rather than the market's response, because the market can be an imperfect measure of environmental effects.

[59] In ***Hudson v New Plymouth District Council,***[13] the Court held that people concerned about property values diminishing were inclined to approach the matter from a rather subjective viewpoint. The Court held that such people become used to a certain environment, and might consider that property values would drop after physical changes occurred, however a purchaser who had not seen what was there before, would take the situation as he/she/it found it at the time of purchase, and might not be greatly influenced by matters of moment to the present owner or occupier.

[60] We agree with the findings in those cases and the reasoning behind them.

[61] The valuation and real estate witnesses for AT were not cross-examined, particularly on the issue of whether existing sub-tenants would leave the site, and/or whether it would prove difficult to re-let parts of the property. We agree with counsel for AT that such claims must, on the evidence before us, be viewed as being entirely speculative.

[62] We consider that Parliament has deliberately created a framework for compensation under the RMA and PWA, in particular s185 of the former and s62 of the latter. This legislative framework contemplates that compensation is not available until a taking occurs or works commence. We discern a number of reasons for this regime. First, losses caused by possible anxiety would be extremely difficult of calculate objectively. Secondly, the "public purse" is involved, and is to be protected from payments being sought beyond compensation expressly ordained by statute. Thirdly, if designations could be successfully attacked and cancelled in the absence of provision for pre-construction compensation, it is conceivable that many major infrastructural projects would never get off the ground, particularly those that require some years of detailed planning and implementation. We were offered no sensible legal framework for finding the existence of a novel type of compensation, and indeed Mr Daya-Winterbottom's own submission about s62 PWA recorded at paragraph [50] above, runs directly counter to the possibility of such existing in law.

[13] Decision number W/138/95 [Environment Court, Wellington]

Temporary effects (during construction)

[63] The evidence on behalf of AT tended to focus on the length of time it would take to construct a new ramp into the Tram Lease property, approximately 3-4 weeks. That however would be to ignore the potential impact of construction effects from the grade separation works between the railway to the north of the property and its road frontage onto Normanby Road.

[64] We consider it important to start by remembering that when major infrastructural works occur in cities, roading patterns are at least temporarily disrupted, and adverse effects such as noise, vibration and dust can be experienced by occupiers of properties in the vicinity. The question is whether these can be adequately mitigated in any given case, or whether a requirement for a designation should be cancelled.

[65] The principal adverse effects here are likely to be of the traffic and transport variety, including vehicular and pedestrian access to the Tram Lease site where there are commercial outlets including a commercial stationery operation and a subscription gymnasium.

[66] The traffic and transport witnesses (Mr I Clark and Mr M Nixon for AT, Mr G O'Connor for the Council, and Mr B Harries for Tram Lease and CJM) were able to reach agreement about a number of matters at the belatedly resumed expert conference.

[67] First they agreed that a safe and operable pedestrian route could be provided between the temporary parking area and the site throughout the ramp construction period. They also agreed that a pedestrian route for persons with disabilities, to and from the temporary carpark to the north of the site, could not be provided because it would need steps; but that this could be addressed through Condition 61. All agreed that the pedestrian accessibility from Normanby Road could be provided for all persons through the existing driveway, and that the permanent arrangement for pedestrian access into the site from Normanby Road would be safe and reasonable.

[68] They also agreed that the on-site parking supply available during the ramp construction period would be less than existing peak demands as surveyed. They agreed that temporary off-site parking would be inconvenient when the carpark on the site was fully occupied during this period, including the need for an approximately

1km diversion route between the two carparks, for vehicles. Mr Nixon offered the opinion that the difference between regular and repeat customers could be taken account of, and "repeat customers," for instance those attending the gym, could be better informed of access to the temporary off-site carparking area, and irregular visitors given priority on site.

[69] The witnesses agreed that the reduction in on-site parking spaces during the construction period would be 15.

[70] Disagreements arose amongst them over the practicality of maintaining the best possible access for parking by customers of the stationary business OfficeMax on account of the 1km quite complex detour. Mr O'Connor and Mr Nixon continued to hold the view that management of parking spaces as between tenancies would assist with mitigation. They considered that offsite provision, combined with such management, would offer acceptable mitigation. The witnesses agreed that if such steps could not be taken, the customers of OfficeMax would be most likely to shop elsewhere if the carpark were full at any time during the 3-4 week construction period (AT's estimate).

[71] We have looked closely at the work done on draft conditions of consent in this regard, and consider that it has been approached sensitively and constructively by AT. There remains the potential for some adverse effects to be somewhat more than minor (but not greatly so).

[72] There was a dispute amongst the witnesses as to the validity of parking surveys that had been undertaken to compare availability of parking at "peak times" with actual usage. The impact on the case of this relatively minor dispute was not addressed in the legal submissions on behalf of the appellant, and Mr Clark was not cross-examined on it.

[73] The parking surveys tended to favour the AT view that disruption would be less than was claimed by Tram Lease and CJM. We agree with the submission made in closing by Mr Beatson that further mitigation measures could be implemented through operation of conditions of consent, for instance through the Social Impact and Business Disruption Deliver Work Plan, assisting with management of parking by different groups of people.

[74] At the end of the day there is also provision for compensation for injurious affection, if needed, under Part 5 of the Public Works Act 1981.

Permanent effects

[75] Adverse effects on Tram Lease, CJM Investments, and sub-tenants and their customers, can be summarised broadly as:

(a) changes to the site frontage;

(b) the addition of an access ramp;

(c) the loss of six carparks (which could have been lessened to 5 carparks absent a request by the appellant about the geometry of the ramp).

[76] The effects tended principally once again to be in the traffic and transport area, but also in the area of urban design and visual amenity.

[77] The traffic and transport witnesses noted that the main section of the new ramp structure as proposed by AT would comply with the maximum gradient in Standard AS2890.2 (that is, 1:6.5), but would not meet the operative District Plan standard of 1:8. The witnesses for AT and the Council agreed that the solution was "not ideal, but safe and reasonable" and as anticipated by draft condition 30.1(i). Mr Harries, called by Tram Lease and CJM, considered that design to the District Plan standards was preferable and achievable because it would provide "greater familiarity to Auckland car and truck drivers, albeit at the cost of one parking space." We consider that this matter can be adequately addressed in conditions of consent.

[78] Bearing in mind the agreement amongst landscape witnesses about minimising the area required for a landscaping strip, the traffic and transport witnesses were able to agree that car parking spaces lost following completion of the construction works would be precisely 1 with a fully compliant District Plan ramp design, and zero with an Austroads design ramp. Having regard to the surveys, Mr Clark considered that a permanent arrangement of 35 carparking spaces would be sufficient to accommodate the observed peak parking demand. Mr Harries considered that tenant access to "legally entitled parking spaces" should take precedence over general carparking occupancy surveys when assessing the situation. Mr Clark maintained the view that parking surveys are useful to establish existing rather than theoretical parking demand, and therefore to understand the actual adverse effect of

loss of parking. He was supported in this by Mr O'Connor and Mr Nixon. We make the same findings concerning the survey issue as we did in discussing temporary effects above.

