BEFORE INDEPENDENT COMMISSIONERS

AT PALMERSTON NORTH

UNDER THE	Resource Management Act 1991 ("Act")
AND	
IN THE MATTER	of an application by KiwiRail Holdings Limited ("KiwiRail") under section 168 of the Act for a Notice of Requirement for the Palmerston North Regional Freight Hub

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SUBMISSIONS OF COUNSEL FOR DR WHITTLE AND DR FOX

14th September 2021

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MAY IT PLEASE THE PANEL:

1. These legal submissions are made on behalf of Dr Whittle and Dr Fox. Along with their young family, they are long term residents of Bunnythorpe.

2. The Panel will hear from Drs Whittle and Fox personally on the Notice of Requirement (NoR). These submissions will focus on the following key legal issues:

   a. Consideration of alternatives.

   b. Scope of the designation.

   c. The application of the permitted baseline.

   d. Future traffic integration.

   e. Uncertainty of effects – amenity effects.

   f. Lapse date.

Consideration of alternatives — s 171(1)(b)

3. Section 171(1)(b) of the RMA directs that the Panel shall have "*particular regard to ... whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work.*" The expression "*have particular regard to*" is a stronger direction than to merely "*have regard to*".[1]

4. The process of the Panel's inquiry is on KiwiRail's process for considering alternative sites, rather than the outcome of that consideration. The requiring authority should have taken sufficient investigations to satisfy itself of the option that is proposed and should not have acted arbitrarily or considered options in a cursory fashion.[2]

[1] *New Zealand Transport Agency v Architecture Centre Inc* [2015] NZHC 1991 at [64].
[2] *Pukekohe East Community Society Inc v Auckland Council* [2017] NZEnvC 27 at [21]–[22].

5. A more careful consideration of alternatives may be required where there are either (a) significant adverse effects of allowing the requirement, or (b) a significant impact on private land.[3] Both circumstances apply to KiwiRail's NoR, and so it is submitted that KiwiRail's process of considering alternatives must be assessed to a high standard.

6. In the *Basin Bridge* case, the Board of Inquiry found that NZTA's consideration of alternatives was inadequate because it had not undertaken the assessment in a transparent and replicable fashion.[4] NZTA's analysis had not been transparent about what weightings were given to various factors, and it had failed to document how evaluation criteria were weighted.[5]

7. It is submitted that KiwiRail's consideration of alternatives suffers from a similar lack of transparency and replicability and was therefore inadequate. This issue arises because KiwiRail has failed to document and explain to the Panel how its bid for funding from the Provincial Growth Fund (**PGF**) in 2018 and the grant of PGF funding impacted on its multi-criteria analysis and decision conferencing process in 2019. In order to explain this issue, it is necessary to set out in some detail the background to KiwiRail's grant of PGF funding.

8. It appears that by around July 2018, KiwiRail had resolved that it would seek PGF funding for a regional intermodal hub near Palmerston North and began to prepare a business case.

9. On 10 July 2018, the Mayor of Palmerston North City Council wrote to the Chief Executive of KiwiRail, recording that they had met to discuss this project.[6] The Mayor provided his endorsement for the business case. He noted the city was well positioned to provide for the intermodal hub, and that it had greenfield industrial land zoned in "*the location you have identified*". The Mayor's letter (**Appendix 1**)

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[3] *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC at [121]; *New Zealand Transport Agency v Architecture Centre Inc* [2015] NZHC 1991 at [142].
[4] Board of Inquiry Basin Bridge Final Report at [1171] and [1216].
[5] Board of Inquiry Basin Bridge Final Report at [1173].
[6] Letter from Grant Smith to Peter Reidy, 10 July 2018.

does not disclose what location had been identified, but it seems clear that KiwiRail had plans for a particular location on greenfield industrial zoned land.

10. KiwiRail then finalised its business case for PGF funding, which is recorded as having been endorsed by its Board on 23 August 2018 (**Appendix 2**).[7] The business case requested funding in two phases, with phase 1a to cover "*site identification, designation, master-planning and concept design*", and phase 1b to cover land acquisition. While the initial funding tranche was for site identification including RMA processes, the business case contains numerous references to funding being sought for the acquisition of land in the North-East Industrial Zone (**NEIZ**) in Bunnythorpe.

11. Subsequent Government documents are also clear that KiwiRail was seeking funding for the greenfield site it had identified at Bunnythorpe that included the NEIZ. For example, a paper prepared by the Provincial Development Unit for a meeting of the Regional Economic Development Ministers on 5 November 2018 states that KiwiRail was seeking funding for the acquisition of land "*in the North East Industrial Zone (NEIZ), in Bunnythorpe, Palmerston North*".[8] (**Appendix 3A)**

12. Cabinet then approved the funding bid for $40 million, and KiwiRail entered into a funding agreement with Treasury[9] (**Appendix 3B**). **This** agreement describes the funded Project as comprising:

    a. Preparation of a master plan and concept design for a transport hub "*in or near Palmerston North*".

    b. Site/options analysis and site selection for the new hub site.

    c. Securing a designation under s 168 of the RMA prior to the potential purchase of land for a new site "*in or near Palmerston North*".

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[7] KiwiRail *Better Business Case — KiwiRail Palmerston North Regional Economic Growth Hub* (August 2018).
[8] Provincial Development Unit *KiwiRail Palmerston North Regional Economic Growth Hub* (for meeting on 5 November 2018).
[9] Funding Agreement between Treasury and KiwiRail for Central North Island Regional Growth Hub.

d. Acquisition of sufficient land in the identified location to develop a regional growth hub.

13. It appears from the terms of the funding agreement that it may well cover funding for acquisition of land at any site that is identified "*in or near Palmerston North*". However, it is significant that KiwiRail's business case was premised on using a site at Bunnythorpe in the NEIZ.

14. Following the grant of PGF funding, KiwiRail commenced the site options analysis. This is recorded in Stantec's June 2020 report on the Multi Criteria Analysis (**MCA**) and Decision Conferencing process. For present purposes, it suffices to note that:

a. KiwiRail and its consultants Stantec convened three workshops in the period August to November 2019 to identify a preferred site.

b. The workshop participants were a range of KiwiRail, NZTA and Stantec staff, and other consultants.

c. Following the first workshop, nine site options along the rail corridor were identified. Four were at Bunnythorpe; four were at Longburn; and one was the existing Tremaine Avenue site. Only one option, Site 3, involved the use of land in the NEIZ near Bunnythorpe.

d. Each option was assigned scores for a range of criteria, and each criterion was assigned a weighting. Some options were dismissed as "*fatally flawed*".

e. The nine options were reduced to a short list of three options after the second workshop. All three of the short-listed options were at Bunnythorpe, including Site 3.

f. Site 3 was ultimately identified as the preferred option. Site 3 is the Bunnythorpe site incorporating land in the NEIZ, for which KiwiRail has issued its NoR.

15. There is a glaring omission from the Stantec report (**Extract, Appendix 4**), which undermines the transparency and replicability of the MCA process. The report

makes no mention of the fact that, prior to the workshop process commencing, KiwiRail had already developed a preference for a Bunnythorpe/NEIZ site and had identified that site in its PGF business case. It is unclear whether this was explained to workshop participants. It seems very likely that at least some participants, namely the KiwiRail employees, would have been aware of what had been said in the PGF business case. Therefore, KiwiRail's preference for a Bunnythorpe/NEIZ site may have had some influence on the MCA process.

16. It is anticipated that KiwiRail will argue that the history of the PGF business case was irrelevant to the MCA process because KiwiRail's funding agreement covers any site in or near Palmerston North, and so the availability of funding would not have influenced the decision conferencing. That argument would have some merit if KiwiRail or Stantec had been transparent and documented the information that was provided to workshop participants about the PGF funding process.

17. However, there is no such documentation. The report says that a summary of the information provided to specialists is contained in Appendix 1.[10] That summary makes no mention of the PGF funding process, KiwiRail's preference for a Bunnythorpe site, or the fact that the funded project was for a site "*at or near Palmerston North*".

