

**Before Commissioner(s)
Delegated by Palmerston North City Council**

Under	the Resource Management Act 1991
In the matter of	a Notice of Requirement for a designation by Kiwirail Holdings Ltd for the Palmerston North Regional Freight Hub

**LEGAL SUBMISSIONS FOR PETER GORE AND DALE O'REILLY
18 AUGUST 2021**

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Introduction

1. This submission is made on behalf of Peter Gore and Dale O'Reilly (**Peter and Dale**), whose submission is #61. You have already heard from them about many of the reasons for their opposition to Kiwirail's Notice of Requirement (**NoR**).
2. The purpose of this submission is to address a central legal issue — namely the insufficiency of Kiwirail's assessment of effects, and inappropriate deferral of proper effects assessment to the outline plan stage.
3. For completeness I record:
 - (a) The limited focus of these submissions should not be taken in any way to indicate a narrowing of the breadth of matters raised in Peter and Dale's written submission.
 - (b) The reason conditions are not being addressed is that Peter and Dale are opposed outright to the NoR, and do not wish to participate in refining the details for a project they believe should not proceed.

Effects Assessment

4. As you know, Kiwirail is leaving a considerable amount of detail to be developed at later stages of the project, to be incorporated in detailed design and addressed as part of the submission of an outline plan (assuming the NoR is confirmed). This two-stage approach is openly acknowledged in Kiwirail's legal submissions¹ and evidence.²
5. In my submission, Kiwirail has taken the approach too far, with the result that it has failed to provide you with the information you need to undertake an effects assessment. Effects assessment is the focal point of s 171.³
6. Counsel for Kiwirail rightly identify⁴ that in *Sustainable Matata v Bay of Plenty Regional Council* the Environment Court said that many cases are prepared on the basis that final design is not known, and the designation process recognises the need for flexibility.⁵

¹ Legal Submissions on behalf of Kiwirail Holdings Ltd, 6 August 2021 at [4.22].

² For example, Statement of Evidence of Stephen Chiles, 9 July 2021 at [9.5]; Statement of Evidence of Lisa Rimmer, 9 July 2021 at [9.18]; Statement of Evidence of Karen Bell, 9 July 2021 at [8.20], [9.28]-[9.29].

³ *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68].

⁴ Legal Submissions on behalf of Kiwirail Holdings Ltd, 6 August 2021 at [4.19] and [4.20].

⁵ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NzEnvC 90 at [45] and [46].

7. However, the price for this flexibility cannot be the lack of information to inform a proper effects assessment. In *Sustainable Matata* the Court went on to say:⁶

In recent years there has been a tendency of consultants to *park* significant issues utilising the devices of management plans and generalised conditions to address effects. The Court has repeatedly noted its concern that it *must*, in terms of both designations and resource consents, be able to understand both the scale and significance of the various effects. Generalised conditions and an outline Management Plan often do not achieve this outcome.

8. Kiwirail contends there will be two opportunities for effects to be considered: this NoR, and the later outline plan.⁷ With respect, the extent of the effects assessment in these two processes are markedly different:

- (a) At the NoR stage, the Act states explicitly that effects *must* be considered, and in undertaking this core task regard must be had to all the dimensions particularised in subsection (1) (relevant policy and plan provisions, consideration of alternatives and so on). It is a mandatory and detailed requirement. By comparison, the Act does not stipulate any matters that a Council must consider on receipt of an outline plan. It states merely that a Council "may request changes"⁸ to the outline plan, but provides no direction concerning the matters a Council must consider, or the basis on which changes might be requested.
- (b) At the NoR stage a potential outcome is a recommendation that the designation be withdrawn.⁹ A Council receiving an outline plan may not make an equivalent request that the outline plan be withdrawn,¹⁰ let alone any broader request addressing withdrawal of the designation itself.

9. In short there are substantial differences at each stage of the process, in respect of both the substance of the inquiry, and the range of potential outcomes. In my submission, while a Council may not be *precluded* from considering effects upon receipt of an outline plan, there is no reason to assume that any meaningful effects assessment will necessarily occur at that secondary stage.

⁶ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NzEnvC 90 at [47].