[79] The urban design and visual amenity witnesses were Mr R Pryor called by Tram Lease, Mr A Ray by AT, together with assistance provided by Mr Newns for explanation of engineering drawings and minimum landscaping dimensions, and Mr S Chapman, a vegetation expert called by AT.

[80] Once again, the resumed expert conferencing proved capable of resolving more than the parties anticipated back in April.

[81] The witnesses agreed that the principal issue in the case is the diminished visibility and physical separation arising from grade separation. Other issues such as the amount of landscaping to be provided were considered comparatively minor.

[82] The visualisations provided with Mr Pryor's evidence-in-chief, and the landscaping elements in the visualisations in Mr Ray's evidence-in-chief, had been superseded as the number of engineering design elements was evolving.

[83] The witnesses agreed that in terms of landscape and visual effects the site and surrounding environment would change substantially. Some of the changes would be positive and some negative.

[84] The positive changes would include:

(a) removal of the level crossing and associated visual clutter and sounds;

(b) lowering of the rail lines adjacent to the site, reducing noise and visual effects, noting however that there was a risk that the catenary might be brought to eye level from the OfficeMax site.

[85] Negative changes comprised most of the matters on which the witnesses were unable to agree, discussion of which follows.

[86] Agreement was reached about modifications to detail such as balustrades (permeability of view favoured), and a balance of the quantum of carparking and

landscaping to be provided. The witnesses agreed that while landscaping would enhance on-site amenity, it was not critical to the functioning of the site.

[87] It was also noted that a 1m wide landscaping strip shown in earlier drawings, could be reduced to 0.5m and offer visual mitigation through planting.

[88] The witnesses agreed that the project has "CPTED" implications (crime prevention through environmental design), which could be addressed through the detailing of permeable balustrades, maximising the width of footpath, orientation of steps parallel to the overbridge, good level of lighting, and selecting materials for ramp and footpath to enhance visual amenity. The witnesses agreed that the draft conditions of consent were heading in the right direction.

[89] Where this group of witnesses was unable to reach agreement, was as to the degree of visual impact anticipated. Mr Ray believed that the design proposals would result in an environment not uncommon in the city fringe area, and believed that the site would still be capable of functioning for activities enabled by the District Plan. Mr Pryor considered that the reduced visibility and physical separation of the site created as a result of grade separation would have an adverse effect on the site's visual amenity. There is some force in both views, but we find Mr Ray's opinion about the locality more powerful, and Mr Pryor's concerns capable of being significantly addressed through mitigation.

[90] We consider that there is nothing in Mr Pryor's complaint that the electric rail catenary might come into view when the overall infrastructure is lowered. Indeed we consider that there would be an improvement in outlook to the north from the site overall, and that the presence of a wire running horizontally through the view would be a minor adverse effect at worst.

[91] There is no doubt that visibility of the site and existing development on it from Normanby Road and wider surrounds will change significantly. The lower part of the building occupied by OfficeMax will be obscured below the raised Normanby Road feature. There was concern on the part of Tram Lease and CJM witnesses that this lessened visibility could result in a downturn in business on the site, but as pointed out to them by the Court during the hearing, signs could be placed on the top of the building (albeit requiring permission under bylaws – as to which we encourage Auckland Council to consider such an approach favourably); and the current relatively

low level of development on the site might not necessarily pertain indefinitely in any event.

[92] We agree with submissions by Mr Beatson that mitigation activity could be further addressed through operation of conditions of consent, including the Social Impact and Business Disruption Delivery Work Plan. Also, that loss of value arising from the change in road level (as with any decrease in carparking spaces) could be the subject of claim under Part 5 PWA. The negative sentiments expressed by valuation and real estate witnesses called by Tram Lease and CJM Investments, not tested by cross-examination, were in our view unduly pessimistic and speculative, and have not succeeded in persuading us that we should contemplate cancelling the requirement for designation. We consider that market forces will be many and varied, will change constantly over time, and should have very little influence on the outcome of the present proceedings other than through imposition of appropriate conditions of consent.

Difficulties with the planning evidence called by appellant and s274 party

[93] We had significant concerns about the evidence of Mr Foster, not just because it covered a great many more issues than it was ultimately necessary to consider (for reasons already discussed), but also because of the way it had been constructed, unsupported by much reasoning, and the use of pejorative and unprofessional expressions about other people and other evidence.

[94] Mr Foster recorded that he is a planning and resource management consultant with over 30 years experience, the last 20 of which have included extensive involvement in large commercial development planning and major infrastructure projects.

[95] Our first concern about Mr Foster's evidence, including his answers to questions in Court, was his tendency to over-confident assertions of opinion backed by little in the way of professional analysis of fact, planning instruments, or expert evidence, but instead amounting to an invitation to us to trust his judgment, something he appeared proud of. The point can be illustrated by an early answer from him to cross-examination by Mr Beatson as follows:

> ...I was looking for a mechanism that actually would allow the concerns of both Tram and CJM as to the effects of the designation on their leasing abilities and so on in the interim period. Now I've always approached major infrastructure projects and I've led many of them, on the basis of

> attempting to as far as possible mitigate any adverse effects whether they be real or perceived and what I'm outlining to the Court in my view is a pragmatic way of addressing the kind of issues that are being raised. Well now it may be off the wall, unusual, but, hello, I have a bit of a reputation for that.

[96] The flavour of his significant confidence in his track record in infrastructural projects unfortunately manifested itself in the tone he employed throughout his evidence, particularly his rebuttal evidence.

[97] With that flavour came a related concern for us, that much of the evidence amounted to advocacy, contrary to the expectations of the Court in its December 2014 Practice Note guiding the work of expert witnesses.

[98] These approaches led him to offer such statements as:[14]

> ...AT fails to recognise or acknowledge such effects. The reality is that an experienced infrastructure provider would realise that such effects are sufficiently significant to warrant a pragmatic approach that involves "buy the property, do the work, and then on-sell it."

[99] Further observations, immediately following the last, included that, in his opinion, the temporary and long-term measures proposed by AT were "unworkable, unrealistic and impractical", followed by an observation that the "*whole thrust of the AT case is founded on the assumption that land will allegedly be made available by KiwiRail to mitigate the adverse effects of the project* [no such arrangement having been made]."

[100] Much of the rest of the evidence-in-chief followed the pattern of starting with a strong negative advocated position, supported by little more reasoning than that we should accept his word because of his considerable experience with major infrastructure projects over the last 20 years.

