BEFORE AN EXPERT CONSENTING PANEL

Under	the Covid-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**)
In the Matter	of an application to an expert consenting panel for resource consent by **KARAKA NORTH VILLAGE LIMITED** for the Karaka Village Project, 348 Linwood Road and 69A Dyke Road, Karaka

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Memorandum of Counsel on behalf of Karaka North Village Limited

Dated 6 July 2022

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May it Please the Panel

Introduction

1. This memorandum is presented on behalf of Karaka North Village Limited (**Applicant**). The application seeks various consents for activities at 348 Linwood Road and 69A Dyke Road, Karaka, Auckland (**Site**).

2. Since lodgement of this matter, the Fast-Track Expert Consenting Panel (**Panel**) appointed to consider this resource consent application under the Covid-19 Recovery (Fast- Track Consenting) Act 2020 (**FTCA**) have issued (inter alia) the following:

    a. Request for Information No 1[1] (**RFI #1**).

    b. Request for Information No 2[2] (**RFI #2**).

3. The Applicant has determined to amend the application for consent. Consequently, some of the questions asked in RFI #1 and #2 are no longer directly applicable, or the context for the question raised has changed. The answers advanced reflect that changed context.

4. This memorandum:

    a. Provides context to the amendments made to the proposal.

    b. Responds to identified parts of RFI #1 and 2.

Amendment to Proposal – Summary and Context

5. The amended proposal responds to a potential lacuna with respect to the Panel's jurisdiction to amend the master plan and landscape and infrastructure plans (**Approved Plans**) approved by the Auckland Council as required by I417.9.1 – 3 of the AUP.[3] That lacuna is briefly referred to in

[1] Dated 23 May 2022.
[2] Dated 9 June 2022.
[3] I address this issue further below.

paragraphs [15] - [26] below.

6. The application as lodged sought (inter alia) "variations" to the approved February 2021 Master Plan and management plans to reflect (relatively minor) detailed design changes to the development consequent to February 2021.[4] These were not "variations" in the s127 sense (refer paragraphs [19] – [26]) and might be better described as amendments.

7. Notwithstanding the above, there is a possibility that the Panel do not have jurisdiction to amend (or 'vary') the approved February 2021 Master Plan and management plans. Although the issue is open to interpretation, the Applicant does not want to proceed with an approach which may leave any consent granted potentially open to legal challenge on a point of law. That would risk compromising the efficiency and effectiveness of the fast-track process and undermine the very purpose for which this procedure was put in place – namely to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

8. Accordingly, the Applicant has amended the proposal to align with the Approved Plans. The February 2021 14-lot subdivision consent will be completed, and the associated approved February 2021 Master Plan and management plans will be relied upon. This proposed development and consent will follow and 'build upon' that 14 lot subdivision. Reliance on the approved February 2021 Master Plan and management plans means that the potential jurisdictional difficulty arising in the context of the original application (and proposed changes to the master plan and management plans) is no longer at issue.

9. The proposed amendments to the approved February 2021 Master Plan were summarised at 3.4.1 of the original AEE. They largely related to layout and road alignment to the northeast corner of the site with consequential implications for the Dyke Road frontage, updates to house design and design

[4] See original AEE, sections [1.0], [3.2] and [3.4].

guidelines discussion, and various changes relevant to the local centre and community/commercial venue. Through the 'middle' of the site, from a subdivision layout perspective, there was no meaningful divergence between what the February 2021 Master Plan approved and what was proposed.

10. Because the February 2021 Master Plan and associated landscape management plan and infrastructure management plan are no longer requested to be altered, the amended proposal removes aspects which do not align with those plans. In addition, to ensure deliverability within the 2 year lapse period the bulk of proposed development in the RCA has been withdrawn from this application.

11. Accordingly, the amended proposal now put to the Panel:

    a. Proceeds on the basis the February 2021 Consent (14 super lot subdivision consent granted on 2 February 2021) will be completed. it has already been given effect to by virtue of Council approving the survey plan pursuant to s223 RMA. Refer to [27] – [33] with respect to the implications for the "environment" as defined.

    b. Reduces the scale of the proposal, within scope of the referral order made by the Minister for the Environment, in order to align with the Approved Plans. Refer to [34] – [38] below for an analysis of scope.

    c. Seeks no changes to the Approved Plans, as the proposal aligns with those plans. Therefore, no issue of scope or jurisdiction arises in that regard.

    d. Seeks consent to:

        i. Develop the central portion of the site and the majority of the Rural Amenity Area.

        ii. Subdivide 330 lots, including 16 super lots for future development. This is expected to enable up to 627 dwellings to be created on this area of the site. Note all of these dwellings and the subsequent subdivision of the 16

superlots will be subject to further resource consent applications.

iii. Construct and operate a water and wastewater treatment plant and associated infrastructure.

iv. Develop the majority of the large open space areas (rural amenity area) and create the village green lot. A consent notice from the February 2021 Consent (requiring development to be consistent with the master plan) will fall down onto the village green title. However, the physical 'development' of the village green will be undertaken when the adjacent houses and the local centre are consented to ensure that the three areas appropriately interact.

v. Establish the main stormwater and stream corridor through the middle of the site, including riparian planting.

vi. Undertake earthworks, for that portion of the site not subject to the December 2021 Earthworks Consent.

vii. Deliver associated infrastructure, including a new roundabout on Linwood and Dyke Roads.

12. The amended proposal before the Panel seeks consent for works on the critical path in terms of development sequencing (i.e. infrastructure and subdivision) and enables construction continuity from the earthworks already well progressed under the December 2021 Earthworks Consent.

13. The Applicant will have the opportunity to pursue development of the remainder of the Site through a separate consenting process before Auckland Council, which may include amendments to the Approved Plans (as Council have no jurisdictional bar to approving amended versions of those plans).

