BEFORE THE FAST-TRACK EXPERT PANEL

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

AND

IN THE MATTER of an application by AW Holdings under section 42 seeking approval for the Auckland Surf Park Community Stage 2 project **(FTAA-2606-1246)**

FIRST MEMORANDUM OF COUNSEL FOR THE AUCKLAND COUNCIL IN RESPONSE TO MINUTE 2

Dated: 9 October 2026

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 We act for Auckland Council (**Council**) in relation to the substantive application for the Auckland Surf Park Community Stage 2 project (FTAA-2606-1246) (**Application** or **Project**) by AW Holdings (**Applicant**) under the Fast-track Approvals Act 2024 (**FTAA**).

1.2 This memorandum addresses the legal questions at paragraphs 15(a) to (d) of the Panel's Minute 2 dated 18 September 2026 (**Minute 2**). It should be read in conjunction with the rest of the Council's comments on the Application (which include planning comments in response to paragraph 15(e) of Minute 2).

2. SUMMARY

2.1 In summary, the Council's responses to the questions at paragraph 15(a) to (d) of Minute 2 are:

(a) **Question 15(a) – net benefits:** The FTAA is silent on whether regional or national benefits are to be assessed on a gross or net basis. However, the approach adopted in *Taranaki VTM* and subsequently in *Ryans Road* is that comparable established disbenefits are discounted from established benefits, with other adverse impacts considered separately under section 85(3). The Council submits that the same approach should be adopted here and supports the Panel's request that the Applicant provide a net economic benefit figure against a clearly defined counterfactual.

(b) **Question 15(b) – benefits of consented stages:** Section 81(5) is not engaged because the Project was referred as a whole under section 21(1)(c), rather than as a staged project under section 21(1)(a). In any event, section 81(5) is forward-looking and does not provide a basis for attributing the benefits of the already consented Stage 1 to this Application.

(c) **Question 15(c) – meaning of 'regional':** Panel decisions under the FTAA indicate that the meaning of "regional" will depend on the context of the application to hand and need not correspond to a region

defined under the Local Government Act 2002 (**LGA**). In the context of this Project, the relevant frame of reference is the Auckland region as a whole. Little turns on its precise delineation here, and the Panel may reasonably treat it as coinciding in practical terms with the Auckland local government region. The question is whether the Project's benefits are significant at that scale.

(d) **Question 15(d) – *Matvin / East West Link / Glenpanel*:** While *East West Link* and *Glenpanel* both refer to a more 'nuanced' approach to policy interpretation, they do not undermine the core findings in *Matvin* regarding the interpretation of the Auckland Unitary Plan's (**AUP**) Future Urban Zone (**FUZ**) provisions. Under the FTAA, inconsistency with planning provisions may remain relevant, including as an adverse impact, but section 85(4) prevents inconsistency or contrariety from being the sole basis for satisfying the section 85(3)(b) threshold.

3. QUESTION 15(a): WHETHER REGIONAL OR NATIONAL BENEFITS ARE A NET AMOUNT

3.1 Paragraph 15(a) of Minute 2 asks:

> Do the parties consider that the regional or national benefits referred to in sections 81 and 85 is a net amount, noting section 22(6) of the FTAA?

3.2 Section 81(4) of the FTAA requires the Panel to consider the extent of the Project's regional or national benefits when taking the purpose of the FTAA into account under clause 17(1)(a) of Schedule 5. The Project's regional or national benefits are also relevant to any decision to decline an approval under section 85(3).

3.3 Before turning to whether regional or national benefits are to be assessed on a gross or net basis, we make a preliminary observation. The Applicant's AEE states that, because the proposal is a referred project, "the project has already been identified as having significant regional or national benefits".[1] However, the Project's referral does not preclude the Panel's independent

[1] Assessment of Environmental Effects, Auckland Surf Park Community – Stage 2 (**AEE**), section 11 headed "Consistency with the Purpose of the FTAA" at page 103.

assessment of whether the contended benefits are "significant", or otherwise, in light of the evidence before it:

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

(b) Several FTAA decisions record that Panels need to reach their own conclusion on whether a project has significant benefits, and their extent.[2]

(c) The referral decision is made on the information in the referral application, at an early stage and without the benefit of comments or the evidence now before the Panel.