[101] Yet another concern was that in his evidence, Mr Foster would repeat the expert evidence of other witnesses called by his clients, supply the assertion about his experience, then offer a conclusion that somewhat resembled an assessment of the sort that should be left to the decision maker, in this case the Court. This occurred particularly in his rebuttal evidence.

[14] Mr Foster, evidence-in-chief, paragraph [3.2]

[102] Members of the Court were sufficiently concerned about all of these aspects of Mr Foster's evidence that the Judge questioned him to enquire whether he wanted to stand by them, resile from them, or express them in different terms. With one exception (where he accepted from the Judge that he could have expressed his criticism of AT as "arrogant" better, by saying that they had proved more difficult to deal with than a certain national infrastructure authority), he refused to resile from his positions.

[103] In addition, the Judge gave Mr Foster the opportunity to explain why he and others brought the facilitated expert conferencing to a premature end, and he acknowledged that with hindsight that decision was "*probably unfortunate*."

[104] We took the rare approach of asking the witness to recite from memory the requirements of the Court's Practice Note for the work of expert witnesses, and after some hesitation, and some prompting from the Court, he accepted the need for truthfulness, independence, objectivity, impartiality, and respect for other experts even if fundamental disagreements existed between their positions.

[105] The Court took Mr Foster through the passages of evidence in his two statements that were of concern to it. Mr Foster proved resolute in defence of them, considered that they represented an appropriate expert witness approach, and returned to the theme that he considered that AT had been difficult to negotiate with (we inferred as some sort of justification for the strength of his own responses and statements). Regrettably, all that was finally forthcoming was a heavily qualified and mis-directed apology:

> All I can say is that if I have offended the Court then I apologise. That was not my intention. I have appeared before the Court on a considerable number of occasions and never before had the kind of questions that Your Honour has directed to me been directed at me and that's why I say that I did not – that I, sorry not I did not – I gave very, very serious consideration as to how I should frame my evidence.

[106] We are bound to record that whether or not the Court is "offended" is not the issue. The issue is the requirement of the Court's practice note calling for professionalism.

[107] After the Court had questioned Mr Foster, Mr Daya-Winterbottom re-examined on these matters. Even then, Mr Foster took no opportunity to resile from his positions. It needs however to be said that counsel shares responsibility for

ensuring professionalism of performance by a witness, from the earliest stages of the life of a case.

[108] As a consequence of the belated outcomes of the facilitated conferences and counsels' ability to produce a considerably narrowed statement of unresolved issues, much of Mr Foster's evidence was not needed. If the other elements had remained in contention however, we would have struggled to assign much of it any real weight. (Mr Daya-Winterbottom offered us detailed submissions on the last day of the hearing, from which it was apparent from decided authorities that such problems usually go to weight rather than admissibility. Having said that, our attention was subsequently drawn to a recent decision of the Privy Council ***Pora v R***,[15] a criminal appeal, where an expert witness was held to have purported to supplant the Court's role as the ultimate decision maker on matters that were central to the outcome of the case. The transgression having been significant, his evidence was held to be inadmissible. For the reasons given at the start of this paragraph we have not needed to make a determination as between admissibility and weight on this occasion).

Decision

[109] It will be apparent from the findings that we have been made in earlier parts of this Decision, that we will not be cancelling the Requirement for Designation, but instead have the intention of confirming it. This will need to be on appropriately framed conditions of consent, as to which we provide guidance to the parties in the following paragraphs.

[110] Our intention is that the parties should work further on the draft conditions of consent, and refer them back to the Court. We comment that the Court has already been asked to consider draft consent orders in relation to four of the six Notices of Requirement for the CRL project, and a fifth is due shortly.

[111] In that context, AT and Auckland Council are to conduct an additional exercise of ensuring consistency where necessary, of conditions proposed to attach to all six Designations. The Court will then consider the draft conditions of consent in the present case along with the others, and no doubt issue consent orders in the others, and will a final decision in the present one.

[112] Costs are reserved.

[15] [2015] NZPC1: [2015] UKPC 15 (3 March 2015)

Guidance on draft conditions of consent

[113] The following are the matters the Court requires the parties to attend to concerning the conditions for the designation:

A. Add a new 1.1(g) to include information provided at the Environment Court hearing;

B. Amend condition 1.2(b) to add in a reference to the Environment Court hearing;

C. Amend condition 2.1 so that the lapse period is ten years;

D. Minor clarification proposed by AT to condition 30.1(c);

E. Revised condition 30.1(i) recommended by Ms Linzey in her rebuttal evidence paragraph [10] concerning pedestrian and two-way vehicle access being maintained at all times to 32 Normanby Road. (Note that we approve the changes to (iii));

F. New and revised aspects of conditions 30.1(j) and (k) based on proposal by counsel for AT in legal submissions on 29 June 2015 in relation to KiwiRail land, incorporating tracked changes proposed by the planners at expert conferencing on 29 June, and further changes recommended by Ms Linzey in her rebuttal evidence paragraph [10]. Note that in (j) references should be to 34 carparking spaces in two places, revision 5.0 of Plan 0058, and a reference to District Plan design standards should be added into (i). Sub-clause (v) to read:

> Provision for landscape planting both on the site and on KiwiRail land in the areas shown on DRG 0058 Rev 5.0, in accordance with condition 47.2(c)(x) where appropriate; indicative widths of landscaping to 1m for the section shown alongside the railway and 0.5m for the section on the southern side of the ramp.

In 30.1(k), reference in the first line to be to sub-condition (j), and reference added to the requiring authority in the second line, and a reference to the access ramp no longer being required by the landowner in the third line. In the sixth line, a timeframe to be referred to.

The trigger point for the condition precedent is to be "construction of grade separation works at Normanby Road… not commencing until KiwiRail land is available…"

G. Condition 47.2(b)(ix) to be as recommended by the planners in their expert conference report dated 29 June, with sub-clause (d) to add in reference to ARCOP guidance for pathways in high risk, high brightness areas;

H. New condition 47.2(c)(x) as recommended by Ms Linzey in the tracked change version and further modified in her rebuttal evidence paragraph [7], concerning landscaping on private property, to take account of comments made by Mr Foster and Mr Scrafton;

I. Revised condition 48.1, which was the subject of the joint witness statement by the visual witnesses, remove the last sentence from Ms Linzey's version as recommended also by the planners;

J. Condition 55.1A – to remain as in the Commissioner's version, with Ms Linzey's tracked changes not to apply – see Ms Linzey rebuttal evidence paragraph [5];

K. Condition 55.3(c) – Ms Linzey's recommended addition to address a concern raised by Mr Scrafton in his EIC paragraph 36, appears appropriate;

L. Provide a condition about a permeable balustrade being required not just for CPTED purposes, but also to provide views into the site to address Tram Lease's concerns;

M. An appropriate condition is to be prepared allowing for AT to consult with sub-lessees in the presence of landowner and head lessee, concerning mitigation and to lessen anxieties;

