact. CDL disagrees, and considers that the potential reverse sensitivity effects will be less than minor. In particular:
- (a) The assessment should be informed by the actual context and likely land use outcomes, rather than being driven solely by the current zoning framework; and
 - (b) Any residual potential for reverse sensitivity is appropriately addressed through the proposed mitigation measures, including landscaped setbacks and no-complaints covenants.
- 9.2 It is submitted that an outcomes-focused assessment is consistent with the FTAA framework as discussed above. In that regard, there is limited prospect of the residual land being used for intensive or highly productive primary production in the future, having regard to the size and location of the resulting landholdings. Further, the support expressed by affected landowners for urbanisation through the FDS indicates an expectation that the area will transition to urban use over time, reducing the weight that should be attached to reverse sensitivity concerns.
- 9.3 In that context, the interface design (including larger lots along open rural interfaces coupled with fencing treatment on interface boundaries, along with stormwater management areas) and no-complaints covenants provide an appropriate and effective response to any potential reverse sensitivity effects. Similar planted buffer treatments (and no-complaints covenants) have been accepted elsewhere, including at Arataki, as an appropriate means of managing the urban-rural interface. The efficacy and legality of no-complaints covenants is addressed further under Issue 4 - Conditions.

- 9.4 For completeness, we note that the Environment Court has recognised that an incoming activity can be expected to accept impacts on amenity that arise from the existing activity. For example, in *Blueskin Bay Forest Heights Ltd v Dunedin City Council*⁷⁴ the Court noted with reference to a rural residential subdivision that:

“We accept the possibility that the secondary effect of reverse sensitivity may arise. But we think that there does need to be a measure of robust realism about this. Those who might come to this area to live have to expect some rural noise, and just have to accept that as a fact of life, or not come at all.”

- 9.5 When those matters are taken into account, any reverse sensitivity effects are expected to be less than minor and do not equate to an adverse impact that weighs against approval of the Project.

10. ISSUE 4 - CONDITIONS

- 10.1 The conditions are addressed in the planning report and so are not addressed in detail here, save to note that CDL has worked to develop a set of conditions that respond to matters raised through engagement with the Council. The proposed conditions have also been informed by and generally reflect those accepted by the Expert Panel in the *Arataki* decision.
- 10.2 These submissions focus on two matters, being no-complaints covenants and the use of a condition precedent in reliance on section 84A FTAA in relation to wastewater and water supply. These are discussed below.
- 10.3 Overall, and with reference to the parameters for FTAA conditions discussed above, we consider that the proposed conditions are lawful and appropriate in terms of both the RMA, Heritage Act and the FTAA and the Project should be approved subject to them.

No complaints covenants

- 10.4 No-complaints covenants are proposed to be registered on the titles of lots within 20 meters of the wastewater pump stations and on lots adjoining the residual rural zoned land.

⁷⁴ [2010] NZ EnvC 177 (paragraphs [34] and [35]).

10.5 CDL does not understand the Council to have an issue with this approach. For completeness, however, we note that:

- (a) The High Court has confirmed the legality of no-complaints covenants in the context of RMA.⁷⁵
- (b) While a no-complaints covenant will not necessarily prevent complaints being made about an activity and may require enforcement, that is not a unique circumstance nor one that renders the covenant mechanism ineffective or inappropriate.
- (c) Related to that is that the lodgement of a complaint regarding an activity is not a reverse sensitivity effect. A reverse sensitivity effect only arises if, as a consequence of complaints, the lawful operation of the industrial activity or its ability to remain in operation is compromised. In this case any complaint will be assessed in context, which includes the Plains Production zone provisions, the terms and conditions of any relevant resource consent, the no complaints covenant and the Plains Production zoning of the Site.

Condition Precedent

10.6 Several conditions are proposed in reliance on section 84A FTAA. This section:

- (a) Was introduced by the Amendment Act.
- (b) Was introduced to clarify that infrastructure need not be adequate at the time of approval, and to enable conditions that envisage infrastructure capacity being achieved through later works, upgrades or arrangements.⁷⁶
- (c) Enables Expert Panels to set conditions that require the provision of infrastructural capacity before development occurs without having certainty as to how that will occur in practice.

⁷⁵ *South Pacific Tyres NZ Limited v Powerland (NZ) Limited* [2009] NZRMA 58at [61], [64]-[67].

⁷⁶ See for example, Briefing: Advice on additional amendments for inclusion in the FTAA Amendment Bill (11 September 2025) at Appendix 1, Topic 3; Departmental Report on the Fast-track Approvals Amendment Bill at 194.

10.7 In this case, water and wastewater servicing for the Project is proposed to be supplied via the public network. That said, the final form that takes is not yet resolved:

- (a) In relation to **wastewater**, there are three potential servicing scenarios. All involve connection to the Breadalbane Pump station but two of the scenarios require upgrades to the pump station ahead of connections being provided. A proposed condition⁷⁷ of consent will prevent titles being issued until HDC has confirmed that any necessary upgrades have been completed.
- (b) In relation to **water**, HDC has expressed in principle support for the development being supplied from the municipal network, however, the preferred long-term supply arrangement remains under development as part of this wider planning work. A proposed condition of consent⁷⁸ will prevent titles being issued until HDC has confirmed that an acceptable water supply solution is in place.

10.8 Accordingly:

- (a) While the final servicing arrangements have not yet been confirmed, it is capable of being made so (“*can be made*”); and
- (b) The condition “*ensure[s]*” that the necessary infrastructure will be in place by preventing the issue of section 224(c) certificates unless the relevant servicing requirements have been satisfied.
- (c) On that basis, we consider that the proposed condition precedent requiring confirmation prior to the issue of section 224(c) certificates meet the test of section 84A(1) FTAA.

11. CONCLUDING COMMENTS

11.1 Overall:

⁷⁷ Condition 23

⁷⁸ Condition 24

- (a) The Project will have significant regional benefits and will achieve the purpose of the FTAA.
- (b) The Project's overall adverse impacts will not be significant. The conditions are practical, reasonable and robust. They are proportionate to the effects they address, and will ensure that, post-mitigation, adverse effects will generally be minor and, in many instances, effects will be positive; and
- (c) The substantial regional benefits of the Project significantly outweigh any residual adverse impacts.

11.2 We therefore submit that none of the FTAA's mandatory or discretionary matters for decline of the approvals are engaged and the Project must be approved by the Panel. Furthermore, we submit that the Panel should approve the Application subject to the proposed conditions, for all the reasons stated above.

DATED this 1st day of October 2026



D A Allan / A K Devine

Counsel for CDL Land NZ Ltd