18. This omission means the Panel can have no comfort as to whether KiwiRail's preference for the Bunnythorpe/NEIZ site has influenced the consideration of alternatives. It is entirely possible that:

    a. Some participants, such as KiwiRail employees, understood that KiwiRail had identified the Bunnythorpe/NEIZ site in its funding bid and had a preference for that site;

    b. Some participants had an accurate understanding that Treasury had agreed to fund sites "*in or near*" Palmerston North, but some did not; and

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[10] Stantec report at page 22.

c. This information was distributed unevenly among workshop participants, including external and independent consultants, during the course of the workshopping process.

19. The potential influence of KiwiRail's PGF funding bid and the preference for a Bunythorpe/NEIZ site means the Panel cannot be confident that there was a robust consideration of the alternatives. Some workshop participants may have been influenced by an (incorrect) impression that PGF funding was only available for the Bunnythorpe site, or that KiwiRail was wedded to that site.

20. The process undertaken by KiwiRail would have been much more transparent and therefore replicable if all workshop participants had been given identical and accurate information about KiwiRail's PGF funding situation, i.e. that PGF funding for land acquisition was available for a site *"in or near"* Palmerston North, subject to the site identification and designation process being satisfactory, and that all of the nine sites under consideration were likely to fall within the PGF funding agreement.

21. Even if KiwiRail's MCA and Decision Conferencing process analyses are in isolation from the PGF funding process, there are major weaknesses in the consideration of alternatives. The nine options that were assessed and assigned scores were all very large sites from 492-ha to 874-ha with provision for 1,500 m back shunts (**Extract, Appendix 5**).[11] The only smaller site that was considered was the existing Tremaine Avenue site, which is around 40-ha. There is no explanation as to why the MCA process started with such large sites.

22. It may well have been the case that if more realistic site sizes had been identified from the start, then a wider range of feasible sites might have been considered.

23. Ultimately, the nine list options were reduced to five and then three options. By this phase in the process, KiwiRail had developed its masterplan for a 120-ha concept layout, and it applied that plan to refine the area options and layout descriptions.[12] In structuring the analysis in this way KiwiRail has omitted the possibility that

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[11] Stantec report "Multi Criteria Analysis and Decision Conferencing Process" at page 20 and "Specialist Assessment – Property Degree of Difficulty Criterion" at page 5.

[12] Stantec Report "Multi Criteria Analysis and Decision Conferencing Process" at page 44, 47 and 64-65.

applying the concept layout to other site options might have revealed feasible options that warranted further investigation.

24. Ultimately the extent of the designation in the NoR is for 177.7-ha of land. There is no explanation as to why options for sites between 40-ha (the current Tremaine Avenue site) and 177-ha (the proposed Bunnythorpe/NEIZ site) were not considered in the alternatives assessment. This is a significant omission from the options assessment process, given the premise of the alternatives assessment required by s171(1)(b) is that the requiring authority does not have an interest in the designation land.

25. Overall, there are at least two deficiencies in KiwiRail's consideration of options. First, the process was not transparent about the potential influence of KiwiRail's preference for a Bunnythorpe/NEIZ site and PGF funding bid on the MCA workshopping process. Secondly, there are obvious options such as intermediate sized sites that were not considered because KiwiRail started with an assumption of a site larger than 120-ha.

26. These deficiencies in the consideration of alternative sites are a matter to which the Panel must have particular regard under s 171(1)(b). Where the designation has significant environmental effects and potential impacts on private land ownership rights, it is submitted that KiwiRail should be held to a high standard. The departure from a fully transparent, replicable, and robust approach should lead to a recommendation that the consideration of alternatives needs to be redone before any requirement can be confirmed.

Scope of KiwiRail's approval as requiring authority

27. Counsel raised a scope issue by way of memorandum dated 6 July 2021 as to whether KiwiRail's approval as a requiring authority under section 167 of the Act covers the full scope of the freight hub for which a designation is proposed. It was a question that the Council had also asked some time ago. KiwiRail's response in its written and oral submissions to the Panel does not convincingly explain why the full scope of the proposed freight hub is within KiwiRail's approval as a requiring

authority. It is submitted that the Panel has an obligation to satisfy itself that it has jurisdiction to consider the NoR.

28. KiwiRail is a "*network utility operator*" because it is a person who "*constructs, operates or proposes to construct or operate a ... railway line*" (s 166 of the RMA). On that basis, it qualified to seek approval as a requiring authority. Its status as a requiring authority was conferred by the Minister in a *Gazette* notice issued on 14 March 2013. KiwiRail is only a requiring authority for the purpose of the network utility operation set out in the *Gazette* notice, and on the terms and conditions specified in the *Gazette* notice (s 167(3)(a)).

29. Significantly, the Minister did not give KiwiRail approval for a "*particular project or work*" under s 167(3)(b). Such approvals under s 167(3)(b) are typically sought and granted where a new development is planned, rather than ancillary adjustment to and maintenance of an existing development. For example, the Minister granted requiring authority approval for the Canterbury "*Central Plains Water Enhancement Scheme*" as a "*particular project or work*" in November 2005.[13] This reflects that the scheme of s 167 is that requiring authorities will need separate approval from the Minister where they propose to undertake projects or works that are outside the scope of their more general network utility operation. But here, KiwiRail has not sought a "*project or work*" approval for the proposed freight hub, and instead relies on the more general approval for its network utility operation.

30. The *Gazette* notice states that KiwiRail's approved network utility operation is the "*construction, operation, maintenance, replacement, upgrading and improvement and extension of its railway line*". KiwiRail may therefore only use the designation process for those approved purposes, which broadly relate to the management of railway lines.

31. The *Gazette* notice should be interpreted through the lens of what an ordinary reasonable member of the public would take from the terms of the notice. That is

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[13] The Resource Management (Approval of Central Plains Water Limited as Requiring Authority) Notice 2005 dated 24 November 2005. Other examples are: The Resource Management (Approval of Rangitata Diversion Race Management Limited as Requiring Authority) Notice 2007 dated 13 December 2007; and The Resource Management (Approval of Riverstone Holdings Limited as Requiring Authority) Notice 2007 dated 15 March 2007.

the approach that is taken to the interpretation of designations in district plans.[14] The High Court in *Titirangi Protection Group Inc v Watercare Services* noted:

> *"[39] Historically, most designations were drafted in very broad terms. Many designations of this type, commonly known as legacy designations, remain in existence because they have been rolled over into successive district plans with or without modification. More recently, however the trend has been to prescribe the activity or use to which a designation relates with some precision so that all persons who have cause to consider the designation can be left in no doubt as to its potential scope.*
>
> *[40] As the present case demonstrates, broadly worded designations can raise issues as to whether a current or proposed use of the land in question is covered by or included within the designation. Often the designation will have been drafted at a time when a proposed use could not have been contemplated.*
>
> *[41] There is no dispute regarding the test to be applied when interpreting the purpose of a broadly worded designation. As confirmed in numerous cases, the test is what an ordinary, reasonable member of the public who is considering the district scheme or plan would have taken from the designation."*

32. As a *Gazette* notice serves a similar function of notifying the public of the scope of authority provided by the RMA, it is submitted that a similar approach should be taken.