(d) Sections 81 and 85 of the FTAA plainly contemplate an assessment of the scope and degree of a project's regional or national benefits, encompassing the extent of their significance. A contrary approach could lead to situations where a Panel identifies on much more fulsome evidence and assessment that a project will not give rise to regionally significant benefits, but is not able to act on that and is forced to approve a project that does not meet the statutory purpose.

(e) It therefore remains essential that a Panel interrogate and test the alleged benefits of a project, consistent with its duties under sections 81(4) and 85(3) of the FTAA. In practice, the Panel's testing should be evidence-based.

3.4 Turning to the question posed, the FTAA does not expressly state whether regional or national economic benefits are to be assessed on a gross or net basis.

3.5 The issue was considered directly in the *Taranaki VTM* draft decision at [85]-[93].[3] The Panel specifically sought submissions on whether a gross benefit approach was required under the FTAA, whether disbenefits or other costs were relevant, and whether a net benefit or cost benefit approach was

[2] E.g. *Maitahi Village*, final decision 18 September 2025, at [85]-[86] (chaired by Hon Lyn Stevens CNZM KC).
[3] *Taranaki VTM* draft decision 4 February 2026 (chaired by Hon Kit Toogood KC),

required. Most commenters supported a net approach, while cautioning against double-counting the same matters again as adverse impacts under section 85(3). The Panel understood the applicant to broadly agree that benefits should be assessed net of relevant disbenefits, provided those disbenefits were not then counted again at the section 85(3) stage. The Panel ultimately adopted an approach under which it first identified established benefits and comparable disbenefits, then discounted the comparable disbenefits from any established benefits, before considering separately under section 85(3) any adverse impacts not already accounted for:

> 93. Taking all those matters into account, the Panel's approach to benefits has involved three steps. It has:
>
> a. first assessed the extent to which any regional or national benefits are established, and the extent to which there may be comparable disbenefits by assessing the veracity of the information provided about each;
>
> b. second, discounted any comparable established disbenefits from any established benefits; and
>
> c. third, for the purpose of s 85(3) FTAA, considered whether any adverse impacts (that have not already been accounted for as disbenefits) are sufficiently significant to be out of proportion to the extent of the project's regional or national benefits.

3.6 Although *Taranaki VTM* was a draft decision, that approach was subsequently expressly adopted by the *Ryans Road* Panel at [97]-[98].

3.7 The Council submits that the same approach should be adopted here. In particular, where economic benefits are relied upon, those benefits should be assessed after allowing for comparable economic disbenefits or costs. Otherwise, gross measures of economic activity may overstate the economic benefit properly attributable to the Project. Put differently, projects that may deliver significant gross economic outputs but impose economic costs that outweigh those outputs could nonetheless be elevated under the FTAA's purpose. Parliament cannot have intended that result, absent express language such as a specific reference to "gross economic benefits".

3.8 The FTAA does not prescribe a particular methodology for assessing net economic benefit. In this case, we understand that the Council's economists consider that a cost-benefit analysis provides an appropriate framework for assessing the Project's economic benefits and costs against a counterfactual.

3.9 The Council therefore supports the Panel's request at paragraph 16(a) of Minute 2 that the Applicant provide a net economic benefit figure, accompanied by a clearly defined counterfactual.

3.10 Finally, Minute 2 also refers to s 22 of the FTAA. Section 22 sets out the criteria for assessing a referral application. Section 22(6) provides:

> (6) For the purposes of subsection (1)(a), the Minister may compare the activity involved in the project against the current and other likely uses of the space, taking into account—
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> (a) the economic benefits and strategic importance of the proposed project; and
>
> (b) the likely impact of the proposed project on current and proposed marine management regimes; and
>
> (c) the environmental impacts of the competing activities.