⁷ Above n 1.

⁸ Section 176A.

⁹ Resource Management Act, s 171(2)(d).

¹⁰ *Waitakere City Council v Minister of Defence* [2006] NZRMA 253 (EnvC).

10. Further, it is hard to see how the *possibility* of a later effects assessment could ever be reflected in the analysis required by this Panel at the NoR stage. There is no basis to suggest that the possibility of a later effects assessment in any way alters the extent of the inquiry dictated by s 171.
11. Accordingly, I submit the adequacy of the information you are being provided by Kiwirail must be assessed according to the clear duty that the Act confers on you (and no other) to assess the effects of allowing the requirement.
12. To discharge that obligation you must ultimately be satisfied that you have been given sufficient information to understand the scale and significance of those effects.
13. Wherever Kiwirail asserts (explicitly or implicitly) that the adverse effects will be appropriately mitigated, you must be satisfied that you have been given sufficient information about that mitigation to understand how it will ameliorate the adverse effects.
14. I submit Kiwirail's evidence does not meet these standards, and in the sections that follow relating to noise and visual amenity effects I provide examples to support this contention. For the record, my focus on these particular topics does not signify acceptance that Kiwirail's information on other topics is sufficient to inform the effects assessment — my focus merely reflects Peter and Dale's limited resources.
15. Related to this:
 - (a) The primary legal or persuasive burden here rests not on submitters but on Kiwirail. It is Kiwirail's evidence that must be evaluated in terms of its adequacy to inform a proper effects assessment.
 - (b) These issues have been identified already by experts: prior to Kiwirail filing evidence, the planning review by Ms Copplestone and Mr Percy concluded that Kiwirail's 'concept plan' approach presented a barrier to the reliable prediction of effects, to such a degree that they were reluctant to provide an overall evaluation at that time.¹¹

¹¹ Section 42A report of Anita Copplestone and Phillip Percy, 9 August 2021 at [888]-[890].

Noise

Construction Noise

16. Construction will occur for potentially 3 years for earthworks, and 3 years for stage 1 alone.¹²
17. Relative to the life-span of the project this may be brief but it deserves full and proper assessment. In *Trilane Industries Ltd v Queenstown Lakes District Council*¹³ the High Court emphasised that notification assessments must properly account for short-lived or "temporary" effects. In my submission those principles are equally applicable to substantive effects assessments. Relatively short-lived effects cannot be ignored, or somehow traded off against a longer term situation. In short, construction effects require their own full and proper appraisal.
18. However, Kiwirail's experts have not calculated or modelled what the construction noise will be, nor provided any predictions of the construction noise levels that will be received.
19. Instead, Dr Chiles' opinions on construction noise on nearby properties are based on approximations: buffer distances of 50m and 200m derived from his experience on "comparable works on numerous other projects".¹⁴
20. With respect, this level of information is no more than a bald assertion. It furnishes the Panel with no information to independently assess whether these approximations are likely to be right – or what it means for people who actually live inside the approximate area. It's the equivalent of saying "these types of things are manageable in my experience" without any evidence to show what "type" of thing you are dealing with. It is not as if there is any doubt that construction noise will affect Peter and Dale's (remaining) property: according to Dr Chiles' assessment, Peter and Dale's house is potentially within 50m of where construction may occur,¹⁵ so close that "enhanced mitigation" might be required in order to achieve compliance with construction noise standards.¹⁶ Yet, you are not told what level of construction noise they will receive or what the "enhanced mitigation" might be.

¹² Section 42A Report of Nigel Lloyd, 9 August 2021 at [90].

¹³ *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647 at [58].

¹⁴ Regional Freight Hub — Acoustics assessment, 23 October 2020, p 31.

¹⁵ Acoustics assessment, above n 14 at pp 33-34. NB. Ms Rimmer's estimate is that the noise wall will be 90m from the house: Statemetn of Evidence of Lisa Rimmer, 9 July 2021 at [4.6].

¹⁶ Acoustics assessment, above n 14 at p 31.