KiwiRail's application to be a Requiring Authority

33. KiwiRail relies on its application to the Minister to support its preferred interpretation of the *Gazette* notice. This application document is <u>irrelevant</u> to the interpretation question because:

    a. The application is not a public-facing document and would not be within the contemplation of an ordinary reasonable member of the public who was reading and interpreting the *Gazette* notice. The first time that submitters were aware of the terms of KiwiRail's application document would likely have been when it was included in KiwiRail's authorities bundle for this hearing.

    b. The Minister's approval of KiwiRail as a requiring authority in the *Gazette* notice should not necessarily be taken as her acceptance or agreement with

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[14] *Titirangi Protection Group Inc v Watercare Services* [2018] NZHC 1026, [2020] NZRMA 200 at [39] –[41].

everything in KiwiRail's application. The Minister's approval under s 167(3) is for the purposes of a particular network utility operation and *"on such terms and conditions as are specified in the notice"*. It is the notice and the Act, not the application, that sets out the limits of KiwiRail's approval.

c. KiwiRail's application to the Minister is in a very different category to the use of *Hansard* and Select Committee reports to aid in the interpretation of legislation.

d. The extent to which KiwiRail's application had any bearing on the terms is debatable.

34. The focus for the Panel should be on the terms of the Minister's *Gazette* notice. As noted above, the approval is for the network utility operation that comprises the *"construction, operation, maintenance, replacement, upgrading and improvement and extension of its railway line"*. The Panel needs to interpret those words through the eyes of an ordinary reasonable member of the public.

35. An ordinary member of the public would understand the term "*railway lines*" to have a broadly similar meaning to that provided in section 4 of the Railways Act 2005, i.e. "*a single rail or set of rails ... laid for the purposes of transporting people or goods by rail*" and associated sleepers, formation/ballast, tunnels and bridges. It is submitted that this captures the common understanding of what a railway line is.

36. There has been some suggestion that the Panel might take an "*ambulatory approach*" to the term "*railway lines*". This approach would be to interpret the concept of "*railway lines*" in accordance with KiwiRail's desired modern use of that term in its current business strategy and recent government policy documents. It is submitted that an ambulatory approach is not appropriate. First, KiwiRail cannot expand the scope of what constitutes its approved railway network utility operation by how it intends to develop its business — that would lead to circularity. Secondly, the authorities on an "*ambulatory approach*" only apply in situations where words

have fallen out of common usage.[15] The expression *"railway lines"* is in common usage and there is no evidence that it has changed its meaning.

New Zealand Railways Corporation's Gazette Notice

37. KiwiRail's predecessor New Zealand Railway Corporation ("NZRC") previously held the requiring power authority for railway lines – this was revoked by KiwiRail's 2013 Notice. NZRC's 2004 *Gazette* Notice was for the *"construction and operation of its railway line."*[16] The Gazette Notices are at **Appendix 6.** The Minister's 2004 Decision on NZRC requiring authority application confirms how this should be interpreted. The Minister's reasons are contained briefing paper to the Minister[17] at **Appendix 7.** The relevant extract sets out the basis for the decision:

> *The definition of a network utility operator under s.166 of the RMA includes a person who (f) Constructs, operates, or proposes to operate, a road or railway line. As operator of the rail infrastructure assets NZRC comes within the statutory definition of a network utility operator.*
>
> *The precise wording of the approval NZRC seeks is for the "construction and operation (including maintenance, improvement, enhancement, expansion, realignment and alteration)* ***of its railway system*** *(my emphasis). Two issues about this wording require consideration.*
>
> *First, NZRC seeks approval for the term "railway system" rather than railway line because the term railway line is defined in the New Zealand Railways Corporation Act 1981 to mean "a set of rails; and includes the area within 3 metres of a line drawn midway between those rails." NZRC advises that significant parts of the railway operation for which they seek requiring authority status are physically outside the area defined as railway line in that legislation.*
>
> ***The Ministry is of the view that approval should not be given for a "railway system" but rather for a "railway line" in accordance with s166(f) of the RMA.*** *The Ministry notes that the term "Railway line" is not defined in the RMA.* ***"Railway line" is also consistent with the wording of the 1996 Tranz Rail approval authority and the Ministry is not aware of any problems about the scope of that approval arising since 1996.*** *NZRC has advised it can accept*

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[15] *McElroy v Auckland International Airport Ltd* HC Auckland CIV 2006-404-5980, 27 June 2008 at [199].

[16] See Appendix 1.

[17] RA-MF-01-18 10 September 2004, briefing paper by Marilyn Bramley to the Minister regarding Requiring Authority Application – New Zealand Railways Corporation. Obtained from Ministry for the Environment via an Official Information Act request. The Ministry has confirmed that it is unable to find the signed briefing paper and therefore the unsigned briefing has been released.

approval for a "Railway line" but will seek to revisit this issue in future should problems arise.

Second it is the Minister's view that the wording of any approval given to NZRC should reflect precisely the wording of s166 (f) of the RMA and thus the phrase ("including the maintenance, improvement, enhancement, expansion, realignment and alteration)" should not be included. NZRC argues that the wording that they seek is identical to the approval given to Tranz Rail in 1996. However, NZRC does agree with the Ministry's proposed wording noting that it considers the words "construct and operate" are sufficiently broad to cover the maintenance, improvement, enhancement, expansion, realignment and alteration of the railway line.

Thus it is recommended that any approval be given to NZRC be for the network utility operation being the construction and operation of its railway line."

38. Drs Whittle and Fox submit that this is conclusive evidence that a narrow interpretation of Railway line is intentional and was deliberately chosen by the Minister:

    a. NZRC and the Minister were alive to the restrictive nature of the term *'railway lines* but the Minister deliberately declined to enlarge it, opting to ensure it was consistent with the definition of Network Utility Operator under s166(f) RMA, limiting the power of designation to "*railway lines*."

    b. KiwiRail assumed these functions from NZRC in 2012. KiwiRail's application to be a requiring authority was advanced on the basis that it sought the same powers as its predecessor.[18] The 2013 *Gazette* Notice revokes NZRC's 2004 Notice and appoints KiwiRail as a requiring authority (on the same terms that NZRC had held previously), with the addition of "*maintenance, replacement, upgrading and improvement*." The term "*railway line*" remained unaltered. Arguably KiwiRail's *Gazette* Notice did not expand those powers.

[18] Letter KiwiRail to Hon Amy Adams dated 29 November 2012 para [20], '*...New approval is therefore sought so that KHL* ***will have the powers currently enjoyed by NZRC*** *to continue to operate and manage the existing and future nationwide rail infrastructure assets.'*

c. To the extent that the briefing paper can be interpreted as supporting a wider definition (based on the observation that maintenance and operation of a *"railway line"* had allowed Tranz Rail to operate without difficulty since 1996), it is submitted that this must be viewed in the historical context of Tranz Rail's use of that power in the period 1996 – 2004 which was limited to operation of its *"railway line."* KiwiRail's 2018-2019 commercial decision to pursue profit by venturing into development of intermodal freight hubs is a new direction for rail, representing a considerable shift in how KiwiRail operates that is not reflected in the historic use or terms of its requiring power.

The danger of comparison

39. The Panel should not assess the extent of KiwiRail's requiring power authority by comparison with other requiring power authorities including what can *"seemingly"* be done by another requiring authority, at a designated site i.e., an airport. That is the wrong approach because:

a. Some requiring authorities will have obtained Ministerial approval to use the designation process for a specific project work – which allows a requiring authority to seek a designation for a specific project authorised by the Minister. For example, Transit New Zealand approval as a requiring authority for the Christchurch Northern Arterial (State Highway 74).[19]

b. The scope of permissible activities will depend on the *precise* wording of the requiring authority power granted via *Gazette* Notice. Many include wider catchalls for *"ancillary activities"* or *"other works"* – for example City Rail Link is a designation for a specific project work for the City Rail Link in Auckland and includes *"and its associated and ancillary structures, works and activities"*.[20] Queenstown Airport Corporation's *Gazette* Notice[21] widely

[19] The Resource Management– (Approval of Transit New Zealand as a Requiring Authority) Notice 1994) Gazette, 3 March 1994, page 978.

[20] The Resource Management – (Approval of City Rail Link Limited as a Requiring Authority) Gazette Notice 10 August 2017 issue 80.