14. The potential lack of jurisdiction to amend the Approved Plans results in constraints on consenting of works and outcomes which are slightly different from the Approved Plans. Therefore, the Applicant has focused on those

aspects of the proposal which are in alignment with the Approved Plans and on the critical path in terms of development sequencing. This means consent is not sought for:

a. Dwellings.

b. Subdivision of a swathe of land down the Dyke Road frontage.

c. Subdivision and development of the commercial centre.

d. Subdivision in the majority of the RCA.

e. A community/commercial venue.

f. Some of the wetlands, swales and connecting infrastructure servicing areas no longer covered by the proposal.

Amending the Approved Master Plan, Landscape and Infrastructure Plans – Legal Issue

15. The Panel raised this issue in the context of RFI#1 under the heading "Variation of Plans". Relevantly the Panel's request states:

> The Panel notes that stage 1 of the proposed development, constitutes a subsequent application for subdivision consent for this land – the first subdivision consent for 14 super lots having been granted on 2 February 2021 (February Consent). The February Consent was supported by a master plan and landscape and infrastructure plans (Plans) approved by the Auckland Council as required by I417.9.1 – 3 of the AUP.
>
> The Panel further notes that the current stage 1 application is supported by a variation to the Plans originally approved.
>
> The Panel also observes that the planning analysis by Purpose Planning purports to address the matters listed in I417.9.1.1, I417.9.2.1(b) and I417.9.3.1(a) of the AUP to support the new Plans.
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> The Panel notes that the Executive Summary of the planning report says that the application seeks approval of the variations (presumably by the Panel) to the Plans previously approved. The Panel records that it has doubts that it has any power to

approve the variations to the Plans and queries also whether such approval should be obtained from the Panel in any event.

As the Panel understands the situation the February Consent was approved on the basis of the Plans then submitted. The Panel assumes that such Plans had been approved by the Auckland Council. The relevant AUP provisions do not appear to expressly require approval of the variations to the Plans, submitted with a subsequent application. While it would seem implicit that is the purpose of the provisions, the Panel considers such approval to the variations should be given (or not) by the Auckland Council, not the Panel. The Panel can then take that approval (or not) into consideration in assessing the applications.

The Panel notes that it does not appear that the new (amended) Plans have been approved by the Auckland Council and if that is the case, the Panel considers that the applicant should provide the new (amended) Plans to the Auckland Council as soon as possible for their approval, separately and before the Panel sends out the formal invitations to comment.

Based on the analysis by Purpose Planning, the Panel does not presently see any issues with the variations to the Plans but considers the Auckland Council is best placed to provide objective comments on the changes and to say whether it would approve the variations or not. The Panel would like this information as soon as possible to assist with its assessment of the application.

16. The position taken by the Applicant is set out in paragraphs [7] – [10] above. In short, the Applicant does not want to engage the risk of any consent granted being potentially open to legal challenge on a point of law. For that reason, an amendment to the February 2021 Master Plan and other associated management plans is no longer pursued. Instead, the proposal as amended is consistent with those Approved Plans.

17. The consequence is that I do not need to address in this memorandum the question above and whether the Panel has the power to amend the Approved Plans.

18. For completeness I make some addition observations.

"Variation"

19. The application for consent as lodged referred to "variations" to the Approved Plans. In other parts of the AEE, "amendments" or "updates" were referred to when addressing changes to those plans.

20. "Variation" was not used in the s127 RMA sense. Rather that terminology flowed from wording in the precinct about changes to the approved plans – see I417.1, I417.9.1(3), I417.9.1(4), I417.9.2(3), I417.9.2(4), I417.9.3(2) and I417.9.3(3) which speak to approved "variation" to the plans, albeit in the context of the 'approval' process which sits alongside applications for landuse and/or subdivision consent.

Variation and the FTCA

21. Under the RMA, a variation application engages section 127. The FTCA makes two references to s 127 of the RMA, in the following sections:

    a. Section 15(4)(a); and

    b. Schedule 6, cl 42(5)(b).

22. Section 15(4)(a) provides that for the avoidance of doubt, a person cannot apply under the FTCA for a change or cancellation of an existing consent. The FTCA defines the term "existing" as meaning "existing before this Act comes into force".[5] Accordingly, prima facie s15(4)(a) only precludes an applicant from seeking a variation to an existing consent if that consent was granted before 8 July 2020. The 14-lot subdivision consent[6] is not captured as it was granted on 2 February 2021.[7]

23. The above provision (s15) commences by stating that a resource consent relating to the referred project may be applied for under the FTCA "instead of" under the RMA.[8] Reading section 15 as a whole, there would appear to be a

[5] Section 7(1).
[6] Appendix 37 to Application.
[7] A variation of an existing consent was not amenable to being one of the types of consent that could be applied for.
[8] s15(1)(a)

clear intention that a matter for which resource consent is required is progressed either under the RMA or under the FTCA. To my mind that does not prevent individual aspects of a proposal for which consent is required potentially being progressed under different regimes (i.e it is possible, as has happened here, to consent earthworks under the RMA while progressing the balance of the proposal under the FTCA) – but I accept that does not equate to the ability to freely choose which jurisdiction a variation of a granted consent might be progressed under.

24. My opinion as to the effect of section 15 is supported by Schedule 6, clause 42. Clause 42 expressly records (inter-alia) that the clause applies to "a resource consent that is granted by a panel".[9] Thus, it is not applicable to the issue being considered here (which relates to approval of a masterplan and landscape management and infrastructure Plans granted by the Council). However, as addressed below, the point of the clause is that it explicitly identifies a power for a local authority to deal with a resource consent granted under the FTCA, including considering a variation. If it were implicit in the statutory regime that either a local authority or a panel constituted under the FTCA could freely consider any variation application for a consent granted by the other body, then this clause would be unnecessary.

25. For completeness, the clause provides that a local authority that, but for the FTCA, would have had responsibility for granting resource consent under the RMA has all the functions, powers, and duties in relation to a resource consent granted under the FTCA as if it had granted the consent itself. To avoid doubt, schedule 6, cl 42(5)(b) expressly states those powers and duties include the determination of any application to change or vary conditions of consent under s127 of the RMA. In other words, an application to vary a consent granted by a panel under the FTCA may be dealt with by a local authority pursuant to the RMA. There is no direct wording in the FTCA that the reverse applies (i.e. that a panel has all the functions, powers and duties in relation to a resource consent granted under the RMA by a local authority as if it had

[9] s42(1)(a).

granted the resource consent itself).