N. Mr Scrafton in his rebuttal evidence paragraph [50] suggests that the visualisation as prepared by Mr Ray be added to the list of drawings in new condition 1.1; however we doubt the wisdom of that pending detailed design;

O. The footprint of the area of the designation should either be extended to include the additional sliver of KiwiRail land, and to accommodate the steps down from Normanby Road; or provision made for KiwiRail to utilise its designation to authorise necessary the works;

P. There is to be no provision for transfer of KiwiRail land to Tram Lease. The conditions should simply remain silent on this point;

Q. Similarly, there is to be no requirement for periodic reports back to the Court, and the conditions will remain silent on that point;

SIGNED at AUCKLAND this 21st day of August 2015

For the Court

L J Newhook
Principal Environment Judge

Waitaki District Council v Waitaki District Council

Environment Court Oamaru C 36/06
3, 5 April 2006
Judge Jackson

Jurisdiction — Procedural decision — Designation — Meaning of "public-work" — Control — Resource Management Act 1991, s 168A; Public Works Act 1981, s 2; Local Government Act 2002, ss 12, 55, 60, 64, Schedule 8, cls 1, 5, 9.

The Waitaki District Council (the WDC) gave public notice of a requirement for a designation of Omarama Airport. The WDC appointed a hearings commissioner to determine the application. Omarama Airfield Ltd (OAL), a council-controlled organisation, managed the airfield and the WDC held 50 per cent of the shares in OAL. The hearings commissioner decided that he had no jurisdiction to determine the application, because the airfield was not a public work as it was not under the control of the WDC. The WDC appealed against the decision as to jurisdiction.

Held (allowing the appeal)

1 The pre conditions for requiring a designation pursuant to s 168A of the Resource Management Act (the RMA) in respect of an established workwere that:

(i) the territorial authority must be authorised to manage, operate or maintain the work;
(ii) it must have control of the work;
(iii) the council must have financial responsibility for the work and;
(iv) the work must be within the district (see para [11]).

2 The commissioner's decision that the airfield was not under the control of the WDC was incorrect. Given the special nature of council-controlled organisations, the meaning of "control" had to be considered in light of the Local Government Act 2002 (the LGA), and an analogy with ordinary company law was invalid (see para [28]).

3 Pursuant to the LGA, all decisions relating to the operation of a council-controlled organisation must be made in accordance with its statement of intent. Further, shareholders of council-controlled organisations had a wide power to require the board to modify the

statement of intent as to, among other things, the objectives of the organisation. Accordingly, the WDC, as a shareholder, had sufficient control of OAL for the purposes of s 168A(1)(a) of the RMA (see paras [25], [28], [29]).

4 If the council requested the designation, it was consequential that the council accepted financial responsibility for those designations (see paras [30], [31], [32]).

Waiotahi Contractors Ltd v Owen (1993) 2 NZRMA 425 followed.

Other case mentioned in judgment
Kelo v City of New London 545 US 469 (2005).

Appeal
This was an appeal by the Waitaki District Council against the decision of Hearings Commissioner Shiels that there was no jurisdiction to confirm notices of requirement for a designation.

G L Berry for the Waitaki District Council.

JUDGE JACKSON.
Introduction
[1] The Waitaki District Council (the WDC) gave public notice of two notices of requirement for a designation of Omarama Airport on or shortly after 11 August 2004. The notices related respectively to:

- the footprint of the airport, being land owned either by Omarama Airfield Ltd (OAL) or by the WDC; and
- the airspace above a much wider area of flight protection areas.[1]

[2] As part of a comprehensive package for the management of Omarama Airport (famous as a gliding base) the Waitaki District Council as territorial authority (the council) notified a variation to its proposed plan and a change to its partly operative district plan as well as the notices of requirement.

[3] A hearings commissioner, Mr T Shiels, was appointed by the council. After hearings he released a full and careful decision on 21 November 2005 on all matters before him. In respect of the notices of requirements Mr Shiels decided he had no jurisdiction[2] to confirm the notices of requirement. The ground for that judgment was that the airfield is not a public work because it is under the control of OAL not the WDC.

[4] The WDC appealed to this Court and requested that the Environment Court resolve the jurisdictional matter as a preliminary issue. After that issue was set down two s 274 parties – Zealandicus Freshwater Crayfish Ltd and Mr M Bayliss – advised the Registrar that they did not wish to be heard on that preliminary issue. There was no appearance by any other party including the council as respondent.

[5] The only party to appear was the WDC as issuer of the notices of requirement. Consequently I have only heard submissions from one party

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1 As shown on the map of "proposed airfield and airspace designations" attached to the "Airspace Designation . . ." dated 11 August 2004.
2 Hearings commissioner's decision dated 21 November 2005 at para 15.

and have not heard submissions for the other side(s) of the argument. I have considered whether I should appoint an amicus curiae but have decided it is not necessary because Mr Shiels, the hearings commissioner, gave full reasons for his decision which I can refer to.

Designations by territorial authorities under Part 8 of the Resource Management Act 1991

[6] Section 168A of the Resource Management Act 1991 (the RMA) provides a mini-code for territorial authorities which wish to designate resources in their own districts. That power contrasts with those given to Ministers of the Crown, local authorities generally and requiring authorities who have to follow the procedures in s 168 of the RMA[3] Section 168A of the RMA states:

> **168A. Notice of requirement by territorial authority** — (1) When a territorial authority proposes to issue notice of a requirement for a designation —
>
> (a) for a public work within its district and for which it has financial responsibility; or
>
> (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work —
>
> it shall notify the requirement in accordance with section 93(2); and the provisions of section 168, with all necessary modifications, shall apply to such notice.
>
> (2) Sections 96, 97, and 99 to 103 shall apply, with all necessary modifications, in respect of a notice under subsection (1), as if every reference in those sections —
>
> (a) to a resource consent were a reference to the requirement; and
>
> (b) to an applicant or a consent authority were a reference to the territorial authority; and
>
> (c) to an application for a resource consent were a reference to the notice under subsection (1).
>
> (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, having particular regard to —
>
> (a) any relevant provisions of —
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and
>
> (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if —
>
> (i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or
>
> (ii) it is likely that the work will have a significant adverse effect on the environment; and
>
> (c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

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3 Or, outside Part 8, in cl 14 of Schedule 1 to the RMA.

(d) any other matter the territorial authority considers reasonably necessary in order to make a decision on the requirement.

(4) The territorial authority may decide to —

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

(5) Sections 173, 174, and 175 apply, with all necessary modifications, in respect of a decision made under subsection (4).