[21] Gazette Notice, 1 September 1994, 6434, page 2690.

defines "*airport*", as meaning "*any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft and includes buildings, installations, and equipment on or adjacent to any such area used in connection with the Airport.*"

c. Differing statutory definitions are applicable to Network Utility Operators such as the definition of airport above[22] and electricity providers and Transport New Zealand [23] are referred to in *Gazette* Notices and will have a bearing on how these functions are interpreted.

d. The extent that a particular work has been undertaken by a designation for a project work cannot be ascertained from the *Gazette* Notice or looking at the completed project.[24] Works are often developed in co-operation with another requiring authority, or as a stand-alone project work. For example, ports frequently involve a mix of requiring authorities.[25]

e. Some facilities pre-date the RMA and their historic use has evolved over time, for example Ports of Auckland and Dunedin.

f. It is not apparent from a particular *Gazette* Notice the extent of activities occurring, at say an airport fall outside activities to which a requiring authority designation relates. Development of activities outside the scope of a designation or activities undertaken by third parties within a designation land obtain resource consent or because of plan changes – to

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[22] See for example The Resource Management (Approval of Nelson Airport Limited as a requiring authority) Notice 1999, Gazette, 23 September 1999, "airport has the meaning given to that term by section 2 of the Airport Authorities Act 1966." **airport** means any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration.

[23]The Resource Management– (Approval of Transit New Zealand as a Requiring Authority) Notice 1994) Gazette, 3 March 1994, page 978. States that "State Highway" and "motorway" have the same meaning as s2(1) of the Transit New Zealand Act 1989.

[24] For example, Wellington International Airport holds designations for project works for a number of Airport Precincts within land acquired from the Miramar Golf course in addition to its Airport Requiring power authority for core airport activities.

[25] A recent example is Waitohi Picton Ferry Precinct Development – contained all resource consents and ODP (within each parties' respective designations) required for the three requiring authorities involved in the Development Port Marlborough, KiwiRail and Marlborough District Council. This was consented as a proposal recognized under the Covid-19 Recovery (Fast Track Consenting) Act 2020.

provide a pathway for additional activities to occur within the designation and resource consents.[26]

g. This approach is confirmed by ss 176(1)(a) and 176(2), the effect of a designation is that *a requiring authority* is exempt from the district plan provisions for a work *undertaken by a requiring authority* under the designation. Provisions of a district plan or proposed plan shall apply to any land that is subject to a designation only to the extent that the land is used for a purpose *other* than the designated purpose. Unlike a requiring authority third party undertaking activities within a designation cannot rely on the designation and must seek resource consent. They are not exempt from district plan provisions, and even the requiring authority must apply for consent to undertake activities within the designation but outside of its designated purpose.

40. There are good reasons why KiwiRail's use of those powers should be strictly confined to the terms of the *Gazette* Notice. The Panel will understand that a designation affords a requiring authority considerable benefit. The process facilitates compulsory acquisition of private property and allows requiring authorities to avoid district plan controls or the need to obtain land-use consent. Section 167 RMA unsurprisingly places significant emphasis on the Minister granting approval as a requiring authority *"on the terms specified in the notice"*,[27] being satisfied that the approval of the applicant is *"appropriate for the purposes of carrying on the network utility operation"* and that in that capacity KiwiRail will *"give proper regard to the interests of those affected."*

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[26] For example, Christchurch, Queenstown, Auckland, and Wellington Airports are complemented by underlying zoning provisions, which provide a consenting pathway for non-designated purposes within the airport precincts or for use by third parties for example Christchurch City's PC84 or WCC Wellington's Airport Precinct.

[27] s167(3)

Where to draw the line?

41. It is submitted that the expert planning evidence of Paul Thomas best captures what an ordinary person would understand to be within the scope of a railway network utility operation. His evidence is that:[28]

    a. A railway "*operation*" would include loading and unloading wagons, marshalling freight to and from the railway line, and loading and unloading road vehicles for inbound and outbound freight; but

    b. Warehousing, distributing, and processing that freight would be outside the scope of a railway operation.

42. Taking KiwiRail's list of the key elements and associated works for its freight hub, Mr. Thomas's view is that the following four aspects may to some extent be outside the scope of a railway operation.

43. Container terminals (176,000m2 required)[29]: The designation can only cover container terminals or container terminal yards to the extent those are for the loading of and unloading of rail wagons and road vehicles. The loading and devanning of containers is a separate aspect that is outside the scope of a railway network utility operation.[30]

44. Freight forwarding facilities (215,000m2 required)[31]: These are only within the scope of the network utility operation if they are for the loading and unloading of freight by KiwiRail. A designation cannot authorise freight forwarding activities by KiwiRail's freight forwarding partners, for example at private sidings.[32] (I would add that it does not appear to make any difference if these are Level 1 or 2).

45. The notice of requirement for a designation cannot lawfully be confirmed to the extent it seeks to cover KiwiRail granting leases or licenses to its freight forwarding

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[28] Paul Thomas evidence at [11]–[12].
[29] See Table 4.1 Key Components of the Masterplan, KiwiRail NoR and AEE, Stantec October 2020.
[30] Thomas at [16].
[31] Ibid.
[32] Thomas at [25].

partners or customers or authorises use of private sidings. It is hard to see how KiwiRail can maintain financial responsibility for these aspects. More generally, a designation can only authorise land uses and activities undertaken by the requiring authority; not by other persons.[33]

46. Log handling yards (87,500m2 required):[34] These are only within the scope of the network utility operation to the extent they are for unloading and loading logs from rail wagons.[35] It is submitted that it would be out of scope for the designation to cover log processing such as fumigants, debarking and splitting.

47. Bulk liquid storage:[36] Mr. Thomas's view is that temporary storage of bulk liquids that have been or will be transported by rail is within the scope of the railway network operation.[37] However, any longer-term storage or warehousing of liquids is out of scope.

48. Buildings and other ancillary activities to the freight hub/office buildings and carparking and mitigation works such as stormwater ponds and noise bunds: Mr Thomas did not comment on these, but the acceptability of these items will depend on the extent they that are required for activities that are in or out of scope.

49. In conclusion, the Panel needs to carefully regard the scope of KiwiRail's approval as a requiring authority for the operation of its railway network utility operation. If the Panel is to recommend confirmation of the NoR, then it should recommend precise wording as to what activities are within scope of the designation. The older approach to designations, for example by simply referring to "*railway purposes*" with no elaboration is not appropriate when KiwiRail is seeking a new designation to cover a very wide range of activities. The modern approach to designations is to provide precise wording as to the scope of the designation.[38]

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[33] RMA, s 167(1)(a).

[34] Ibid.

[35] Thomas at [29].

[36] Is not broken down in Table 4.1 of the NoR and AEE – no figure is given. Note the reference to KiwiRail facilities at 173,000 indicates that commercial services (requiring 302,500m2) may also be operated by third parties – and should be clarified.

[37] Thomas at [32].

[38] *Titirangi* at [39].

50. The Panel should also carefully assess whether the full area of land proposed for the designation is necessary for activities that are within the scope of KiwiRail's approval as a requiring authority.

51. If the Panel agrees that KiwiRail's intermodal freight hub includes land required for activities that exceed its authority as a requiring authority, it follows that the designation process is unavailable for those elements of the proposal and cannot be granted.[39] It can always seek a private plan change and/or resource consent for those components of the project.

52. What is difficult in this case is that KiwiRail has set out to develop an intermodal freight hub; it has been quite clear about that.[40] If that exceeds its powers, then as Ms Poulson, KiwiRail's Executive General Manager of Property at Kiwirail, and Mr Myles, KiwiRail's Chief Operations Officer, explain in their evidence, KiwiRail scoped the necessary activities based on the components it identified that it needed to develop an intermodal freight hub,[41] this fed into its Masterplan,[42] development of its project objectives,[43] alternatives assessment[44] and site selection[45] resulting in KiwiRail's NoR and its AEE and evidence.[46] The error is apparent from the outset. It follows that consideration would need to be given to the extent that the out-of-scope components of the project have tainted or infected these decisions and assessments of the remaining aspects of the proposal.

