

Before the Fast-track Expert Consenting Panel

FTAA-2503-1038

Under the Fast-track Approvals Act 2024 (**FTAA**)

And

In the Matter of an application for resource consents and an archaeological authority by Fulton Hogan Land Development Limited – Milldale stages 4C and 10 to 13

**Memorandum of Counsel on behalf Fulton Hogan Land Development Limited
Responding to Comments Received**

Dated 5 August 2025

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May it please the Panel:

Introduction

1. This memorandum is presented on behalf of the Applicant, Fulton Hogan Land Development Limited (**FHLD**). It accompanies FHLD's response to comments.
2. Specifically this memorandum addresses one aspect of comments received from Auckland Council and Watercare.
3. To summarise, there is stated to be a lack of certainty about whether Watercare will accept the reverse osmosis waste stream (**RO Waste**) (arising from the temporary treatment plant proposed by FHLD) into its wastewater system. The details of this issue are addressed in responses from Apex Water and in the revised AEE.
4. The Apex Water response engages with technical aspects of the issue. The revised AEE with respect to this issue includes the following at [3.4.2]:

Consistent with typical resource consent practice, other processes under the Trade Waste Bylaw 2013 (for the discharge of the RO waste stream) and the Water Supply and Wastewater Network Bylaw 2015 will address the detailed approval of connections to the public network. As set out in the legal memorandum... these processes require Watercare to form a "reasonable opinion" in deciding whether to approve such applications, which must be based on facts and evidence. The detailed technical analysis completed for this Application demonstrates that Watercare can approve such an application when it is made.

Watercare's ability to decline to accept connections

Relevant Legislation/regulation

5. Watercare is treated as if it is a local authority in relevant legislation. Watercare is in law a legal person with full capacity to carry on or undertake any business or activity.

6. As you might expect Watercare has obligations under the Local Government Act 2002 and the Health Act 1956 to manage, regulate and protect effective and efficient wastewater infrastructure and ensure the quantity and quality of waste disposed through that infrastructure is appropriate.
7. It is unsurprising that an oversubscribed or compromised wastewater system would result in adverse effects. Consequently Watercare must balance provision of new infrastructure against regulation of new connections to infrastructure within the confines of its existing capacity.
8. Auckland Council has a Water Supply and Wastewater Network Bylaw 2015 (**Bylaw**) which is of relevance.
9. The purposes of the Bylaw are to:¹
 - a. protect the public water supply and wastewater networks from damage, misuse and interference;
 - b. assist in the provision of reliable, safe and efficient water supply and wastewater services in Auckland;
 - c. protect the environment and the health of people using the water supply or wastewater network.
10. Clause 6 of the Bylaw is concerned with connection to the water supply and wastewater networks: [my emphasis]

6 Connection, disconnection and other works

(1) No person may, without Watercare's approval:

- (a) connect to the water supply network or the wastewater network;
- (b) disconnect from the water supply network or the wastewater network;
- (c) carry out any other works on, or in relation to, the water supply network or the wastewater network;

¹ Auckland Council Water Supply and Wastewater Network Bylaw 2015 (25 June 2015), cl 4(1).

(d) open any manhole, chamber, access point, or valve on, or otherwise tamper with, the water supply network or the wastewater network.

(2) Any person wishing to connect to or disconnect from the water supply network or wastewater network, or to otherwise carry out works on such a network, must make a written application for approval to Watercare, and must provide with that application all information relating to the application as is specified by Watercare.

(3) Watercare may grant approval to such connection, disconnection or other works, as the case may be, and may impose conditions which must be complied with in the exercise of the approval.

(4) Without limiting subclause (3), a condition imposed under that subclause may require that the connection, disconnection or works comply with any relevant code of practice.

(5) Watercare **may refuse an application for approval to connect** to a network where:

(a) the applicant has not paid fees or charges associated with the connection (including infrastructure growth charges) that have been required by Watercare, or has refused to provide such information relating to the application as has been specified by Watercare; or

(b) Watercare has a documented record of the applicant's non-compliance with this bylaw or any previous water supply or wastewater bylaws, codes of practice, or approvals granted under such bylaws or codes of practice; or

(c) in Watercare's **reasonable opinion**, there is **insufficient capacity** in the network to accommodate the connection; or

(d) in Watercare's **reasonable opinion**, the connection could compromise its ability to **maintain levels of service** in relation to the water supply or wastewater network; or

(e) the connection is outside the area currently served by the water supply or wastewater network, regardless of its proximity to any specific component of the water supply or wastewater network; or

(f) in Watercare's **reasonable opinion**, refusal is necessary to **protect** the water supply network or **wastewater network**, the health and safety of any person, or the environment.