[7] The procedure for territorial authorities who wish to designate for the prescribed purposes[4] in their own district appears to be:

(1) the territorial authority notifies[5] the requirement as if it were a resource consent;[6]

(2) the notice is processed[7] as if it were a resource consent – so there may be submissions, and if so the council must hold a hearing and issue a decision;

(3) the territorial authority must have particular regard to the matters identified in s 168A(3);

(4) the territorial authority does not give a recommendation (as under the ss 168 to 171 of the RMA procedure) but either confirms or modifies the requirement or adds conditions to it or withdraws it;[8]

(5) the territorial authority must serve notice of decision on submitters and landowners/occupiers directly affected.[9]

[8] The following persons may appeal against the territorial authority's decision: the territorial authority itself[10] or a submitter. If a designation is confirmed it must be included in the district plan.[11]

[9] This case turns on the preliminary circumstances which must exist before a territorial authority can use the s 168A procedure. There are alternative sets of circumstances. The first[12] is that the notice of requirement must be:

- for a public work;
- within the district; and
- one for which the territorial authority has "financial responsibility".

The second[13] is that the designation must be:

- in respect of any land, water, subsoil, or airspace
- where a restriction is necessary for the safe or efficient functioning or operation of
- a public work.

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4 As stated in s 168A(1)(a) and (b) of the RMA.
5 Section 168A(1) of the RMA.
6 Under s 93(2) of the RMA.
7 Section 168A(2) of the RMA.
8 Section 168A(4) of the RMA.
9 Sections 168A(5) and 173 of the RMA.
10 Sections 168A(5) and 174 of the RMA.
11 Sections 168A(5) and 175 of the RMA.
12 Section 168A(1)(a) of the RMA.
13 Section 168A(1)(b) of the RMA.

[10] "Public work" is defined as having the same meaning as in the Public Works Act 1981 (the PWA). That is[14] (relevantly):

> **Public work** and **work** mean —
> (a) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use:
> . . .

"Local work" means:[15]

> . . . a work constructed or intended to be constructed by or under the control of a local authority, or for the time being under the control of a local authority:

[11] Combining the requirements of the two statutes, the RMA and the PWA, I hold that the first set of preconditions for requiring a designation in respect of an established work are:

(1) that the territorial authority must be authorised to manage, operate or maintain the work;
(2) it must have control of the work;
(3) the council must have financial responsibility for the work; and
(4) the work must be within the district.

There is no doubt that Omarama Airport is in the Waitaki district so does not need to be considered further.

[12] The first requirement, as to control, was at the heart of Mr Shiels' decision. Mr Shiels held that Omarama Airport is not "local work", and therefore not a "public work" because it is not in the control of the WDC. His reasoning was:[16]

> . . . At least at first sight, the airfield is under the control of Omarama Airport Limited. I accept that, for the purposes of the Local Government Act, Omarama Airport Ltd is a "Council Controlled Organisation". But that does not mean that the airfield itself is under the control of the Waitaki District Council. The point is commonplace in company law. A holding company neither owns nor controls assets held by its subsidiary, even a 100% owned subsidiary. It must be assumed that the whole point of vesting assets in a company, especially one held only 50% by Council, is so that the Directors of the company control the assets rather than the Council itself. For these reasons, I cannot find that the Omarama Airport is under the control of the Waitaki District Council.

[13] As to the WDC's authority, Mr Shiels wrote:[17]

> Mr Berry's submissions refer to the "general power of competency" given to territorial local authorities by Section 12 of the Local Government Act 2002.

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14 Section 2 of the Public Works Act 1981 (the PWA).
15 Section 2 of the PWA.
16 Commissioner's decision, para 75.
17 Commissioner's decision, para 76.

> He submits that the consequence of this is that *any* work undertaken by a territorial local authority is a "local work" and a "public work". That may or may not be correct. Section 3 of the Airport Authorities Act 1966 authorises local authorities, with the prior consent of the Governor-General in Council, to establish, operate or manage airports. There was no suggestion that the Waitaki District Council has such consent in relation to the Omarama Airfield. The general power in Section 12 of the Local Government Act is subject to any other enactment. It may be that an Order in Council under the Airport Authorities Act is still necessary before a local authority can operate an airport. I do not need to decide that because the answer to Mr Berry's submission, in the circumstances of this case, is that the work that is Omarama Airfield is not "undertaken" by the Waitaki District Council. It is "undertaken" by Omarama Airport Limited. The Council's "involvement" as the effective funder of it is not, in my judgment, sufficient to meet a statutory test of who undertakes the work or who has control of the airfield.

[14] I now turn to the three questions that follow from para [11] above.

(1) Does the council have authority to manage or operate an airport?

[15] Section 12 of the Local Government Act (the LGA) stated (relevantly):

> (2) For the purposes of performing its role, a local authority has —
> (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
> (b) for the purposes of paragraph (a), full rights, powers, and privileges.
> (3) Subsection (2) is subject to this Act, any other enactment, and the general law.
> . . .

This general competency appears apt to manage an airport. I should not go behind it and investigate s 3 of the Airport Authorities Act 1966. Nothing the Environment Court can say about the relationship of those two statutes has any authority. I hold that, for the purposes of s 168A of the RMA only, the council has authority under the LGA to operate, manage and maintain Omarama Airport.

(2) Who has control of the airport?

What is "control"?

[16] The first question of course is what is meant by "control"? Since OAL is a limited liability company under (I assume) the Companies Act 1993, Mr Shiels applied an analogy from company law and held that it is the board of OAL which has control of the airport not the shareholders of OAL. I am sure he knows more about the law of companies than I do, so on that issue I would defer to him, without having heard detailed submissions. But I am not sure the analogy is a correct one because "control" of the airport has to be considered in the light of the meaning of that word in s 2 of the PWA, and the special nature of OAL under the LGA. I will turn to those issues shortly, but first I discuss the purpose and context of s 168A(1)(a) given the definitions of "local work" and "public work" in s 2 of the PWA.

[17] The purpose of requiring a local work to be under the control of a territorial authority is the negative but important purpose of ensuring that the powerful provisions of the PWA are not used by private interests. It is, perhaps, the implicit version of the limit to the eminent domain given by the Fifth Amendment to the Constitution of the USA that "private property [shall not] be taken for public use, without just compensation". As Justice O'Connor explained in her (dissenting) opinion in the recent decision of the (US) Supreme Court in:*Kelo v City of New London*[18]

> . . . Government may compel an individual to forfeit her property for the *public* use, but not for the benefit of another private person.

As far as I know the same principle generally applies in New Zealand, although it is subject to various statutes, including the RMA.

[18] As for the context of s 168A(1)'s requirement for control I consider there are three provisions in the RMA which provide why the standard of control required by the territorial authority should not be placed too high as a jurisdictional hurdle. They all relate to the fact that the Council's control of a public work can be substantively tested. First, s 168A(3) provides that the territorial authority, not as requirer but local authority, must have particular regard to alternative sites, routes or methods of undertaking the work if:[19]

> . . . the requiring authority does not have an interest in the land sufficient for undertaking the work; . . .