Integration with Future Transport Network

53. Another issue for this hearing to grapple with has been the implications of KiwiRail applying for a NoR for the freight hub in advance of the roading projects required in the vicinity to provide for the efficient transport of freight to and from the freight hub via road. The following roading projects are necessary:

[39] i.e cannot be said to be reasonably necessary.
[40] Mr Myles at para 1.4 -1.6. Ms Poulson at 4.1-4.3.
[41] Ms Poulson at para 4.4.
[42] Ms Poulson at 4.5.
[43] Mr Myles at 5.1 re drivers for delivering an intermodal Freighthub.
[44] Ms Poulson 5.1 -5.4
[45] Ms Poulson 5.5.
[46] One example is the extent upon which the purported economics and benefits of the Freight-hub are reliant upon activities for which a Notice of Requirement cannot be issued.

a. Palmerston North Integrated Transport Improvement Projects (PNITI) – including the Regional Freight Ring Road Projects[47] and

b. PNCC Roading Requirements identified in the LTCP that appear to have provision for funding.

54. KiwiRail has acknowledged that projects in a. are not part of the existing environment in a *Hawthorn* sense as they are not yet part of the existing environment – including the reasonably foreseeable future environment - as they have not been confirmed, applied for, or approved and all are dependent on future processes.[48]

55. In respect of projects outlined at b., both Council's and KiwiRail's traffic experts agree that these projects should be considered part of the future traffic environment. Whether that is correct will depend on whether PNCC has obtained roading designations or resource consents for these works (if those are necessary).

56. Counsel for KiwiRail in opening and Ms Bell in her evidence have agreed that it is inappropriate to consider the effects of future roading projects. The Panel must determine whether the project alone meets the Act's sustainable purpose, *as a standalone proposal*. KiwiRail has confirmed that the NoR has been designed to function without these projects.

57. The correct approach was discussed by Board of Inquiry in *Basin Bridge*. In that case the Transport Agency had sought a NoR for the Basin Bridge Proposal in isolation from the interrelated Mt Victoria Tunnel Duplication Project:

> *"[233] We are required to make a determination of the Project before us, having regard to the effects of the Project (both Positive and Negative) and that project alone [..]*
>
> *[234] As Mr. Milne stated we must now take the position as it is. That is, we must determine whether the project before us meets the Act's sustainable management purpose as a stand-alone project (i.e. in the absence of the Mt Victoria Duplication) and on the basis of information regarding the outcomes of the Public Transportation*

[47] PNITI was developed by Waka Kotahi in partnership with the Palmerston North City Council, Manuwatu District Council, Iwi Horizons Regional District Councils and other stakeholders.
[48] Karen Bell evidence 8.13

> *Study available to us. That is a key consequence of the Transport's decision to seek approval from the project as a stand-alone project separate from that of the tunnel duplication, and in advance of the Public Transport Spine Study and outcomes being finalized."*

58. This approach was confirmed by the High Court on appeal.

59. As noted by Ms Fraser[49] this approach has been muddied by KiwiRail's objective 2 which is aimed at integrating and connecting rail with other transport modes and networks. KiwiRail's discussion of how the NoR achieves this place considerable reliance on future Waka Kotahi's North Integrated Improvements Project (Regional Freight Ring Road).[50] It is difficult to see how this objective can be met without considering future roading proposals (which cannot be considered). As noted in the Officers' Report the freight hub will enable rail to be connected to other modes and networks but not always in an efficient way, and that suboptimal integration would risk undermining KiwiRail's other objectives for the project.[51]

60. The impact of future roading proposals is particularly relevant when considering the stated positive effects of the freight hub.

61. The claimed positive effects of the freight hub, being regional growth, increased employment opportunities, increase in the capacity and efficiency of the rail freight transportation network, reduced costs, reduction of carbon emissions and increased efficiency in road/rail are all heavily dependent upon future roading projects – the development of an efficient integrated transport network to realise those benefits.

62. The relationship between future roading improvements and positive economic effects is unclear in Mr Colgrave's evidence. He quantifies the economic benefits of the freight hub and importance to Palmerston North and the wider economy. Nowhere in Mr Colgrave's description of economic benefits of the proposal (including estimates as to economic benefit associated with full operation of the

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[49] S42A Traffic and Transport Sections 7.3, 9.7 and 9.8.
[50] See NoR, 10.3.1.2 – First two paragraphs deal exclusively with future proposals.
[51] Officer Report planning para 902, citing s42A Economic assessments sections 4.3 and 6 and s42A Traffic and Transport sections 7.3, 9.7 and 9.8.

freight hub) does he acknowledge or mention the important role of the PNITI works to unlock those benefits.

63. Mr Paling has also provided evidence as to the economic effects of the proposal including transport efficiency, and benefits and economic drivers for well-integrated and connected road/rail transport. Like Mr Colgrave, he has also included assessments of growth and benefits associated with the hub when fully operational. While Mr Paling goes into considerable detail as to transport efficiency, reduction in cost of moving rail freight integration and connectivity to the hub and wider transport network when making his assessment of the benefits arising from road and rail, he fails to mention the necessity of future PNITI works to facilitate the successful integration of road and rail and transport efficiency.

64. This difficulty with the claimed positive effects of the proposal was commented on in the s42A Report, based on Mr Vuletich's concern that the positive effects were overstated:[52]

> *"The achievement of these positive effects is heavily reliant on the Freight hub being well connected and integrated with the wider Transport Network and with other economic activities in the northeast of the city."*

65. Ms Bell elsewhere in her evidence has acknowledged the importance of the PNITI works and relationship with the freight hub (to an extent that the economic witnesses do not) in the context of discussing lapse periods:[53]

> *"The delivery of the PNITI programme of works will be important* ***to enable the benefits of the freight hub to be fully realised*** *and become fully operational."*

66. This is an important concession. Nowhere else does KiwiRail acknowledge that unlocking the claimed positive benefits of the proposal is contingent on the PNITI works. It is entirely absent from the economic expert's assessment of the positive economic effects of the proposal. The strong correlation between integrated network PNITI works and the success of the freight hub has not been properly acknowledged in those assessments. Mr Vuletich's evidence is that efficient

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[52] PNCC Section 42A planning Report at [17].
[53] Ms Bell, planning evidence at para [9.8].

connections between the freight hub and the existing future road network is the other essential component to maximising the potential economic benefits of the freight hub.[54]

67. In my submission, a serious question arises as to whether the Panel can properly assess the claimed environmental costs and benefits of the project given that full recognition of those positive benefits is contingent on other proposals (the PNITI) that have not been approved. There is a risk those have been overstated or may not be capable of being achieved. KiwiRail should be required to confirm what the positive economic effects of the project are "*as is*" – i.e., without future integration.

Effects assessment

68. Drs Whittle and Fox support and adopt the legal submissions made by Mr Slyfield on behalf of Peter Gore and Dale O'Reilly in their entirety. KiwiRail's approach to the NoR lacks sufficient detail to the extent that it is impossible to determine what those effects might be. It falls short of what is required to enable the Council's experts, Panel and those affected to understand the scale and significance of the various effects and engage with those in any meaningful way. The scenarios discussed by Mr Slyfield in relation to construction and operational noise and visual amenity illustrate this point and are equally applicable to my clients and many others.