21. Worse than that, Dr Chiles considers there will be some construction activity that can only occur at night and which *will* lead to breaches of construction noise limits.¹⁷ He says alternative measures should be taken to manage those noise effects.¹⁸ He does not recommend particular measures, because he considers this can all be developed later, under a management plan. In summary the Panel is told the standards will be breached (but not by how much), and mitigation should be applied (but not what it will be).

Operational Noise

22. The situation for operational noise is not much better. Daytime and night-time noise exposure for nearby dwellings like Peter and Dale's will not be known until detailed design occurs. In the meantime the noise control boundary proposed by Dr Chiles is "indicative". It is possible to see this, as Dr Chiles does, as an opportunity for improvement: through detailed design Kiwirail might identify and implement ways to operate the Freight Hub with a smaller noise footprint.¹⁹ But the Panel is no position to rely on that possibility. At the other end of the spectrum lies the possibility that by the time Kiwirail gets to detailed design it finds that its indicative control boundary has *under-represented* the actual noise footprint of the Freight Hub.
23. Dr Chiles resists Mr Lloyds specific proposal for implementing noise mitigation through building upgrades, on the basis that it is 'speculative'.²⁰ That characterisation may be a fair but if Mr Lloyd is speculating that is because the information provided by Kiwirail has left him no other choice. It is Kiwirail's choice not to provide detailed scientifically robust predictions of what actual noise levels will be experienced at relevant receiving locations. Dr Chiles is being no less speculative in his apparent optimism that the actual noise effects may be less than the 'indicative' control boundary suggests. He is right: they may be less. However the Panel's assessment of the available information cannot be coloured by such optimism. Where Kiwirail has elected to leave matters uncertain in this way it must accept that the Panel has to assess effects according to the upper end of their possible range, not according to the lower end of that range. It is the upper end of the possible range that the Panel must be satisfied is ultimately acceptable.
24. There is some irony in Kiwirail's use of the term 'buffer' to describe land like Peter and Dale's.²¹ 'Buffer' describes the function that the land will serve for

¹⁷ Statement of Evidence of Stephen Chiles, 9 July 2021 at [9.19].

¹⁸ Statement of Evidence of Stephen Chiles, 9 July 2021 at [9.19].

¹⁹ Statement of Evidence of Stephen Chiles, 9 July 2021 at [9.14].

²⁰ Statement of Evidence of Stephen Chiles, 9 July 2021 at [9.15].

²¹ Acoustics Assessment, 23 October 2020 at p 31 and Figure 10.

other land further away from the Freight Hub: Peter and Dale's residual land will 'buffer' others from the effects. But what does this indicate the effects on the buffer land itself will be?

Visual Amenity Effects

25. The Landscape and Visual Effects Assessment filed in support of the NoR identified that Peter and Dale's property is one of those most likely to experience adverse visual amenity effects.²²
26. This is confirmed in Ms Rimmer's evidence: she identifies the potential for high adverse visual amenity effects on the property, being one of those with close, open views towards the Freight Hub, where noise mitigation structures are proposed in close proximity.²³
27. Despite this, no site-specific viewpoints have been assessed and no site-specific visual modelling has been done. As Ms Rimmer explains, photo-simulations were not prepared because they require a detailed 3-dimensional model which is not intended to be prepared until the outline plan.²⁴ She says the Freight Hub buildings will contribute to the potentially high adverse effects, but the buildings have not yet been designed, so showing them (by photo-simulation) "would over or under state the potential effects".
28. The desire not to misrepresent effects is a commendable one, but the Panel must be clear sighted that this is achieved at the expense of simply not representing the effects at all. From Peter and Dale's property at 242 Te Ngaio Road, what will they see of the Freight Hub? Kiwirail makes no attempt to answer that question, except to acknowledge the likelihood that it will be highly adverse to the visual amenity values from the property.
29. Notably, Ms Rimmer defends the absence of photo-simulations on the basis that visual effects can be analysed from the use of cross-sections and viewpoints.²⁵ There is no viewpoint specifically from Peter and Dale's property, nor a cross-section — and even if there were a cross-section, the risk that it might under-represent effects seems no different than with a photo-montage given the uncertainty that remains over the final locations and dimensions of buildings within the Freight Hub.