[19] Secondly, as I discuss shortly, the territorial authority must have financial responsibility[20] for the local work, as well as control of it, so there is a doubling up of control obligations required of the authority.

[20] Thirdly, as Mr Berry pointed out, s 185 of the RMA provides that an owner of an interest in land that is subject to a requirement or a designation may apply to the Environment Court for an order that the requiring authority acquire an interest in the land provided certain circumstances obtain. They include either that the blight on the land represented by the requirement/designation prevents "reasonable use" [21] of the land or that the applicant was the owner[22] of the land when the original notice of requirement was given.

The extent of the council's control of Omarama Airport

[21] In the circumstances of Omarama Airport the purpose of requiring control to be in the WDC as requiring authority may be met by the special circumstance that OAL, which on the face of it manages and operates the airport, is a "council-controlled organisation".

[22] As to the council's control of the Omarama Airport, regrettably no affidavit was lodged about those matters. All I have is the (necessarily unchallenged) statements of Mr Berry in his written submissions that:[23]

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18 545 US 469 (2005).
19 Section 168A(3)(b)(i) of the RMA.
20 Section 168A(1)(a) of the RMA.
21 Section 185(3)(b)(i) of the RMA.
22 Or spouse etc: s 185(3)(b)(ii) of the RMA.
23 Mr Berry's submissions, para 10.

> Omarama Airfield Ltd is a Council controlled organisation of WDC under S6 of the [Local Government Act] 2002 ("LGA") as WDC holds the shares (equity securities) carrying 50 % of the voting rights at a meeting of the shareholders of the company and appoints 50% of the directors. . . .
> The Airfield Company is required to report to Council, operate in accordance with a "Statement of Intent" approved by Council, and is therefore subject to Council control, (as the LGA 2002 defines such organisations). Such control extends to all aspects of OAL activities which WDC as the controlling share holder can direct under Schedule 8 clause of the LGA. This imputes that financial responsibility, (in the form of the LGA controls held by Council), rests ultimately with Council, (Part 5 LGA 2002), Which can impose objectives, governance requirements, limitations on nature and scope of activities, asset and borrowing ratios accounting policies, performance targets and other methods by which to judge performance, shareholder distribution requirements, reporting requirements, and share acquisition procedures on OAL, (clause 9 Schedule).
> To the extent that it may be required to do so, WDC can therefore control OAL.

It appears to me that Mr Berry rather overstates the council's direct control of OAL, especially since it only holds exactly 50 per cent of the shares of the company, and therefore cannot outvote them.

[23] I accept that OAL falls within the definition[24] of a "council-controlled organisation". I doubt if that title is conclusive evidence that OAL is controlled by the WDC.

[24] Part 5 of the LGA sets out the powers and duties of council-controlled organisations. Section 55 of the LGA explains that:

> **55. Outline of Part** — This Part establishes —
> (a) requirements for the governance and accountability of council-controlled organisations and council organisations; and
> (b) procedures for the transfer of local authority undertakings to council-controlled organisations.

[25] As to the OAL's power to make decisions, s 60 of the LGA provides:

> **60. Decisions relating to operation of council-controlled organisations** — All decisions relating to the operation of a council-controlled organisation must be made by, or under the authority of, the board of the organisation in accordance with —
> (a) its statement of intent; and
> (b) its constitution.

[26] A statement of intent is not exactly explained but elaborated in s 64 of the LGA:

> **64. Statements of intent for council-controlled organisations** — (1) A council-controlled organisation must have a statement of intent that complies with clause 9 of Schedule 8.
> (4) Schedule 8 applies to statements of intent of council-controlled organisations.
> (5) A statement of intent —

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24 Section 6 of the LGA.

(a) must not be inconsistent with the constitution of a council-controlled organisation; and
(b) may include and apply to 2 or more related council-controlled organisations.

. . .

[27] Rather curiously the purpose of a statement of intent is not specified in the LGA itself but in Schedule 8 to that Act. Clause 1 of that schedule reads:

> **1. Purpose of statement of intent** — The purpose of a statement of intent is to —
> (a) state publicly the activities and intentions of a council-controlled organisation for the year and the objectives to which those activities will contribute; and
> (b) *provide an opportunity for shareholders to influence the direction of the organisation;* and
> (c) provide a basis for the accountability of the directors to their shareholders for the performance of the organisation [Emphasis added.]

Initially I was concerned about the lack of the power given to shareholders. The only extra powers they are given, in addition to the powers shareholders usually have to remove and appoint directors, is the power to "influence the direction" of the council-controlled organisation. That does not sound like "control" to me.

[28] However, I note that the shareholders may have the last word. By resolution they have a wide power to require[25] the board of a council-controlled organisation to modify the statement of intent as to, amongst other things, the objectives[26] of the organisation. In those circumstances I consider that the commissioner's analogy with ordinary company law is invalid. Under the LGA the shareholders (which includes the council) have control over the objectives of the directors. That is enough "control" for the purposes of the PWA, and therefore the RMA.

[29] I therefore hold that the WDC has sufficient control of OAL to satisfy the requirement of s 168A(1)(a) of the RMA.

(3) Does the council have financial responsibility for the airport?

[30] Counsel advised me[27] that:

> It has been categorically accepted by Council in relation to these designation requests that the Waitaki District Council accepts financial responsibility for the designations. The assurance was specifically provided to the Commissioner, and is consequential, in the fact that the designations have been requested by the Council, and, if approved, Council will be the party that holds the designations (not the Airfield Company).

[31] The reason why financial responsibility is important was explained in *Waiotahi Contractors Ltd v Owen*[28] There the High Court

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25 Clause 5 of Schedule 8 to the LGA.
26 Clause 9 of Schedule 8 to the LGA.
27 Mr Berry's submissions, para 9.1.
28 (1993) 2 NZRMA 425.

was considering an appeal from the Planning Tribunal in a case where the Whakatane District Council had refused to accept continuing financial responsibility for a public work. The High Court concluded that a designation could not be maintained in the face of a designating authority's disclaimer of financial responsibility for it. Henry J concluded:

> . . . The provision in a district Plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. *In this context the nature and extent of the financial responsibility is irrelevant. That is something that must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important.* I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work [Emphasis added].

[32] I hold that the WDC has financial responsibility for the Omarama Airport.

Conclusions

[33] I hold that there is no jurisdictional bar to the Environment Court hearing the substantive appeals against the council's decision as territorial authority that the notices of requirement be withdrawn.

[34] Mr Berry advised me that he understands all parties agree to mediation. Accordingly this proceeding is now placed in the Parties' Hold track and referred to mediation. The council is directed to report on progress by 30 September 2006.