69. KiwiRail has taken a selective approach to the assessment of effects of the project – Best practice requires that the level of detail correspond with the severity of the effects.[55]

    a. KiwiRail's approach is also inconsistent with the s3 definition of "*effects*" in the Act:[56]Construction noise and construction traffic have not been modelled[57] (and little attempt has been made to quantify these) despite the

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[54] Section 42 A Report: Economic Impacts, Section 6.2
[55] Schedule 1 RMA – applicable to Resource Consents, provides some guidance as to what is required here. Form 18
[56] Section 3 RMA Meaning of effect In this Act, *'unless the context otherwise requires, the term* **effect** *includes—**(a)**any positive or adverse effect; and**(b)**any temporary or permanent effect; and**(c)**any past, present, or future effect; and**(d)**any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect, and also includes—**(e)**any potential effect of high probability; and**(f)**any potential effect of low probability which has a high potential impact.'*
[57] Dr Chiles' evidence para 4.13.

likelihood for significant "*effects*" including temporary (albeit long term) effects.

b. Cumulative acoustic and vibration effects of the NoR have not been considered. These are defined as '***any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect.***' There is no mention of the cumulative effects of construction noise, intermodal freight hub operational noise, noise generated by trains, construction/operational traffic. Compartmentalising these activities provides no protection for affected properties who will be subjected to significant noise at high levels simultaneously.[58] There are no defined periods for when construction ends and operations start, the definition of operation excludes key activities. The Panel cannot rely on NZS such as the construction or operational noise standard as providing a reasonable level of protection, because the conditions provide and expect those limits to be breached and there is no "*upper limit*" identified in the acoustic conditions for both construction noise and operational noise – just a trigger for further assessment or identification as requiring acoustic treatment or notification.[59]

c. Operational noise is said to exclude operational train noise or vibration (or presumably increased use of NIMT) as a result of the freight hub.[60] Acoustic experts have identified this as "*a legal issue*,"[61] but it was not discussed in KiwiRail's opening and counsel for PNCC has not yet addressed this. It is difficult to see what the legal basis for excluding acoustic effects of train usage of the NIMT is. The relocation of parts of the NIMT line is proposed as part of the NoR for the freight hub, outside of the existing designation. Dr

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[58] Construction and Operational Noise, appear to be compartmentalized. See condition 85(b) Train noise from NIMT and traffic noise have been excluded from this assessment. 6 August conditions.

[59] See for example 6 August condition 71 – sets out soft limits in Table 1 for construction noise and vibration condition 72 table 2. However proposed condition 72 (c) (d) provide a pathway for those to be exceeded with no hard limit. Proposed condition 72A again provides a pathway to exceed construction noise limits in table 1, again with no upper or hard limit – proposed condition 73A also appears to anticapte or allow exceedance.

[60] Dr Chiles' evidence para 4.3 and 4.4 6 August conditions proposed conditions 85(b) noise and vibration 'does not apply to traffic on the perimeter road, or rail traffic on the NIMTL.'

[61] Dr Chiles' evidence para. 9.4.

Chiles clearly claims acoustic benefits relocation of the NIMT as a result of the Freight hub in his evidence as positive effects – but excludes the adverse effects.[62] KiwiRail cannot have it both ways. Mr Lloyd's concerns are supported here. [63]Trains are expected to increase in frequency as a result of the freight hub, rail is a key component of the freight hub therefore acoustic and vibration effects of rail operation including the relocated NIMT should rightly be considered and assessed as part of the effects of the NoR, and/or the existing NIMT as a cumulative effect in conjunction with other noise effects.[64]

d. KiwiRail has failed to undertake any assessment of cultural effects.[65] It is difficult to see how the Panel can ensure that its decision shall recognise and provide for the matters in s6(e)[66], have particular regard to 7(a)[67](aa)[68] or to consider s8[69]. In my submission KiwiRail's recommended condition – for identification on the effects after the NoR has been confirmed,[70] cannot replace the need for the Panel to understand what those effects are and take them into account now – it can't abdicate its responsibilities to decide what levels of adverse effects are appropriate over a whole range of issues.

e. KiwiRail's experts have wrongly dismissed Council's experts concerns regarding deficiencies in the information on ecological, stormwater, natural

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[62] Dr Chiles' evidence para 6.3.
[63] Mr Lloyd's evidence para 224 -225.
[64] In a s104 context, In *Auckland CC v Auckland* RC CA101/07 the Court confirmed that the scope of effects to be considered under s 104 should rightly include those effects that will inevitably flow from allowing the activity. Both the increase in traffic and trains will inevitably flow from the Freight hub designation and should be treated as an effect of confirming the designation. There is no basis for taking a different approach here.
[65] KiwiRail opening legal submissions para 7.3-7.6.
[66] S6 In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
[67] Section 7 Other matters
'In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
(a) kaitiakitanga: **(aa)** the ethic of stewardship:
[68] Ibid.
[69] Section 8 Treaty of Waitangi
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
[70] 6 August conditions PNCC version 10A-10D.

hazards, waterways, and dust effects on the basis they will be the subject of regional consents.

70. The effects assessment is a mandatory part of the NoR application. Section 168 (2) requires KiwiRail to give notice of its requirement in the prescribed form. Form 18[71] states that an application for a NoR should include:

> *"the effects that the public work (or project or work) will have on the environment, and the ways in which any adverse effects will be mitigated."*

71. Consideration of effects of the proposal is focal point, front and centre of the Panels inquiry at s171(3):

> *"When considering a requirement and any submissions received, a territorial authority **must**, subject to Part 2 **consider the effects on the environment** of allowing the requirement..."*

72. It is submitted that:

   a. There is no ability in s171 for the Panel to defer the consideration of effects to an ODP. Effects are a crucial plank of the decision-making function in s171(4).

   b. The Panel must also consider Part 2 matters, the mandatory direction does not allow the Panel to disregard consideration of those Part 2 matters that "may be the subject of future regional consents" or ignore the regional planning framework entirely –the statute does not say that quite the opposite. Section 171(3)(a)(iii) and (iv) directs the Panel to have particular regard to Operative and Proposed Regional Policy Statements and Plans and National Policy Statements and National Environmental Standards – these matters need to be considered.

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[71] *Form 18,* ***Notice of requirement by Minister, local authority, or requiring authority for designation or alteration of designation***

Sections 145, 168(1), (2), 168A, and 181, and clause 4 of Schedule 1, Resource Management Act 1991

c. Conditions may be imposed by the Panel (s171(2)(c)) including to avoid, remedy, or mitigate an effect of the NoR.[72] While there are no restrictions on conditions that can be imposed on a designation, a condition for a designation should:[73]

   i. Be for a resource management purpose.

   ii. Be fairly and reasonably related to the proposed work.

   iii. Not be unreasonable.

   iv. Have to be certain.

   v. Not require third party action.

   vi. Not be discretionary and/or delegate power to make or colour further recommendations.

   vii. Not defeat the designation.

d. Conditions imposed must correspond to an identifiable effect and the Panel must have confidence/ certainty that the condition can address those effects, the Panel cannot delegate its decision-making function[74] (or pass on the responsibility) by imposing conditions such as proposed condition 58 and 79 direct KiwiRail to *"avoid, remedy or mitigate" an identified effect."*[75] The frequency of such conditions are also evidence that there is insufficient understanding of the effects.

e. There are very few "*hard limits*" provided in the 6 August conditions. It is difficult to reconcile these with the Category A,B and C assessments. Mr

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[72] There is no distinct provision relating to conditions imposed on an NoR, it is submitted principles from resource consent conditions under s108 are relevant.

[73] Quality Planning – conditions on designations.

[74] See *Turner v Allison* and *Olsen v Auckland City Council and others* – Salmon J noted in Olsen at page [8] "the condition in effect ousted the ordinary jurisdiction of the Courts to determine the question of compliance or non-compliance with a condition properly imposed by the Board. It is clear that a Court entrusted with judicial duties cannot delegate the performance of such duties to someone else."

[75] See for example 6 August conditions 58 – 'the objective of the CMP is to describe ameansures necessary to avoid, remedy or mitigate the effects of construction of the Freight hub. Or condition 79, re the Operation Traffic Management Plan to avoid, remedy or mitigate any identified transport effects of that traffic.'