26. It might be argued that the somewhat unusual approval process for a masterplan and landscape management and infrastructure plans, and the nature of the documents in question (being 'plans' not resource consents), might engage different considerations and not be caught by the provisions discussed above. I do not take that issue further, as the Applicant's preference is to obtain a consent not potentially threatened by novel determinations of law.

Environment

27. The "environment" embraces not only the existing environment, but also the future state of the environment as it might be modified by permitted activities and by resource consents which have been granted where it appears likely[10] that those consents will be implemented.[11]

28. Previously the Applicant advised that it would not complete the February 2021 Consent (14 super lot subdivision consent granted on 2 February 2021).[12] That position has changed. The subdivision will be completed. It has already been given effect to by virtue of Council approving the survey plan pursuant to s223 RMA[13] on 4 August 2021. The survey plan has subsequently been lodged.

29. The implication of the consent being implemented is that the environment for this site and surrounds includes the 14 lot subdivision of sites ranging in size between 1.486ha and 24.151ha lots and consent notices on those titles which require (inter alia):

    a. Under condition 6, all development and activities on Lots 1001 – 1014 inclusive, must be consistent with the Karaka North Master

[10] Likely means "more likely than not".
[11] *Queenstown Lakes District Council v Hawthorn Ltd* [2006] NZRMA 424 at [79].
[12] Appendix 37 to the original application.
[13] RMA s125(2) ...a subdivision consent is given effect to when a survey plan in respect of the subdivision has been submitted to the territorial authority under section 223, but shall thereafter lapse if the survey plan is not deposited in accordance with section 224.

Plan, the Landscape Management Plan and Infrastructure Management Plan referenced in Condition 1.[14]

b. Under condition 7, identification of a maximum yield of 850.

30. Thus, the Karaka North Master Plan, the Landscape Management Plan and Infrastructure Management Plan effectively form part of the environment as all development and activities on Lots 1001 – 1014 inclusive, must be consistent with them by virtue of the granted conditions of consent and consent notices.

31. The findings in the relevant decision[15] determining that environment (set out in the reasons for granting consent), include (inter alia):

a. The proposal overall is considered to be generally consistent with and not contrary to the objectives and policies. The land is identified for development by the Precinct provisions and the proposed subdivision and future residential activities are anticipated by the Precinct provisions and the various relevant residential zones applicable to the sites.

b. Although there are some changes proposed to the rural character/rural amenity overlay areas and some planned residential use of underlying rural zoned land, the proposed layout provides for a balance that retains the general placement and extent of rural areas while facilitating a more detailed and comprehensive use of the land in the application site.

c. An assessment of the proposal concludes, even though the residential yield is greater than anticipated by the Precinct Plan, that that the Masterplan and all information provided by the applicant demonstrates that any adverse effects arising from the proposed change to residential yield, can be accommodated without resulting in more than minor adverse effects on the environment. Further,

[14] These are the approved 2021 version of these plans.
[15] Decision made by Commissioner acting under delegated authority.

the proposal will not be contrary to the applicable objectives and policies, providing a balance between urban and rural spaces, particularly when considering the Precinct Plan provisions, as the proposed layout of the masterplan will give effect to the 'rural village' concept that the Precinct provisions seek to achieve.

32. I underline that the findings above are in the context of the February 2021 Master Plan, which includes (inter alia) provision for rural open space to the east of the RAA identified in the Precinct Plan with the Precinct RAA area being subject to development[16], and a total yield of 850 dwellings. Those findings flow from an extensive period of consultation and engagement with Council, detailed technical and specialist analysis informing the structure and detail of the proposal, reviews by the Urban Design Panel resulting in support for the project, and adoption of best-in-class wastewater solutions which have removed the previous technical limitations which were causative of the imposition of a 460 dwelling cap in the Precinct provisions.

33. In addition, the December 2021 Earthworks Consent (with the consequent character, landscape and amenity change it brings) and the granted water take consent form part of the environment – the former has been given effect to and the latter is likely to be given effect to.[17]

Scope to undertake Amendment

34. In my submission there is scope to amend the proposal in the manner advanced by the Applicant.

35. The Expert Consenting Panel for the Wooing Tree Estate application pursuant to the FTCA, received independent legal advice from Mr Matthew Allan of Brookfields Lawyers which addressed the issue of scope for amendments in the context of the FTCA. That advice is publicly available on the Environmental Protection Agency website.

[16] The December 2021 Earthworks Consent approves earthworks in the precinct RAA area. This consent has been given effect to and works are underway.

[17] With respect to the water take, the bores have been drilled (under the bore permit) and flow tests have been undertaken. All that remains is commencement of daily draw for everyday use.

36. In a letter of advice dated 22 September 2021 Mr Allan commented on scope at paragraphs [2] – [12]. I adopt those statements as to the correct approach in law. For ease of reference that advice is:

> 2. In addition to addressing your query as to any procedural requirements, we also address whether amendments to resource consent applications are permissible, noting your observation that amendments are not explicitly provided for in the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**).
>
> 3. We agree that the FTCA does not explicitly make provision in relation to amendments to resource consent applications.
>
> 4. Similarly, the Resource Management Act 1991 (**RMA**) does not expressly provide for amendments to resource consent applications. Despite that, the Courts have long accepted that it is part of the resource consent application process that sensible modifications will take place. Refer for instance to *Waitakere City Council v Estate Homes Ltd* (2006) 13 ELRNZ 33 where the Supreme Court accepted at [29] that:
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> > … in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. …
>
> 5. There is now a significant body of case law concerning the approach to take under the RMA to evaluating whether amendments to a resource consent application have gone beyond the scope of the original application, so as to make it a new application where a fresh application / re-notification must be considered. We do not propose to go into the detail of that case law for present purposes, but highlight two passages below, which we consider apply equally to applications under FTCA.
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> 6. In *Collins v Northland Regional Council*[1], Asher J accepted the following statement by the Planning Tribunal in *Haslam v Selwyn District*[2]:
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> > The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. … **In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions.**
>
> 7. Asher J also commented in *Collins* that:
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> > … **It is part of the resource application consent process that sensible modifications will take place.** Whether there is a need to re-notify will turn on the facts and will often be a question of degree. The extent of the modification and its impact are critical factors. These are best considered on the knowledge of the parties at the time of the change. It will be difficult to establish a need to notify if the change appears to be minor, even if it is later shown to have effected a significant change. It is the fairness of the process that is at issue, not the merits of different proposals.
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> 8. In our opinion, it must be a part of the FTCA resource consent application process that "sensible modifications will take place" from time to time, for instance in response to comments received or as a consequence of matters raised by the Panel. Further, in terms of the passage in *Haslam* quoted above, it is to be expected that the lodging of comments by opponents may lead to an applicant modifying its proposal to meet objections that are found to be sound. We consider that must be part of the statutory intent of FTCA in providing for comments.
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> 9. In this context, it may be helpful for us to clarify one aspect of paragraph 4 of our letter of 20 September, where we state:
>
> > … While the consenting process under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (FTCA) bears some similarity to the consenting process under the Resource Management Act 1991 (RMA), the FTCA consenting process is a bespoke process, and we do not consider that the same approach to scope as generally applied under the RMA is necessarily available to the Panel.
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> 10. RMA case law and principles on scope may still be relevant to assessing whether alterations to FTCA applications are permissible. Our point in the above paragraph, as clarified subsequently at paragraph 8 of our letter, is that we do not consider that where a referral order has set a clear restriction (here a cap on the number of lots), it would be open to apply

a 'RMA-style' approach of allowing a modification that increases the number of lots provided there is no substantial change to the scale or intensity of the activity or to the character or effects of the proposal.

11. In terms of procedural requirements, as with the RMA, there are no formal / prescribed procedural requirements relating to amendments to an application.

12. Assuming that the Applicant's amendments have the effect of reducing the number of lots to comply with the caps stated in the referral order, and therefore reduce the scale / intensity of the proposal, we would not anticipate any issue in terms of typical RMA principles relating to scope.

37. With reference to the 'standard' RMA approach to assessing scope – namely is the refined proposal significantly different in its scope or ambit in terms of the scale or intensity of the proposed activity, or the altered character or effects of the proposal[18] (from the perspective of increased effects) - I say that no issue arises. There is a reduction in the scale, intensity and effects of the proposal.

38. Schedule 6, cl 2(1) provides that an authorised person may apply for resource consent in respect of a referred project that would otherwise have been considered under the RMA. It is also relevant that the FTCA process, like the RMA process, is enabling. In other words, an authorised person is not required to lodge consent applications in respect of all activities identified in the Order in Council. Thus, the Applicant had (and has) a choice as to how consenting of various parts of the project is progressed.

Objectives and Policies

39. I have referred above under the heading "Environment" at paragraph [31] to findings by Council with respect to objectives and policies in determining the February 2021 Consent. The application as amended aligns with the outcomes approved by that consent. In my submission those findings are correct and applicable here.

40. To assist in the assessment exercise required I make further comment with reference to relevant case law.

[18] *Atkins v Napier City Council* [2009] NZRMA 429 at [20].

Case Law – s104D

41. Section 104D of the RMA applies to the Panel's consideration of a non-complying referred project by virtue of clause 32(1) of Schedule 6 to the FTC. Accordingly, the Proposal must pass one of the 'gateway' tests prescribed in section 104D(1):

> Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> a. the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
>
> b. the application is for an activity that will not be contrary to the objectives and policies of—
>
> i. the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
>
> ii. the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
>
> iii. both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

42. The word "contrary" for the purposes of section 104D(1)(b) means that it must be opposed to in nature, different to, or repugnant to.[19]

43. With respect to the effects gateway (section 104D(1)(a)) I note that a conclusion that a single effect was more than minor is not determinative. The Environment Court has addressed this as follows (emphasis added):[20]

> [48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.
>
> [49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for

[19] *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at 80.
[20] *SKP Inc & Onr v Auckland Council* [2018] NZEnvC 081.

instance in connection with visual amenity from certain properties, but the **law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects", not individual effects**.

[50] The **evaluation under subsection 1 (b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach.** As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.

44. The position with respect to section 104D(1)(b) is similar (as referenced in paragraph 50 of the *SKP* case quoted above). A conclusion on whether a proposal is repugnant to relevant objectives and policies must be reached in the context of consideration of the objectives and policies as a whole.[21]

45. In addition to emphasising the need to address relevant objectives and policies as a whole, *Fonterra Co-operative Group* also rightly points out that where objectives and policies seek to achieve certain effects outcomes, conclusions reached as to the effects of the proposal will be relevant.[22]

46. The obligation to appraise objectives and policies as a whole was addressed by the Environment Court in *Saddle Views*:[23]

[80] … A key question here is whether a proposal has to be generally relevant not contrary to the objectives and policies of a plan, or whether it must be not contrary to any objective and policy. The former has been understood to be the correct legal position for most of the life of the RMA. There has been a suggestion that two decisions called *Queenstown Central Limited v Queenstown Lakes District Council* throw doubt upon that.

…

[81] … In both decisions, the High Court seems to be suggesting that being

[21] *Fonterra Co-Operative Group Ltd v Manawatu-Wanganui Regional Council* [2013] NZEnvC 250.
[22] In other words, if it is determined that the effects are appropriate, then it follows that the objectives and policies have been satisfactorily achieved.
[23] *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243 at [80] – [82].

contrary to one objective in a proposed plan entails that the second threshold test is failed.

[82] Counsel agreed that this approach by the High Court is inconsistent with the previous approach of the Court of Appeal. For example in *Dye v Auckland Regional Council* the Court of Appeal stated:

"… The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law."