29 November 2012

Hon Amy Adams
Minister for the Environment
c/- Ministry for the Environment
PO Box 10362
WELLINGTON

Copy to: Oliver Sangster, Natasha Tod, Emma Whalley, Ministry for the Environment

Dear Minister

APPLICATION FOR APPROVAL AS A REQUIRING AUTHORITY UNDER SECTION 167 OF THE RESOURCE MANAGEMENT ACT

Introduction

1. KiwiRail Holdings Limited ("**KHL**") applies for approval to become a requiring authority under section 167 of the Resource Management Act 1991 ("**Act**"). This letter outlines the matters to take into account when considering the application (as required by Form 17 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003).

2. KHL seeks for the approval to take effect on 31 December 2012, which is when it will take over the KiwiRail business and become a network utility operator.

3. We appreciate the tight timeframes involved and are available to assist throughout the process to allow that deadline to be met.

Background

4. On 31 December 2012, KHL will take over the KiwiRail business that is currently operated by the New Zealand Railways Corporation ("**NZRC**"). NZRC is currently a requiring authority in respect of the network utility operation of its railway line. On 31 December, KHL will become the operator of the rail network, take over financial responsibility for the railway line and will take over the designations currently held by NZRC. Because KHL will essentially take the place of NZRC in this way, KHL requires the same requiring authority status that NZRC currently has. This will enable the effective transfer of NZRC's designations to KHL, and allow the KiwiRail business to continue operating as it does currently.

5. To explain further, Cabinet has agreed to restructure the ownership of the KiwiRail business as follows:

   (a) The Minister of Finance and Minister for State Owned Enterprises incorporated KHL on 6 November 2012. Its certificate of incorporation is **attached** as Appendix 1. It will be made a State Owned Enterprise by Order in Council, with effect from 31 December 2012.

(b) The KiwiRail Holdings Limited Vesting Order 2012 ("**Vesting Order**") will be made under section 6 of the New Zealand Railways Corporation Restructuring Act 1990. The Vesting Order will transfer to KHL virtually all of NZRC's assets and liabilities, including NZRC's designations and consents. (The Vesting Order is expected to be approved by Cabinet shortly. The above mentioned Ministers have already signed the list of assets and liabilities to be transferred (**attached** as Appendix 2), which is the first step in the vesting process outlined in that Act.)

(c) The result will be that the KiwiRail business will be operated by KHL. That is, KHL will essentially be substituted into the same position as NZRC, as the parent entity operating the KiwiRail business and owning subsidiary companies.

KHL as a network utility operator

6. KHL is a network utility operator as defined in section 166 of the Act because, from 31 December 2012 when the Vesting Order takes effect, KHL will be a person who constructs, operates, and proposes to construct and operate, a railway line, satisfying paragraph (f) of the definition of "network utility operator".

7. KHL will be responsible for the nationwide operation, construction, maintenance, improvement, replacement and extension of the existing railway system, as well as being responsible for future construction of new rail routes (such as the currently designated route from Southdown to Avondale, in Auckland). The KHL Group will own the railway infrastructure assets, including tracks, and will lease the underlying land.

Network utility operation which application relates to

8. The application relates to the following network utility operation: the construction, operation, and proposed construction and operation, of any railway line currently owned by NZRC and any future railway line to be part of that network.

9. NZRC owns 4,000 kilometres of track and has rights to use 18,000 hectares of land. From 31 December 2012, the KHL Group will own the tracks and all other railway infrastructure assets, and have rights to use the underlying land. It will become responsible for the nationwide operation, construction, maintenance, improvement, replacement and extension of the existing and future railway system (including lines, rail yards, station precincts and off-rail sites, and route protection corridors).

10. A basic map of the network can be accessed at kiwirailfreight.co.nz/our-locations.aspx. The network utility operation will occur throughout 57 territorial authorities. A list of those territorial authorities is **attached** as Appendix 3.

11. Freight, long distance passenger and commuter passenger services operate over the network, most of which are operated by KiwiRail.

12. The KiwiRail business consists of the following units:

- **KiwiRail Freight** provides rail freight services and locomotives for passenger services.

- **KiwiRail Interislander** operates the Cook Strait ferry passenger and freight services.

- **KiwiRail Passenger** provides urban passenger services in Wellington under contract to the Greater Wellington Regional Council through the Tranz Metro business. It also operates long distance passenger train services, such as Scenic Journeys provided on the Coastal Pacific, TranzAlpine, Northern Explorer and Capital Connection services.

- **KiwiRail Infrastructure and Engineering** maintains and improves the rail network and controls the operations of trains on the network. It also services locomotives and rolling stock.

13. KiwiRail's Infrastructure and Engineering team undertake maintenance, renewals and upgrades to the network. The team also manages major infrastructure projects including developing Auckland's rail transport network, the Wellington region rail programme, North South Junction upgrade work, the bridge replacement programme, and the sleeper replacement programme.

Why approval of this application is appropriate

14. Approval of this application is appropriate to enable KHL to carry out that network utility operation for the following reasons;

15. The railway is generally a non-flexible feature of New Zealand's infrastructure. It is restricted by New Zealand's topography and the physical limitation of railway operation such as engineering constraints for curves, gradients and tunnels. The very nature of the railway as a continuous corridor sees it passing through 57 territorial authority boundaries with numerous zonings ranging from rural / residential, to industrial / commercial. Compliance under such a multitude of zones and district plans under the resource consent process would be of significant detriment to the ability to operate, maintain and enhance the railway, given its nature as a non-flexible continuous corridor.

16. In addition, without requiring authority status, KHL would not be able to take immediate, preventative or remedial measures pursuant to section 330 of the Act in order to repair damage to the network. For example the recent South Island seawall works required KiwiRail to exercise the section 330 powers. Another example is the Matata Bridge 123 matter, where a bridge was washed away and KiwiRail exercised the powers under section 330 to repair the bridge so it could continue to operate its network. If KiwiRail had not been able to exercise those rights the situation would have been untenable. In that situation, KiwiRail would have had to await the conclusion of an Environment Court appeal before repairing (as a neighbour was opposed to the regional council's stormwater management policies generally) or undertake the repair works unlawfully.

17. In the case of washouts, landslips and other incidents where KHL's facilities (as they will be after 31 December 2012) are affected by natural forces, or other matters outside its control, it cannot simply rely on the normal resource consent process to get its network back in quick working order and requires requiring authority status to access the powers of section 330 to achieve that.

18. The KiwiRail Strategic Plan, approved by the Government, was designed to preserve and enhance New Zealand's national rail freight network and move KiwiRail to a sustainable business model that delivers value to its customers

and the taxpayers. KiwiRail has made significant progress towards achieving this and has so far invested $1.8 billion in the network. It has expanded its freight operations year on year to entice businesses to use rail freight more. New rolling stock, the extension of the Aratere and major upgrades to the network means KiwiRail can now offer fast and more frequent services for its freight customers.

19. KiwiRail, with investment from the Government, has also invested significantly in improving passenger services to encourage people to use them. Major upgrades to the Auckland and Wellington metropolitan networks have been completed.