3.11 Section 22(6) applies only where:

> … the Minister considers there is likely to be competition for space in areas of New Zealand's continental shelf or exclusive economic zone between activity involved in the project proposed to be undertaken under an approval described in section 42(4)(k) (marine consent) and—
>
> (a) any activities to which the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 or any other specified Act applies; or
>
> (b) commercial fisheries activities.

3.12 Given that narrow focus, we do not consider subsection (6) to be of direct assistance.

4. QUESTION 15(b): BENEFITS OF STAGES THAT HAVE ALREADY RECEIVED CONSENT

4.1 Paragraph 15(b) of Minute 2 asks:

> Section 81(5) states that the Panel may consider the regional or national benefits of the whole Project, having regard to the likelihood that any later stages of the Project will be completed? Does this section allow the Panel to consider the regional or national benefits of those stages of the Project that have already received consent?

4.2 The full text of section 81(5) of the FTAA states:

> For the purposes of subsection (4), if the substantive application was made under section 42(1)(aa) or (b), the panel—
>
> (a) must treat the stage of the project to which the application relates as constituting the project; but

> (b) may consider the regional or national benefits of the whole project, having regard to the likelihood that any later stages of the project will be completed.

4.3 Section 81(5) only applies if the substantive application was made under section 42(1)(aa) or (b), which state:

> 42 Authorised person may lodge substantive application for approvals
>
> (1) The authorised person for a listed project or a referred project may lodge with the EPA—
>
> (a) 1 substantive application for the project; or
>
> (aa) 1 substantive application for a stage of a listed project that the Minister has determined, under section 37A(6)(a), may be lodged as a separate substantive application; or
>
> (b) in the case of a referred project whose referral application was accepted under section 21(1)(a), 1 substantive application for each stage of the project.

4.4 The Application is for referred project and would need to have been accepted for referral under section 21(1)(a) for the section 81(5) approach to benefits assessment to be available. However, the referral decision records that:[4]

> The Minister has decided to accept the referral application for the **whole project** as he is satisfied it meets the criteria in section 22 (**s 21(1)(c)**) and to refer the project to the fast-track approvals process under section 26(2)(a).
>
> [**emphasis** added]

4.5 Therefore, the approach to assessment of benefits in section 81(5) is unavailable on the text of the section because the referral was for a whole project under section 21(1)(c) rather than a staged project under section 21(1)(a).

4.6 In any event, even if section 81(5) were engaged, the benefits of Stage 1 should not be included in the assessment of the benefits of this Application because:

(a) Section 81(5) is forward-looking. It is concerned with the likelihood that "later stages" of a project will be completed. It enables a panel

[4] https://www.fasttrack.govt.nz/__data/assets/pdf_file/0027/6858/27-BRF-6249-Auckland-Community-Surf-Park-Stage-2-project-Stage-2-Notice-of-Decisions_Redacted.pdf

For clarity the "whole project" that was referred was the "Auckland Surf Park Community – Stage 2" "to construct and operate an artificial intelligence data centre, integrated residential development comprising approximately 500 residential units including visitor accommodation, a village centre, work-live precinct, subdivision and associated activities over 54 hectares of land at approximately 1350 Dairy Flat Highway, Dairy Flat" along with variations sought to the Stage 1 resource consent.

considering an application for an earlier stage to take into account the benefits of later stages that are not yet before it, having regard to how likely they are to be completed. It says nothing about stages that have already been consented.

(b) Stage 1 is a consented activity that is being implemented; enabling earthworks are underway.[5] On this basis its benefits are likely to be realised irrespective of the outcome of this Application. The AEE itself treats Stage 1 as part of the existing environment for the purposes of assessing effects: "the Stage 1 proposal is considered to form a part of the existing environment".[6] It would be difficult to reconcile treating Stage 1 as part of the existing environment for the assessment of adverse effects, while also attributing its benefits to the Application.