47. In a similar vein the Court in *Akaroa* said:[24]

[74] In all but the simplest cases the second gateway test is very difficult to apply because most district plans have a plethora of objectives and policies. We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. But the proposal may be so strong in terms of that policy that it outweighs all the others if that is the intent of the plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in a district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal before the consent authority, it may be open to the consent authority to find the proposal is contrary to the objectives and policies under section 104D. We add that it is rare for a consent authority, or the court, to base its decision either way, on a single objective or policy. The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed.

48. Every case stands or falls on its own merits, and therefore outcomes in other cases are not transferable. Each case requires a "contextual analysis of the relevant Plan provisions".[25] However, I briefly refer to the section 104 D

[24] *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.
[25] *Calveley v Kaipara District Council* [2014] NZEnvC 182, at [142].

outcome of some other cases as it is instructive to the extent that it illustrates the application of the principle referred to above:

a. In *Akaroa*,[26] although ultimately consent was declined in the context of specific matters addressed in the context of section 104, in the context of the section 104D assessment the proposal was held to be contrary to the "central objective" of the transitional district plan, and contrary to "some of the most important policies" in the relevant section of the proposed district plan, but nonetheless was not found to be contrary to the objectives and policies of the proposed district plan as a whole – and therefore the Court determined the proposal "squeezes through the second gateway".

b. In *Man O'War*,[27] the approach adopted in *Akaroa* was approved. Although there were adverse findings from an effects perspective with respect to natural character of the coastal environment and outstanding natural landscapes, the Court accepted that when the relevant plans were read as a whole issues of visual amenity or perceived natural character were not so overwhelmingly important as to outweigh the other considerations. Accordingly, again on the basis that objectives and policies were considered as a whole, the second gateway was passed.

Avoid

49. I also note the Precinct Policies include the use of the term "avoid".[28] The Supreme Court determined that this is a "strong word, meaning "not allow" or "prevent the occurrence of"".[29] *King Salmon* considered the NZCPS provisions, and noted various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others.[30] The Court stated that the

[26] *Akaroa*, at [76] – [77].
[27] *Man O'War*, at [124] – [126].
[28] I417.3(2), (11), (13).
[29] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, at [126].
[30] See discussion in *King Salmon*, at [127].

differences in wording adopted matter.

50. Policy I417.3(2) refers to avoidance of "more intensive housing". "More intensive housing" is not defined. Dwellings are a Discretionary activity (not a prohibited activity) in the RAA and RCA.

51. With respect to policy (2), the amended proposal no longer seeks consent for dwellings. They will be the subject of a separate consenting exercise. Strictly, that results in policy (2) not being engaged.

52. To the extent the subdivision proposed is relevant to policy (2), for reasons addressed in evidence and expert assessment on behalf of the Applicant the intrusion into the RCA is minimal in scale and results in negligible effects. The proposed development in the RAA is more significant – with the bulk of the RAA being subdivided albeit with a 'replacement' area of rural open space provided adjoining to the east. In that regard I observe:

    a. I417.9.1.(3) provides subsequent land use and/or subdivision consent applications must be consistent with the approved master plan.

    b. As already addressed in these submissions, the February 2021 Consent forms part of the environment. That consent and the associated approved Master Plan provide for development in the RAA and find for reasons recorded that it is acceptable.

    c. The February 2021 Consent requires a consent notice to be registered on Lots 1011, 1012 and 1014 providing that no dwelling shall be constructed or established on the lot. This secures the alternative rural open space area, which mitigates the development of the RAA through provision of alternative rural open space which is (for reasons addressed in the landscape and urban design reports on behalf of the Applicant) superior to the RAA area identified in the Precinct Plan.

53. Turning to wastewater matters, no clash exists with respect to the wastewater

related policies (11) and (13).

Context

54. Finally, context is also important for objective and policy assessment. The site is subject both to several zones and to a Precinct. With reference to *Budden*[31] (addressing the interface of underlying zone rules with controls applying to the same site by virtue of an overlay), it cannot be said that the Precinct provisions have primacy over underlying zone provisions.[32] The Court found that applying an integrated management approach, competing considerations must be considered on the evidence and in light of directions given by objectives, policies and other provisions.[33]

55. In this matter I say the exercise described above must flavour what is understood to be the applicable rural character and amenity in the context of the future development. Whilst the Precinct does not trump other provisions, its clear and direct purpose is to provide for the establishment of a new rural village settlement. Thus, to meaningfully give effect to that purpose, the rural amenity and character to be provided for must be of a 'village variety' rather than that which exists in more conventional rural zones.

RFI #1

56. RFI #1 addresses seven issues, which in summary are:

    a. Variation to Plans;

    b. Permitted baseline;

    c. List of Infringements;

    d. Earthworks; and

    e. Staging:

[31] *Budden v Auckland Council* [2017] NZEnvC 209.
[32] The Precinct provisions expresly state relevant overlay, Auckland-wide and zone objectives and policies apply in the precinct in addition to those specified in the Precinct.
[33] *Budden*, at [70].

i. Order of stages;

ii. Wastewater/stormwater; and

iii. Lapse.

57. I respond to these matters below.

RFI #1 - Variation to Plans

58. This issue has effectively been addressed above under the heading "Amending the Approved Master Plan, Landscape and Infrastructure Plans". Refer paragraphs [16] – [17].

RFI #1 - Permitted baseline

59. The Panel asked:

> While the Panel does not consider the February Consent can be taken as part of the future environment, as it will not be given effect to, the Panel nevertheless enquires whether the applicant has any comment on whether it should be seen as constituting any sort of permitted baseline in the assessment of this new application.

60. For reasons set out in paragraphs [27] – [33], the February 2021 Consent is part of the environment (as is the December 2021 Earthworks Consent and the water take consent).

61. The granted consents are not a permitted baseline.

62. A granted consent is not relevant to s104(2) RMA, as that relates to an adverse effect of an activity where a "national environmental standard or the plan permits an activity with that effect."

63. I do note the Panel is able under clause 31(1)(d) of Schedule 6 to consider "any other matter the panel considers relevant and reasonably necessary to determine the consent application".