Lloyd's comments that the acoustic assessment is nothing more than a *"virtual placeholder"*[76] for future assessments rings true. Use of New Zealand Standards including NZS has been watered down with language not used in the standard such as *"best practicable"* and *"objective," or key sources of noise excluded.*[77] The upper limits of the construction noise standards and operational noise standard are treated as *"soft limits"*[78] triggering further conditions (that themselves have no hard upper limit restricting noise emitted from the freight hub).

f. S176A provides for an outline plan to be provided at the construction stage, when additional information is available. However, it must be understood that territorial authorities cannot impose conditions on an outline plan. A territorial authority can only request changes to the outline plan. Thus, it is normally more appropriate to attach conditions to a designation to provide a framework for preparing and considering an outline plan of works. There is no subsequent ability for a Council to refuse or recommend that a ODP be withdrawn or conditions of a NoR altered if there is later disagreement about the extent of effects or appropriateness of mitigation there would be no recourse for the community. Based on the conditions proposed it would be very difficult to demonstrate non-compliance.

73. In order to reach a decision and impose conditions designed to manage effects of the NoR via a future ODP the Panel needs to be very confident that they have a full understanding of the receiving environment and the extent of the effects of the NoR.

74. KiwiRail depend upon a raft of management plans to address effects. Although a management plan can provide information as to how the parameters or controls can be achieved, it is inappropriate for those controls to be left to the management plan. In *Wood v West Coast Regional Council*:

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[76] Mr Lloyd's evidence para 102.

[77] 6 August conditions noise and vibration.

[78] This means that the Panel should exercise caution in relying upon New Zealand Standards in an *Macquire* sense, as being sufficient or adequate protection – because the conditions provide and expect those standards to be breached.

> *"In the end counsel were agreed on a submission by Ms Robinson that a management plan can be required to be prepared pursuant to section 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent. So for example, in the case of noise, specific noise control limits can be laid down but the way in which these are to be complied with is for the consent holder who will be required to provide a management plan containing information about the method of compliance."*

75. If the Panel accept that a particular measure is necessary to protect amenity or reduce effects to an acceptable level, it is requested that Panel ensure that these are provided for in the conditions imposed by the Panel as "*hard limits.*"Including to control future effects of the freight hub, restrict night time noise, retain indoor and outdoor amenity, recognize and protect a range of noise sensitive areas. This turns an expectation into a certainty and ensures it is enforceable.

76. KiwiRail have opted to take an envelope approach to the NoR, while focusing much of their expert evidence on suggested possible mitigations that are not reflected in the proposed conditions. The danger in this approach is that it will solidify upper limits or worst-case scenario effects (or no upper limits) and once established these quickly become design parameters – there is no incentive to reduce these further and no onus on KiwiRail to do so.

The permitted baseline

77. There is dispute as to whether or not the permitted baseline should apply, and the extent it is relevant. Section 104(2) RMA provides:

> *When formally forming an opinion on subsection (1)(a), **a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect**.*

78. Where applicable, this allows adverse effects contemplated by the plan to be disregarded. However, there is no equivalent provision for designations. The Court in *Beadle* accepted that the permitted baseline *could* apply to designations.[79]

[79] *Beadle* at [63].

However application of the permitted baseline is at the Panel's discretion; it is not mandatory, and these is no case law or statute requiring its application.[80]

79. If applied, the permitted baseline would operate to reduce the adverse effects of the NoR under consideration. As observed by Court of Appeal in *Far North District Council v Te Runanga O' Ngati Kahu:*[81]

> *What is decisive is the exclusionary nature of the permitted baseline test. In essence what this Court observed in Arrigato:*
>
> > *[29] thus the permitted baseline... is the existing environment overlaid with such relevant activity ...as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss104 and s 105 assessments.* ***It is part of the baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.***

80. It is submitted that it would not be helpful to apply the permitted baseline in this case. It is of limited usefulness as it would only be applicable to one third of the site; most of which is zoned rural.[82] Even within the NEIZ land subject to the application the permitted baseline to the freight hub within the NEIZ is artificial and distorts what would usually be achievable in that zone because application of the permitted activities at a scale and intensity proposed in the NoR was never intended (or possible in that area) – it does not represent an accurate or realistic benchline of activities anticipated there. This operates to downplay the true effects of the proposal by manipulating the effects envelope – this approach is particularly inappropriate as it relates specifically to downplay significant amenity effects that KiwiRail has made no attempt to internalise within the NoR.

81. The underlying planning environment is more useful to inform the Panel as to what the district plan provides may occur on the application site and surrounding properties, rather than being adverse effects that the Panel should ignore. It is also useful to understand the reasonable expectations of those who reside in

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[80] Board of Inquiry *Basin Bridge* at [221].
[81] Planning response Question 182.
[82] Ms Bell's evidence para 9.26.

Bunnythorpe as to the intensity, scale and nature of activities that the plan anticipated were acceptable or appropriate in the area,

Lapse date

82. Drs Whittle and Fox seek the statutory default lapse period of 5 years.[83]

83. The Environment Court has previously recognised the default 5 years provided for in s184 RMA as "*being the term* recognised *by Parliament as being an appropriate period for a party to invoke a designation*".[84] Drs Whittle and Fox request that the statutory norm apply here. It is not necessary to complete construction in order "*to give effect*" to a proposal, but it requires KiwiRail to make a start (and an extension to the lapse sought if required).

84. It is accepted that the Panel can exercise its discretion to extend that period.

85. The Environment Court in *Beda Family Trust & Otrs v Transit New Zealand*[85] considered a request for a lapse period of 20 years for a designation for the Hamilton Bypass, noting:

> *"[112] No guidance is given as to the principals that are to be applied in determining a period different to the 1–5-year period mentioned in the statute. To extend the period beyond 5 years a territorial authority and this Court is given a wide discretion.*
>
> *[113]* ***The discretion has to be exercised in a principled manner, after considering all of the circumstances of a particular case****. There may be circumstances where a longer period that the statutory 5 years is required to secure the route for a major roading project.* ***Such circumstances need to be balanced against the prejudicial effects to directly affected property owners who are required to endure the blighting effects on their properties for an indeterminate period. The exercise of discretion needs to be underlain by fairness****"*

86. Counsel for KiwiRail cited this case in opening[86] but appears to have misapplied it. In applying the discretion, it is the need to *balance* the interests of the requiring authority and the interests of directly affected landowners that is at the heart of this

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[83] Section184 RMA
[84] Judge Smith, *North Eastern Investments Limited v Auckland Transport* [2016] NZEnvC 073 at [170] –[171].
[85] Environment Court A139/04
[86] Opening submissions for KiwiRail para 7.59

test. KiwiRail's focus on *"certainty"* for businesses who might be enticed to *"invest in"* the vicinity due to the designation[87] ignores the toll on property owners whose homes and lives will be adversely affected by the designation. While KiwiRail may have acquired 41% of the properties within the NoR[88] it has overlooked the many significantly affected properties that sit outside the designation footprint and will not be acquired as part of the process. For those people a 10 or 15-year lapse period is a 10- 15-year sentence of living in limbo and experiencing stress and uncertainty until at some point the project is developed and they will be subjected to long-term open-ended construction and operational effects.