²² Landscape and Visual Effects Assessment, October 2020 at [6.78].

²³ Statement of Evidence of Lisa Rimmer, 9 July 2021 at [7.12] and [8.11]-[8.12].

²⁴ At [5.3].

²⁵ At [10.14](c).

30. Worse still, whatever the effects are, Ms Rimmer does not assume that it will even be possible to mitigate those effects in detailed design: she says the investigation is to determine, among other things, whether the effects "can" be reduced.²⁶
31. In summary, Kiwirail's evidence concerning visual amenity is that the effects on Peter and Dale may be highly adverse, but that Kiwirail cannot take that matter any further due to the lack of detailed design; and while further work will be done on this, mitigation may or may not be possible.
32. Yet Kiwirail implicitly seeks a finding that the visual amenity effects on Peter and Dale are acceptable. With respect, there is simply no evidential basis on which you could make such a finding.

Closing remarks

33. Kiwirail maintains the effects of the Freight Hub can be "appropriately managed" through conditions.²⁷ That is the position adopted by its relevant witnesses. However, in my submission, that is not a conclusion open to the Panel on the evidence. It is not open to the Panel to adopt the optimism of Kiwirail's witnesses in the absence of evidence.
34. I acknowledge that Kiwirail's requiring authority status reflects a greater public good inherent in the network utility it provides. However, s 171 does not say that this greater public good displaces the need for an adequate assessment of effects. To the contrary, it explicitly says that effects *must* be considered, and prescribes that this consideration is subject to Part 2. That invokes the RMA's fundamental approach towards effects — that they must be avoided, remedied or mitigated. Indeed, in the event of a conflict with the directions in s 171, Part 2 matters override them.²⁸
35. As counsel for Kiwirail rightly observes,²⁹ the RMA is not a "no effects" statute. However, in my submission Kiwirail subtly skews the meaning of this. When describing the Act in this way, the Courts are describing the *outcome* of an assessment, not the information requirements necessary to undertake that assessment. In other words, I accept that you do not have to measure the proposal against a "no effects" standard, but this does not allow Kiwirail to avoid providing you with enough information to properly assess all effects.

²⁶ At [7.12].

²⁷ Above n 1 at [5.15].

²⁸ *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68], citing *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

²⁹ Above n 1 at [5.17]

36. In my submission, the ultimate question is (as counsel for Kiwirail puts it³⁰) whether the effects "are sufficiently avoided, remedied or mitigated". Counsel for Kiwirail adds the words "in the context of the Project as a whole", which seems to be where we differ. In my submission there is no allowance to temper the effects assessment by reference to the "Project as a whole". Effects assessment is at the heart of s 171, and the requirements of Part 2 remain paramount (including the requirement to avoid, remedy or mitigate all adverse effects).
37. In their s 42A report Ms Coplestone and Mr Percy question whether Kiwirail's team considered an alternative configuration for the designation, extending the boundaries to include land significantly affected by noise.³¹ Kiwirail is resistant to that, and among its answers is the suggestion that it would be undesirable to 'sterilise' land in this way.³²
38. With respect, this represents a significant failure on Kiwirail's part to properly apprehend one of the real effects of its project. Whether it designates additional surrounding land or not, the land will be sterilised. The sliver of land Peter and Dale will be allowed to keep is a good example. It won't be part of a working farm anymore. It won't be surrounded by open land and rural activity, as it is now. It will be reduced to a residential property on land that can no longer sustain productive rural activity, and its defining feature will be the immediate presence of the Freight Hub itself, and all its related effects.
39. Yet, as summarised above in relation to noise and visual amenity effects, the real extent of the adverse effects on Peter and Dale are just not covered in the evidence you have been given. You are not in a position to understand the scale and significance of those effects, nor to assess the adequacy of any mitigation that may or may not be possible.
40. For those reasons, I submit the only recommendation you can make is for the Notice of Requirement to be withdrawn.


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18 August 2021

³⁰ Above n 1 at [5.18].

³¹ At [11] and [895].

³² Statement of Evidence of Stephen Chiles, 9 July 2021 at [9.9].