(6) Without limiting subclause (5), Watercare may refuse approval to connect to a network work where:

(a) in the case of the water supply network, connection may detrimentally affect its ability to supply water at the volume and/or pressure required for firefighting;

(b) in the case of the wastewater network, connection would or may give rise to wastewater overflows.

11. Subsequent clauses in the Bylaw include in Part 4 clauses 14 and 15 specifically relating to the wastewater network. These clauses address prohibited inflow, infiltration and discharge, and unauthorised discharge to wastewater network.
12. Clause 14 (3) provides no person may discharge or introduce prohibited waste into the wastewater network. Prohibited waste is defined with characteristics set out in Schedule 1. I understand that the RO Waste at issue in this case would not come within the definition of prohibited waste.
13. Various clauses of the Bylaw refer to codes of practice. Clause 5 of the Bylaw defines "code of practice" to mean "an approved code of practice that sets standards in relation to water supply or wastewater infrastructure that is to vest in Watercare or connect with the water supply or wastewater network". Broadly speaking I understand that the codes of practice largely relate to technical design matters for new assets proposed to form part of or connect to Watercare's water supply and wastewater systems.
14. The Bylaw does not incorporate any provisions addressing rights of objection or appeal against decisions taken by Watercare regarding connections.
15. I acknowledge there is no ability to insist that Watercare accept a connection. In relatively recent case law with respect to a dispute about Watercare's

refusal to accept the vesting of infrastructure², the Court of Appeal determined that no one could insist that Watercare accept infrastructure as its own, because there is no right to vest assets in Watercare. The Court made obiter comment in that case that there is no right to connect a watermain to the public water system – Watercare must agree for that to occur. That reflects the position identified in the Bylaw. These observations are analogous to a finding that there is no right to a wastewater connection.

Discretion not unfettered

16. I note however that Watercare’s discretion is not unfettered.
17. Watercare’s right to decline to accept an application to connect to the network is subject to a requirement to act reasonably in doing so. That reflects not only broader principles governing the exercise of a public authority’s decision making powers, but also the express wording of the Bylaw. The Bylaw requires any opinion held by Watercare to justify refusing a connection based on insufficient capacity, or compromise to levels of service, or a need to protect the wastewater system or the environment, to be “reasonable”.
18. It is not necessary for me in the context of this memorandum to set out extensive case law or legal analysis by reference to what standard “reasonable” decision-making must meet. That is particularly so because it is not a matter which this Panel has jurisdiction to determine. In my view it is sufficient to record that in essence any decision by Watercare must not be irrational or predetermined and should be founded upon probative evidence.
19. FHLD’s position is that it is normal practice for an application to connect to Watercare’s network to follow grant of consent, and further that there is technical analysis completed for this Application which demonstrates that Watercare can approve such an application when it is made.
20. I also note for completeness that:

² *Thirty Eight Moffat Ltd v Auckland Council and Watercare Services Ltd* [2023] NZCA 107.

- a. The Local Government (Auckland Council) Act 2009 (“LGA-AC”) under which Watercare is established, requires that Watercare “must act consistently” with the relevant aspects of Council plans and strategies to the extent specified in writing by the governing body of the Council (LGA-AC s58(2)). In this case the land in question is live zoned for residential development under the Auckland Unitary Plan (Operative in Part).
- b. The general decision making requirements under Subpart 1 of Part 6 of the Local Government Act 2002 apply.

Conclusion

21. Watercare has a separate process (to resource consenting) regarding applications to connect to its infrastructure. That decision is not one within the jurisdiction of the Panel in this matter. Watercare’s ultimate decision-making in this regard must be reasonable.
22. Watercare has indicated it is not currently in a position to approve a connection for disposal of RO Waste, and various queries have been identified about the nature and technical detail of that proposed discharge. The expert response from FHLD includes comprehensive technical analysis which answers Watercare’s queries and establishes why a connection can be accommodated. The draft conditions of consent advanced by FHLD engage with parameters and technical aspects of proposed wastewater treatment and disposal of RO Waste.
23. It is also worth emphasising that the wastewater treatment system being consented is temporary. It will operate for a relatively short timeframe (it is anticipated to only be required until 2031 which is when Watercare have advised the Army Bay Wastewater Treatment Plant is to be upgraded by), it will take several years before it operates at full capacity, and that full capacity operation will have a shorter timeframe again.³ That does not mean that the

³ It is possible that the plant will only work at full capacity for approximately 12 months prior to the Army Bay upgrade being completed.

RO Waste should not comply with appropriate parameters (and it will comply), but it is a relevant factor in determining what is reasonable.

24. On that basis, in my submission the dialogue between and FHLD regarding disposal of RO Waste has no adverse implications for the Panel's determination of the application.



Jeremy Brabant
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5 August 2025