4.7 Finally, it may be helpful to comment in passing on the statement in AEE that:[7]

> The economic impacts of the application have been comprehensively assessed in the economic assessment prepared by Property Economics. We rely on this assessment to evaluate the economic benefits of the proposal. As detailed within the Referral Application, the ASPC, since its inception was always intended to be a comprehensive master-planned development. The investment required to deliver on the original consent is contingent on a belief that there is a pathway to fully realising the aspiration articulated under this current application. To this effect, the full realisation of the Stage 1 benefits is dependent on Stage 2. For this reason, while the economic assessment focusses on the benefits that are derived from the Stage 2 proposal, benefits derived from Stage 1 have also been considered.
>
> [emphasis added]

4.8 The economic assessment states the position as:[8]

> The wider Surf Park Project includes both Stage 1 and 2 of the overall application for the Site. The components of the two stages function as one integrated project that, as we understand, have material crossover and symbiotic benefits for co-location. As such it is considered appropriate to represent the economic benefits as a whole

4.9 This approach is further confirmed in the peer review:[9]

[5] AEE, section 6.3.1 headed "Stage 1 Fast-Track Approval (BUN60429155)".

[6] AEE, section 10.14 headed "Character, Built Form and Appearance".

[7] AEE, Section 11.0 headed "Consistency with the Purpose of the FTAA"

[8] Appendix 57, Economic Impact Assessment, Property Economics, Section 1.

[9] Appendix 58, Peer review of assessment for Stage 2 of the Surf Park Fast-Track substantive application, Insight Economics, page 3.

> A central feature of the EIA is the integrated treatment of Stage 1 and Stage 2, which the wider project team has confirmed as appropriate in this instance. The project is clearly presented as a mixed-use masterplan with interdependent elements, and the EIA's treatment of economic effects reflects that logic.

4.10 However, there does not appear to be any evidence to support the underlying assumption that "*The investment required to deliver on the original consent is contingent on a belief that there is a pathway to fully realising the aspiration articulated under this current application".* This assumption should therefore be treated with caution. Nothing in the Stage 1 Panel decision indicates that the benefits of that stage were contingent on this application.[10]

5. QUESTION 15(c): THE MEANING OF 'REGIONAL'

5.1 Paragraph 15(c) of Minute 2 asks:

> What definition of 'regional' should the Panel employ in terms of sections 81 and 85 of the FTAA?

5.2 The FTAA does not define "regional" or "region". In the absence of a definition, the meaning of the word is to be ascertained from its text and in light of its purpose and context.[11] The question arising is whether the reference area for assessing benefits is a region as defined in the LGA[12] or something else.

5.3 As explained below, the expert panels that have previously addressed the point have interpreted "regional" in a general sense, rather than by reference to the LGA.

Waihi North

5.4 In *Waihi North Project*, the Panel declined to equate "regional" with the area of a regional council under the LGA. It construed "regional" in a more general sense to mean the area in and around Waihi, which it treated as the Hauraki District.[13] Limited reasoning was provided by the panel to support its findings, which were not determinative because it found that 442 additional

[10] Record of Decision of Expert Consenting Panel under clause 37 Schedule 6 of the COVID-19 (Fast-track consenting) Act 2020 dated 25 June 2024 (https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Auckland-Surf-Park-/Decision/Auckland-Surf-Park-Decision-and-Conditions.pdf)

[11] Legislation Act 2019, s 10(1).

[12] Local Government Act 2002 at section 5 and schedule 2.

[13] *Waihi North*, final decision 18 December 2025, at [845].

jobs for the Hauraki District is a significant regional benefit irrespective of the meaning to be attributed to “regional”.

Taranaki VTM

5.5 The Panel in the *Taranaki VTM* draft decision cited *Waihi North* and stated:[14]

> In its consideration of the purpose of the Act as described in s 3, the Panel notes that the FTAA does not define ‘regional’ in relation to the assessment of benefits and that nothing in the Act suggests that the region is limited to the area of a regional council constituted under the Local Government Act 2002. We are content to adopt the more general approach taken in the NZIER report, meaning that we assess the regional benefits of the project as applying to the combined Taranaki Region and Whanganui District.