87. KiwiRail and Council take differing approaches to certainty. KiwiRail contends a 15-year period of the NoR *"sends a clear message"* and creates *"certainty for everyone"*, whereas Council and submitters see it as prolonging uncertainty. In *Hernon & Ors v Vector Gas Limited,*[89]the Environment Court applied *Beda* to decline an application by Vector to extend a lapse period to 10 years. Rejecting Vector's argument that a longer designation provided *"certainty for affected landowners and the community"*, imposing 5 years on the basis that *"greater certainty would be obtained by a shorter period"*.[90] This view is supported by Drs Whittle and Fox and confirmed by Council's experts, including their economic expert Mr Vuletich:[91]

> *"Given the large number of businesses, public sector organisations and households whose future plans depend on the outcome of this project, I would recommend that the lapse period be kept as short as is reasonably possible."*

88. Other factors which support a shorter lapse period are:

    a. KiwiRail advanced the NoR in some haste and now seeks time to work out many of the issues, such as transport connections, consultation and engagement with iwi, detailed site assessments etc. that should have (or at least could have) properly occurred in advance of it seeking the NoR.[92]

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[87] Ibid at 7.63.
[88] Ibid at 7.63
[89] [2010] NZEnvC 203.
[90]*Hernon v Vector Gas Limited* [2010] NzEnvC 203.
[91] Mr Vuletich evidence at para [19].
[92] Evidence of Karen Bell at para 4.7 (e),(f)

b. Bunnythorpe is at significant risk of social and planning blight[93] (for residents both in and out of the designated area).

c. This is exacerbated by the uncertainty as to the severity and duration of adverse effects on properties outside the NoR and lack of ODP.

d. A long lapse period imposes controls on the use of land within the NoR and will adversely affect the ability to sell and price realised for properties outside of the NoR area (that have been identified as being affected).

e. KiwiRail has a history of leaving properties abandoned to become derelict while it decides what to do,[94] further fuelling blight.

f. Long lapse periods increase the risk of designations "*going stale*". They reference long superseded standards and practices (potentially superseded legislation as a result of the proposed repeal of the RMA) and contain conditions that do not properly address all relevant effects in a manner expected at the time they are implemented – in this case up to 2051.

89. In response to the reasons cited by KiwiRail for requesting a 15-year lapse period it is noted that:

a. Transmission Gully Proposal and East-West Link Proposal (cited as being similar projects with 15-year term) are not comparable projects.[95] They were both called in as Roads of National Significance by the Minister and were granted with a full set of resource consents and necessary plan changes in place. The Auckland City Rail Link is a better comparison (albeit more complicated), containing successive designations across urban Auckland. All contain a 10-year lapse date for delivery across all sections despite 20 years initially being sought.

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[93] Defined as *'the reduction of economic activity or property values in a particular area resulting from the expected or possible future development or restriction of development.'*
[94] https://www.stuff.co.nz/business/property/300262139/milliondollar-dumps-publicly-owned-properties-fall-to-rack-and-ruin in respect of the abandoned Waitakere Train Station.
[95] Evidence of Karen Bell at 4.8 and opening submissions at [7.64].

b. Ms Bell's contention that the uncertainty caused by the freight hub NoR is "*no different*" to any other zone change[96] fails to appreciate the extreme stress the designations put on those affected as it removes property owners' rights in favour of the requiring authority (i.e. restrictions on use of land subject to an NoR (s176 RMA)/designation/compulsory acquisition lack of certainty as to detail design and inability for resident participation/challenge to the ODP process, etc.).

Amenity

90. Section 7(c) of the Resource Management Act makes provision for consideration of amenity values. Section 7(c) directs the Panel to "*have particular regard to,*" "*the maintenance and enhancement of amenity values.*" Amenity values are defined in the Act as being:

> *"Those natural or physical qualities or characteristics of an area that contribute to people's appreciation of its pleasantness aesthetic coherence, and cultural and recreational attributes."*

91. Drs Whittle and Fox are concerned about the likely and potential significant adverse effects of the freight hub but are uncertain as to the precise effects they will experience. The remaining residents (those outside of the proposed designation) will be subjected to significant effects particularly in respect of amenity effects (traffic, noise, vibration, dust, light, visual and construction effects). If the freight hub is developed (on the conditions proposed) it will significantly degrade their environment.

92. The freight hub is relatively unique in terms of its desire for 24 hours a day/7 day a week intensive – constant industrial activity (traffic, dust, lights, noise, vibration) and the potential scale of those effects. KiwiRail has not offered the usual respite in the evenings or weekends, or holidays which is often put forward by applicants to mitigate the effects of disruptive exposure to significant amenity effects – even where the long-term construction standard is used this is not uncommon. Activities where this is not possible (one local example PNCC is windfarms or largescale

[96] Ms Karen Bell, para [9.6].

continued quarrying) are usually subjected to far closer scrutiny as to mechanisms, monitoring, reporting, conditions restricting operational activity to certain times, site management, compliance testing and the like aimed at protecting residents from both long- term construction and permanent operational effects.

93. There has been no attempt by KiwiRail to internalise the effects of the NoR within its site or to accept any constraints on its use of the site in order to reduce cross boundary effects to acceptable, safe, or appropriate levels. Mr Lloyd's comments on this are supported. It is not unreasonable to expect KiwiRail to largely manage the effects of its activities onsite and for there to be some control of effects at the boundary of the designation. If that cannot occur, then land can be included in a designation, where it is reasonably necessary to allow for the safe operation of the freight hub (s168(2)(b). This would be a common-sense approach that would enable KiwiRail to acquire land to protect neighbouring residents from unreasonable levels of noise (or other emissions such as dust) and ensure that its neighbours are not unduly affected or burdened by its operations – but it has declined to do so, citing costs and a preference not to sterilise land.[97]

94. The expectation that remaining residents bear the brunt and pay the cost of off-site effects is illustrated by the "*buffer zone*".[98] It is unclear what this is designed to protect given that it comprises many occupied private dwellings – Kiwirail should control its effects at its boundary. Another example which provides an unfair advantage to KiwiRail (over residents) is the exclusion of SACs, the way in which noise predictions and proposed conditions focus on occupied dwellings – for application of the construction noise standard, and the notional boundary not the site boundary of the property which is the usual approach to noise measurements in district plans.[99] KiwiRail's mitigation conditions aim at making affected properties homes "*habitable,* while Category C acknowledges noise at a level where many may not be – is unacceptable.

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[97] Mr Lloyd at para 20.
[98] Mr Lloyd's evidence at para 7.
[99] Mr Lloyd's evidence para. 69.

95. This approach downplays/ ignores the impact on these rural /residential properties. As noted by the Environment Court in *West Wind:*[100]

> *"…. the definition of amenity values in s2 of the Resource Management Act does not limit them to what can be perceived from only inside houses."*

96. Judge Dwyer in relation to *Motorimu*[101] Windfarm emphasised the impact of amenity impacts on rural properties:

> *"People in rural communities enjoy all parts of their properties and can have extensive views over the landscape from some locations. This is a community of people who work on their land. There can be little doubt that for people on such properties, sharing the landscape with a windfarm will be an everyday reality."*

97. Judge Dwyer's comments are equally relevant to Bunnythorpe today. COVID-19 restrictions have meant more people are confined to their homes and have gained a further sense of appreciation of their property's outdoor areas making their gardens and paddocks (not just their dwelling) more pertinent than ever.

Concluding comments

98. In conclusion it is submitted that:

    a. KiwiRail has sought a requirement for activities which exceed its powers as a requiring authority and for these aspects of the proposal no designation is available.

    b. The NoR contains insufficient information to enable the Panel to undertake a proper assessment.

    c. The NoR is to the extent that it can be determined inconsistent with Part 2 of the Act.

    d. It will result in significant adverse effects on the environment that are not adequately avoided, remedied, or mitigated by the proposed conditions.

[100] W031/2207 para 519.
[101] W031/2007 at 142.

e. The positive effects of the freight hub have been overstated and wrongly rely upon on future roading improvements that may or may not occur.

f. KiwiRail's consideration of alternative process was flawed due to early assumptions made as to the size of the site land required and lack of clarity as to how knowledge of the PGF funding impacted the choices of those who participated in the alternatives assessment process and site selection.

g. In the circumstances this designation is not reasonably necessary for achieving the objectives of the requiring authority.

Relief

99. Drs Whittle's and Fox's position remains as stated in their submission. They request the Panel/PNCC recommend to the requiring authority that the requirement be withdrawn.

100. However, in the event that the Panel is inclined to recommend that the NoR is confirmed, it is requested that the designation be modified, and the conditions imposed to address the concerns raised in these legal submissions and in Dr Whittle's and Dr Fox's personal submissions to the Panel.

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P D Tancock

Counsel on behalf of Dr Jo Whittle and Dr Aaron Fox.