64. For completeness, even if the February 2021 Consent were not being given effect to, I would have submitted that it does illustrate the implication of the

current zonings and precinct provisions for the Site (significant earthworks and landscape change). In that regard it assists in undertaking a real-world analysis.

65. Case law has established a consent authority should not consider a future environment that is artificial – there is a need for a "real world analysis" when determining what the environment is.[34] In this matter a real-world analysis is important in the context of assessing rural character and amenity for the Site and surrounds, both by reference to what exists and what the AUP anticipates.

66. The AUP identifies the bulk of the site for urbanisation and development with obvious and significant change for the future environment.

67. Future urbanisation which is not permitted or presently consented may not come within the parameters of the "environment" as identified in *Hawthorn*. However, taking account of the squarely signalled and enabled urbanisation certainly comes within the ambit of matters the Panel may consider relevant and reasonably necessary to determine the consent application.[35] Those matters provide context to the assessment of effects on and changes to the environment.

RFI #1 - List of Infringements

68. The Panel requested (inter alia):

> The Panel therefore requests information in the form of a Table of each Infringement, including any difference in the nature of the Infringement that occurs within a site with a split zoning. The Panel wants to ensure that each infringement has been assessed.

69. No dwellings are now being consented. Therefore, this request has been overtaken by the amendment to the proposal. The infringements for buildings in the water and wastewater compound are identified and assessed in the revised AEE.

[34] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [85], adopted by *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [64].
[35] Clause 31(1)(d) of Schedule 6 to the FTCA.

RFI #1 - Earthworks

70. The Panel requested:

> The Panel understands there will be two earthworks consents if this consent is approved. Would the applicant accept surrendering the existing earthworks consent, and if so, would the applicant accept a condition being imposed, to ensure only one earthwork consent is active over the site. This request is made to mitigate conditions being confused by Council compliance teams.

71. The Panel is correct that there is an existing consent (which has been given effect to) for the Site. Earthworks pursuant to that existing earthwork consent will not have been completed by the time a fresh consent is granted by this Panel (assuming consent is granted).

72. However, the revised earthwork consent now sought does not have any overlap with the existing earthworks consent - they relate to different areas of the site. Accordingly, it is now appropriate to have two separate earthwork consents. There is no risk of confusion with two separate consents applying to different areas of land.

RFI #1 - Staging

Order of stages

73. The Panel requested:

> With regard to the first tranche of work – what stages are proposed to be completed first and in what order, and is this staging able to be locked in with a condition of consent?

74. The amended proposal is intended to progress as follows:

    a. Title the 14 lot subdivision (noting s223 plan already approved in August 2021).

    b. Subdivide lot 1002 into two lots (6001 and 6002).

    c. Develop Lot 6001 (Stages 1, 2, 6 and 7) noting that these stages may

be titled at slightly different times. The earthworks for this area are already complete. Along with this 'stage' the central stream corridor, wetland and planting within Lot 1012 will be completed, the portion of the rural open space area south of the plane tree avenue[36] will be developed, the village green lot will be created, Linwood Road roundabout works completed, and the water and wastewater plants and associated utility lots/easements will be completed ready to service the houses (once consented and built).

d. Lot 6002 will be developed as stages 8-11. The earthworks in this area are 60-70% complete and will be finished by Christmas 2022 enabling civil works to commence.

e. Stage 5 would follow. The earthworks contract for this area has been let and the works are expected to be complete by March 2023 (they need to be completed by this time so that the rural open space area is finished). Civil works to follow.

f. Stages 16 and 17 are last. Earthworks would start (assuming consent granted) in October 2023 and would take less than 4 months with the subdivision following on from this.

Wastewater/stormwater

75. The Panel requested:

> Will the wastewater and stormwater management systems for the site be constructed in their entirety prior to the completion of stage 1?

76. APEX Environmental have provided a response to address the wastewater aspect of this question and for completeness they have also commented on the water treatment plant.[37] In short, the plants will be able to supply potable water and receive untreated wastewater. However, because the wastewater system relies on a biological process which can only occur once the houses are completed and there is a steady flow of effluent into the plant the final

[36] The rural open space area within Lot 1011.
[37] The APEX letter dated 26 May 2022 accompanies this memorandum.

commissioning will occur some time after the first 224c is issued for the sections.

77. The water treatment plant will be fully commissioned prior to completion of Stage 1, however the 3,000,000 litre storage tank will only be constructed once there is sufficient demand to ensure that the water in this tank does not sit for too long prior to use. Prior to this, smaller temporary storage tanks will be installed to service the first stages. This solution is best practice to ensure appropriate water quality.

78. From a stormwater perspective, only the stormwater devices within the stage being developed or required to service that stage will be completed. For stage 1 this will include the main wetland at the head of the central stream and the easement through this area for overland flow. These are marked Stage 1 on the scheme plan. The staging of the swales is also shown on the scheme plan, and they align with the respective stages that require them.

Lapse

79. The Panel requested:

How does the applicant intend on compliance with the proposed condition 2:

Lapsing of consent 2. In accordance with clause 37(7) of Schedule 6 to the COVID-19 Recovery (Fast-Track Consenting) Act 2020, this consent lapses two years after the date it commences unless the consent is given effect to prior.

80. The intent of this query is unclear. The Applicant will comply with the 2 year lapse period for giving effect to the consents.

RFI #2

81. The second RFI sets out 15 issues. I respond below. In the interests of limiting the length of this response, I do not repeat the text of the issues identified.

RFI #2 – First Issue

82. The intention was to amend (vary) the Approved Masterplan to align it with

the proposal as advanced. However, for reasons addressed in paragraphs [5] – [12], the Applicant has now amended the application before the Expert Consenting Panel, will now proceed with the 14-lot subdivision, and will rely on the Approved Plans (which the amended proposal is in accordance with).

83. The February 2021 Consent is thus part of the environment (as is the associated approved February 2021 Master Plan referred to in Condition 1 of the consent secured through consent notice).

84. The amended position addresses the first issue, because the Panel no longer has to consider a "variation to the masterplan approved in February 2021".