Ayrburn Screen Hub

5.6 In *Ayrburn Screen Hub*, the Panel adopted and extended the approach from *Taranaki VTM*:

(a) It accepted that any assessment of regional benefits is region-specific. A benefit worthy of attention in the Auckland Region may not be so in the Otago Region, and vice versa.[15]

(b) It agreed with the *Taranaki VTM* panel that regional benefits should not be confined to benefits within the regional council boundary. It treated this as relevant because the applicant's evidence described benefits accruing to the "Otago/Southland region".[16]

(c) It held that economic activity drawn to the project from studios in Auckland or Wellington would be a regional benefit to Otago but would be neutral at the national level.[17]

Analysis

5.7 On the present state of non-binding Panel authority, the following propositions can be advanced with reasonable confidence:

(a) "Regional" in ss 3, 81(4) and 85(3) does not mean an LGA region.

(b) The reference area is chosen by reference to where the project's benefits actually fall. It may be a district or a group of districts (*Waihi*

[14] *Taranaki VTM*, draft decision 6 October 2025 at [288].
[15] *Ayrburn Screen Hub,* final decision 14 April 2026, at [162].
[16] At [163].
[17] At [161], [235].

North), or may cross regional council boundaries (*Ayrburn*; *Taranaki VTM*).

5.8 In the context of this Application and the economic analysis advanced by the Applicant, the relevant regional frame of reference is the Auckland region as a whole. Little appears to turn on the precise delineation of that region in this case: the Panel may reasonably treat that, in this instance, as coinciding in practical terms with the Auckland local government region, without suggesting that "regional" in sections 81 and 85 must in every case be defined by reference to LGA boundaries. The Applicant's economic assessment also adopts the Auckland region as its frame of reference.[18] The question is whether the Project's benefits are significant at that scale.

6. QUESTION 15(d): MATVIN, EAST WEST LINK AND GLENPANEL

6.1 Paragraph 15(d) of Minute 2 asks:[19]

> Can the parties comment on the way the approach in *Auckland Council v Matvin Group Limited* [2023] NZHC 4281 to the interpretation of the FUZ provisions, and planning provisions more generally, might have been altered by later decisions of the Supreme Court in *Royal Forest and Bird Protection Society of NZ Inc v Waka Kotahi NZTA* [2023] NZSC 26 and the Court of Appeal in *Glenpanel Development Ltd v Expert Consenting Panel* [2025] NZCA 154?

East West Link

6.2 *East West Link*[20] arose under the RMA in relation to notices of requirement and resource consent applications. The Supreme Court found (inter alia) that the "avoid" directive in policy 11 of the NZCPS with respect to the indigenous biological diversity leaves room for deserving exceptions, even if, in almost all cases, its effect is clearly to "not allow" or "prevent the occurrence of". The Court found that these exceptions are necessary for the broad language of the policy to work as intended in the innumerable places and circumstances to which it must be applied, and without producing outcomes plainly at odds with Part 2. The residual discretion is simply a

[18] Economic Impact Assessment, Property Economics, e.g. on pages 6, 7, 10, 12, 17, 18, 19, 20, 21, 22, 27, 29, 30.
[19] It is respectfully noted that there are typographical errors in the case citations in this question, the correct citations are *Auckland Council v Matvin Group Limited* [2023] NZHC 2481 and *East West Link* as [2024] NZSC 26
[20] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241.

mechanism to ensure that the policies are applied in accordance with the purpose of the RMA.[21]

Glenpanel

6.3 These findings were applied by the Court of Appeal in *Glenpanel*[22] in the context of a resource consent application for urban development under the COVID-19 Recovery (Fast-track Consenting) Act 2020 which had been declined by a panel. The proposal involved the creation of approximately 179 residential units and a primary school, or up to 384 residential units without a primary school.[23] The proposal was for a non-complying activity on rural zoned land outside a prescribed urban growth boundary under the Queenstown Lakes Proposed District Plan (**PDP**), and partly within an Outstanding Natural Feature. However, the appellant argued that a series of formal and informal planning documents identified this area as a site for urbanisation in the future, and the PDP had been amended in response to the National Policy Statement on Urban Development 2020 to contemplate additional housing in the area over the short to medium term, with a map of "Indicative Future Expansion Area(s)", which included land to which the proposal related.[24]

6.4 A key issue in *Glenpanel* was the application of RMA section 104D's "non-complying activity" gateway test in the fast-track context.[25] The panel found that adverse effects would be more than minor and that the project was contrary to a set of objectives and policies in the PDP, including the avoidance of urbanisation of rural land outside urban growth boundaries and the protection of landscape values of outstanding natural features.

6.5 On appeal, applying the Supreme Court's subsequent *East West Link* decision, the Court of Appeal found this to be in error, as a "more nuanced approach" to assessment was required given the substantive nature of the wider planning instruments.[26] The Court of Appeal noted that the fast-track regime was intended to "bring forward" projects that would otherwise likely

[21] *East West Link* at [105].
[22] *Glenpanel Development Ltd v Expert Consenting Panel* [2025] NZCA 154.
[23] *Glenpanel* at [5].
[24] Ibid at [6].
[25] Ibid at [14]–[16].
[26] Ibid at [38].

be granted under the RMA in the future, including "planned projects",[27] and found that the panel in *Glenpanel* erred by concluding that "the plain wording of the provisions of the Proposed District Plan prevented the application from being granted because urbanisation of this area was planned for a later time".[28]

6.6 The Court of Appeal in *Glenpanel* recorded important qualifications to this approach:

(a) Bringing forward consideration of projects in this way does not mean applications should be granted;[29]

(b) The more nuanced approach to appraisal of objectives and policies flowing from *East West Link* does not dictate an outcome;[30] and

(c) Under the more nuanced approach, uncertainties connected with where and how the urban development would take place, including uncertainties about exactly how such urbanisation would occur, would properly be taken into account by the panel.[31]

6.7 While these statements from *Glenpanel* arose under a different statutory scheme, they do underscore that a fast-track panel process is not a 'rubber-stamp'; it must still assess impacts and can refuse consent if warranted.

6.8 The FTAA has its own distinct evaluative framework, which:

(a) Does not carry over section 104D of the RMA;[32]

(b) Imposes the proportionality test in section 85(3); and

(c) Contains an express instruction in section 85(4) that inconsistency or contrariness with the planning instruments is not, by itself, a sufficient reason to decline.

[27] Ibid at [43].
[28] Ibid at [44].
[29] Ibid at [45].
[30] Ibid.
[31] Ibid at [46].
[32] FTAA, Schedule 5, clause 17(1)(b).

Matvin

6.9 The decision of the High Court in *Auckland Council v Matvin*[33] must now be read subject to *East West Link*. The case arose under the FTCA and concerned the proposed development of a retirement village, i.e. urban development, in the FUZ ahead of a plan change. Woolford J held:[34]

> [29] The Panel criticises the "strict literal" interpretation of the FUZ provisions taken by the Council. However, words are generally to be given their natural or ordinary meanings. The Panel also says that they do not read the Zone description as being absolute. However, I view the Zone description as a synthesis of the objectives and policies. It is quite clear in its meaning. It succinctly states in three sentences:
>
> > *The Future Urban Zone is applied to greenfield land that has been identified as suitable for urbanisation. The Future Urban Zone is a transitional zone. Land may be used for a range of general rural activities but cannot be used for urban activities until the site is re-zoned for urban purposes.*
>
> The Zone description uses the words, "cannot be used", not "can perhaps be used" or "may be used."
>
> ….
>
> [35] Again, quite strong words are used – "require", "avoid" and "prevent".
>
> [36] In interpreting the FUZ provisions, it is not a question of weighing up the various objectives and policies for and against urban development. There are no provisions specifically allowing urban development.
>
> …
>
> [38] I am therefore persuaded that the Panel made an error of law in finding that the overall purpose of the FUZ was to preclude activities that may compromise future urban development. The overall purpose of the FUZ is as a holding zone and to provide a transition from rural to urban use and development. The zone recognises the need for comprehensive and intentional design for soon-to-be urban areas. Until rezoned urban, the primary set of activities that are to occur in the FUZ are rural.