RFI #2 – Second Issue

85. This consent process will no longer approve a new masterplan.

86. Any future amendments to the existing Approved Plans would need to be progressed with Council in the context of future variation applications or alternatively in the context of consideration of a new consent application lodged with Council.

RFI #2 – Third Issue

87. Activity Table (A4) applies to dwellings. The amended application does not seek to consent dwellings in the RCA or RAA and therefore (A4) is not engaged.

88. Future proposed dwellings will require consent as a Discretionary activity.

89. Note in addition, the approved February 2021 Master Plan is relied upon which already shows development in the RCA and RAA and has been incorporated into conditions of consent and consent notices as part of the February 2021 Consent.

RFI #2 – Fourth Issue

90. Given my comments above with respect to the third issue, there is no follow on to the fourth issue. However, the revised AEE does assess relevant objectives and policies.

91. As above, the approved February 2021 Master Plan is relied upon which already shows development in the RCA and RAA and has been incorporated into conditions of consent and consent notices as part of the February 2021 Consent.

92. The RFI states "Can the applicant provide any legal and/or planning analysis that would enable the Panel to approve a development that appears to be contrary to these Objectives and/or Policies…".

93. In my submission the amended proposal is not contrary to relevant objectives and policies. Refer to the assessment in the revised AEE[38] and paragraphs [41] – [48] above which speak to germane caselaw.

RFI #2 – Fifth Issue

94. Given my comments above with respect to the fourth issue, strictly there is no follow on to the fifth issue. A new masterplan is not being approved.

95. As already addressed in this memorandum, the approved February 2021 Master Plan is relied upon which already shows development in the RCA and RAA and has been incorporated into conditions of consent and consent notices as part of the February 2021 Consent. This outcome forms part of the environment.

96. I would add that the RCA is not reduced or abandoned because of some development occurring within it. The revised application largely avoids the RCA aside from a small number of lots.

97. I agree that the RAA area as shown on the Precinct Plan is now consented to be subject to relatively significant development – but that is in the context of the consent securing an alternative rural open space area of equivalent (the Applicant says superior) quality. The consent provisions impose a consent notice that prevents establishment of any dwellings in that area. The intent of the Precinct provisions is achieved.

98. In my submission the Precinct Plan is not akin to a standard. Standards are

[38] See Section 15.

expressly identified.

RFI #2 – Sixth Issue

99. No consent was or is being sought to alter the Precinct Plan (that can only be achieved through a plan change). An Applicant is entitled to apply for consents with the RCA and RAA, with those to be assessed on their merits.

100. The amended consent application does not reduce the RCA. For reasons already detailed, the limited subdivision now proposed in the RCA (aligning with the approved February 2021 Master Plan) has no material effect on the RCA and is deserving of consent.

101. No buildings are now proposed in this consent in the RCA or the RAA.

102. The new rural open space area to the east of the RAA provides mitigation for development within the RAA. This new area is established through the February 2021 Consent and is protected from further residential development by a consent notice – refer Appendix 26 to the revised AEE. Condition 6 of the February 2021 Consent also requires a consent notice on the titles which in turn requires all development and activities on all lots including those now providing rural open space to be consistent with the February 2021 Master Plan. That Master Plan provides for rural open space in the area in question.

RFI #2 – Seventh Issue

103. The amended application does not breach standard I417.6.2. No consent for dwellings is being sought. Dwellings will require future resource consent.

104. Although strictly not relevant to whether standard I417.6.2 is engaged, the amended application seeks subdivision consent for less than 460 lots.

105. Further, the approved February 2021 Master Plan provides a yield of up to 850 dwellings. The approval of that master plan and associated subdivision consent included supportive findings by the decision maker with respect to yield and objectives and policies (refer paragraph [31]).

106. Finally, the expert assessments for the Applicant with respect to traffic,

infrastructure, landscape and urban design considerations determine that the amended proposal is appropriate and deserving of consent.

RFI #2 – Eighth Issue

107. Resource consent for the village centre facilities and the Community venue is no longer sought as part of this consent application. Those activities and buildings will be consented through applications to Auckland Council.

108. The zoning in place and the February 2021 Master Plan enable and require future establishment of a local centre serving local convenience needs. The village green lot which will abut this future centre will be titled as part of Stage 1 of this amended proposal.

109. The village green will present as an open lawn pending development coordinated with the local centre, village square and adjacent housing. This amenity, along with completion of the rural open space area south of the plane tree avenue (within Lot 1011) by the time the first 224c is granted and the high level of existing amenity (being the church, St Margaret's Café, Paddock to Pantry (local store), and sports fields (and associated clubs bowls, tennis, cricket, rugby etc.)) will provide sufficient day one amenity.

RFI #2 – Ninth Issue

110. Consent for temporary uses is no longer sought.

RFI #2 – Tenth Issue

111. No consent for dwellings is being sought in the amended application.

112. Further detail about the wastewater and water treatments plants is provided in advice from APEX. Refer paragraphs [76] – [78] above.

113. The plants will be built to their full servicing capacity (with the exception of water storage) prior to the first 224c being issued. The 67-week timeframe given includes design time. This design has progressed in parallel with this consent process. It is expected that the building consents will be ready to lodge in July - August with work on site starting in spring (assuming consents

granted) and complete prior to 224C for the first stage.

RFI #2 – Eleventh Issue

114. The village will have an extremely large area of open space – the assessment of the revised proposal by Greenwood Associates identifies 14.1ha of such space and provides helpful comparisons to other Auckland parks to give an indication of the scale of area to be provided.

115. The rural areas to be given to the resident's society (in this application these are the rural open space (south of the plane tree avenue) and the central stream corridor) are sweeping areas that will be available for the residents and wider community to enjoy and interact with.[39]

116. Turning specifically to the query about condition 172, the wording reflects that the Local Board has expressed a desire for a Council owned pocket park but the parks department does not want one. The condition as drafted provides flexibility for this to be public/vested or remain privately owned. If it remains privately owned because Council don't purchase it, the park will still be publicly accessible.

RFI #2 – Twelfth Issue

117. While no longer part of the amended application, the applicant expects that the future development of the local centre will include provision for EV charging. This approach is consistent with its other commercial developments where EV provisions has been made.

118. In terms of EV charging at home this is best left to the electricity provider (Counties Power) and the individual residents and is outside the applicant's control (and the scope of this consent).

RFI #2 – Thirteenth Issue

119. The management plans in question have been submitted to the Panel in a final

[39] The Council have advised that they will not agree to this land being publicly vested. Thus, it will remain privately owned – but it will still be publicly accessible.

form, and do not need subsequent certification.

120. In terms of the bulk earthworks under way pursuant to the December 2021 Earthworks Consent, there is no bulk earthworks in the areas covered by either the Coastal Management Plan or the Stream Restoration Management Plan. In relation to the Native Lizard Management Plan, the Applicant has implemented it for the December 2021 Earthworks Consent - and the proposed conditions of consent for the earthworks consent as part of this application include a Native Lizard Management Plan.

RFI #2 – Fourteenth Issue

121. The Panel have asked questions about the mechanics of the Design Review Panel process.

122. The February 2021 Consent includes consent notices which will in turn fall down onto subsequent lots to be created.

123. Condition 6 imposes a consent notice which requires all development and activities on the lots to be consistent with the February 2021 Master Plan, and the associated approved management plans.

124. Condition 8 imposes a consent notice which requires future development (within Lots 1002 and 1006 – 1009) to be designed and constructed in general accordance with the Residential – Mixed Housing Suburban Zone and the Karaka North Precinct subject to a package of alternative specified development restrictions addressing building height, height in relation to boundary, front yards, building coverage and landscaped area.

125. Condition 9 imposes a consent notice which requires future development (within Lots 1003 - 1005 and 1010) to be designed and constructed in general accordance with the Residential – Single House Zone and the Karaka North Precinct subject to a package of alternative specified development restrictions addressing building coverage and landscaped area.

126. The February 2021 Master Plan sets out (inter alia) development controls and urban design guidelines. Section 5.2 of the Master Plan includes specific

development control modifications as set out in the above consent notices.

127. Turning to urban design matters, Section 9 of the February 2021 Master Plan provides specific guidance, including with respect to multi-lot designs and house and site designs. That guidance addresses:

    a. Overall design criteria;

    b. Multi-lot designs:

        i. Block structure (fronts and backs, orientation, block sizes, public space interface); and

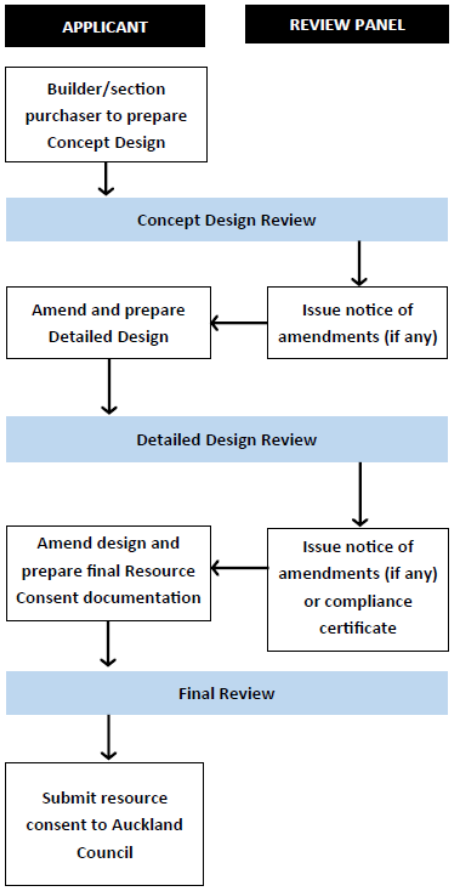
        ii. Lot shape and size.

    c. House and site designs:

        i. Site layout (house, garage and private open space location, fronting the street, garages); and

        ii. Built form (primary forms, secondary forms, private landscape, links and add-ons, solid and void, materials and colours, fencing, pathways and front doors, minor dwellings and accessory buildings).

128. The guidelines also include a requirement for an internal review process before a Design Review Panel as described in Section 9.7:



129. The associated approved Landscape Management Plan provides further detail with respect to landscaping for private realm areas and standalone plots.

130. In terms of the "mechanics" being advanced, the Applicant's position is that an express condition of consent requiring a consent notice to impose the Design Review process is not required as:

    a. The consent notices imposed on the existing 14-lot subdivision (February 2021 Consent) require development to be consistent with the Master Plan and management plans. This consent has been given effect to.

    b. The consent notices on the titles to be issued, will in turn fall down onto subsequently subdivided lots resulting from this proposal (if granted), thereby binding future owners to develop in compliance with the Master Plan and management plans.

    c. The Master Plan specifically requires development (both multi-lot

precincts and house and lot applications) to proceed through the Review Process. Development of the Site must be consistent with the Master Plan which includes the Design Guidelines.

d. The Review Process is an internal review process undertaken via the Karaka North Design Review Panel. The Review Panel will review proposed drawings and provide a sign-off certificate to be lodged with the resource consent application. There is also an ability for the Design Panel to issue notice of amendments to ensure that designs are fully compliant with the Design Guidelines.

e. A safeguard to ensure compliance with the Master Plan (including the Design Review requirements) is already secured by reference to the existing February 2021 Consent consent notices (which will endure notwithstanding future subdivision).

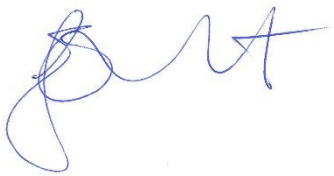
RFI #2 – Fifteenth Issue

131. The staging proposed is explained in paragraph [74].

Suspension of Processing

132. In accordance with the Applicant's request, the Panel suspended processing as at 11.59pm 7 June 2022.

133. The Applicant will lodge a request pursuant to clause 23(6) of Schedule 6 FTCA that processing resume.



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Jeremy Brabant

Counsel for Karaka North Village Limited

Dated 6 July 2022