6.10 While *East West Link* and *Glenpanel* both refer to a more 'nuanced' approach to policy interpretation, they do not undermine the core findings in *Matvin* regarding the interpretation of the AUP's FUZ provisions. We make several observations in this regard:

(a) His Honour Woolford J's analysis of the directive language in the FUZ provisions – emphasising that words like "avoid", "prevent" and

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

[34] At [29]–[38].

"cannot be used" should be given their natural meaning – remains good law.

(b) The key development from *East West Link* is the recognition that genuine, on-the-merits exceptions may be permitted where they would not subvert the general policy and where sustainable management clearly demands it.

(c) However, the Supreme Court was clear that this exception is fact-specific, requiring circumstances where granting consent would advance rather than undermine the policy framework and where sustainable management clearly demands it. We also draw to the Panel's attention the Supreme Court's comment that "the more precise and sharp-edged the policy, the less room there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified".[35]

(d) Under the FTAA regime, while section 85(4) prevents reliance solely on planning inconsistency as grounds for decline, the underlying policy framework and the real-world issues it addresses remain highly relevant to the overall proportionality assessment.

6.11 Nor do *East West Link* or *Glenpanel* render the FUZ status of the land irrelevant. The Court of Appeal in *Glenpanel* did not say that the provisions of the objectives and policies in the PDP relating to urbanisation of rural land outside urban growth boundaries are irrelevant. Clause 17 of Schedule 5 to the FTAA incorporates section 104(1)(b) of the RMA, such that relevant provisions of the AUP must be had regard to as part of the wider FTAA assessment.

6.12 It is important to distinguish between treating inconsistency with or contrariety with a planning document as sufficient, of itself, to satisfy the threshold in section 85(3)(b) (which section 85(4) precludes) and treating that inconsistency as a relevant adverse impact alongside other adverse impacts. Section 85(4) does not require inconsistency with planning provisions to be disregarded. Nor does it prevent the Panel from considering the underlying adverse effects or other issues to which those provisions are directed. It simply provides that inconsistency or contrariety cannot, by itself, establish

[35] *East West Link* at [109].

that the adverse impacts are sufficiently significant to be out of proportion to the Project's regional or national benefits.

6.13 Against that background, the FUZ status of the land, the Structure Plan, and the timing for urbanisation in the Future Development Strategy reflect adopted planning judgements about the form and sequencing that urbanisation should take, including that significant supporting infrastructure is needed before intensive development occurs. While the Panel is empowered to accelerate development ahead of that schedule/sequencing, the consequences of doing so must still be grappled with. This approach is entirely consistent with the findings in *Glenpanel*.

Summary

6.14 In summary, in answer to the Panel's question:

(a) *East West Link* and *Glenpanel* have qualified the approach in one respect: they confirm that directive policies, including "avoid" policies, leave room for genuine, on-the-merits exceptions that would not subvert the general policy and where sustainable management clearly demands it; and that the assessment of a proposal against planning provisions should be approached in a nuanced way having regard to the substance of the wider planning instruments.

(b) They have not altered *Matvin*'s findings as to the meaning of the FUZ provisions, including that the FUZ is a holding zone in which land "cannot be used for urban activities until the site is re-zoned for urban purposes", and that the overall purpose of the FUZ is not merely to preclude activities that may compromise future urban development.

DATED the 9th day of October 2026



M Allan / R Ashton
Counsel for the Auckland Council