20. In order to continue to operate the nationwide rail network and undertake the other activities outlined above, KHL needs to be responsible for the existing designations held by NZRC. 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.

Responsibilities

21. KHL will continue to carry out all the responsibilities (including financial responsibilities) of a requiring authority under the Act and will give proper regard to the interests of those affected and to the interests of the environment in the following ways.

22. KHL will carry out the financial responsibilities of a requiring authority as it will own the relevant railway infrastructure assets, and the business unit to maintain and construct the railway network.

23. KHL will continue NZRC's practices in respect of giving proper regard to the interests of those affected by its activities and to the interests of the environment. NZRC has a proven track record in this regard.

Environmental responsibility

24. KiwiRail has recently updated its Corporate Responsibility and Environmental policies which set out its strategy for working within NZ's social, economic and environmental content. These, and the other documents cited below are **attached** as Appendix 4.

25. Much of the work carried out by KiwiRail is contained within its existing designated corridors and there have been few large extensions to the network in the last 20 years.

26. Where new alignments and corridors have been proposed, KiwiRail has embraced the RMA process – including community consultation. For example, the most recently completed Notice of Requirement process has been the Oakleigh to Marsden Point link in Northland. KiwiRail worked in partnership with the Northland Regional Council on its Notices of Requirement to the Whangarei District Council. The new designation, which was settled by consent this year when agreement was reached with all affected landowners, NZTA and the District and Regional Councils, contains conditions and a management plan approach to the future construction and operation of the new rail link, to ensure that those affected by the designation and associated works and the environment are adequately provided for. That Notice of Requirement was advanced with extensive consultation with affected parties and the wider

community and was adapted to ensure that the delivery of the project will reduce disruption and will be integrated well with the local community.

27. KiwiRail has good relationships with iwi, and often calls upon the assistance of those relationships in RMA matters from Te Kupenga Mahi; a Maori Network operating within KiwiRail and the greater rail industry in New Zealand. The network provides advice to the company in policy development, other culturally appropriate matters, assists staff in their RMA interactions with councils/consultees, and supports KiwiRail's strong regional iwi relationships throughout the country.

28. KiwiRail has, over the past 5 to 8 years, also worked closely with Auckland Transport (formerly ARTA) and the Auckland Council on the improvements to the Auckland metropolitan network via two major projects:

    (a) DART (double tracking and station upgrades); and

    (b) the Electrification Project (electrification of the Auckland metropolitan area).

29. These projects have all been developed in close partnership with the relevant local territorial authorities and (former) regional council and have largely been completed via the Outline Plan of Works process, with a management plan approach to any environmental effects generated throughout the construction process. These large projects give effect to the new Auckland Council's Auckland Plan and regional land transport objectives.

30. Other recent examples of collaboration between KiwiRail and relevant Council's and stakeholders in Auckland include the Additional Waitemata Harbour Crossing and CBD Link projects. Both of those projects have seen NOR documentation finalised collaboratively.

31. In Wellington, the Wellington Regional Rail Programme ("**WRRP**") was successful in achieving a stepped change improvement to Wellington's railway network. The benefits included double tracking to Waikanae, constructing a third track into Wellington Station and improving the traction overhead to carry more power. This work resulted in increased train speed, improved timekeeping for trains, reduced number of faults and more train services. These works were designed to maximise the existing railway corridor in order to minimise effects on adjacent land uses.

32. On a day to day basis, the works needed to be undertaken by KiwiRail to enhance the bulk of KiwiRail's infrastructure are more about upgrading the existing track and equipment needed to run trains, accommodate passengers, maintain the railway and load and unload freight. This can range from works to provide for track slews and realignments, maintenance, and upgrading, to providing facilities for modal transfer (yards and sidings). The majority of this day to day work relies upon the Outline Plan of Works process with most territorial authorities in New Zealand, as the work falls within existing designations.

33. As outlined above, significant works have been undertaken with extensive consultation (even though that technically was not required for outline plans).

34. The KiwiRail business will continue the above approach to responsible development, consultation and collaboration under KHL.

Financial responsibility

35. As a newly incorporated company KHL does not yet have any annual reports. Given the transfer of the KiwiRail business to KHL, the latest NZRC annual report is relevant to this application, and is **attached** at Appendix 5, along with KiwiRail's statement of corporate intent (Appendix 6). However, the financial statements of KHL will differ from NZRC. The key reason for the Cabinet decision to restructure the ownership of the KiwiRail business is to establish a balance sheet for KHL's commercial operations which enables better measurement and monitoring of the Crown's continuing investment in them. This involves the KHL Group not including the value of railway land on its balance sheet (as it will only have a leasehold interest in land) and valuing assets on a profit oriented entity (POE) basis. NZRC will continue to value its assets, railway land, on a public benefit entity (PBE) basis. It is expected that KHL will begin trading with around $1.0bn of assets and $0.5bn of liabilities, as detailed in the list of assets and liabilities to be vested in KHL that has been signed by Ministers (Appendix 2). KHL will own the assets to continue to operate the KiwiRail business and have access to the railway land under a lease.

36. In respect of obligations on KiwiRail as a requiring authority to acquire land affected by its designations, the vast majority of KiwiRail's railway corridors are on Crown land over which the KHL Group will have rights to occupy and use. Virtually all land is purchased, held and disposed of via the Public Works Act process. However, in some places, slivers of land that have not yet been purchased by the Crown are designated for corridor widening works or for new corridors (eg at Marsden Point and Avondale Southdown).

37. In addition, historically some designations covered a more extensive area than was required for the construction of the railway alignment. Where land is no longer required by KiwiRail, it takes the opportunity through District Plan reviews to remove private properties that are no longer required for the designated purpose from the designation. For example, KiwiRail is currently in the process of uplifting designations from 54 properties through the new Auckland Unitary Plan process.

38. KiwiRail is also working closely with Northland Regional Council to meet its obligations to purchase the land affected by the Marsden Point designation.

39. The remaining slivers of land designated and not yet owned by KiwiRail nationally would amount to no more than $8 million. However, not all land subject to a designation is required to be purchased.

40. Accordingly, KHL would have the financial capability to acquire land over which it would have designations if required to do so under the Act

Timeframe

41. Under section 180 of the RMA, a designation can be transferred from one requiring authority to another when financial responsibility for a network utility operation transfers. On 31 December when the Vesting Order takes effect, KHL will become the owner and operator of the rail network, take over financial

responsibility for the railway line and have vested in it the designations currently held by NZRC.

42. KHL must have requiring authority status by 31 December 2012 in order for the transfer of designations to be effective under that section. Accordingly, KHL seeks that this application be processed with urgency.

43. Cabinet is expected to grant approval for the 28-day rule (that Orders in Council should not come into force until at least 28 days after they are notified in the Gazette) to be waived for making the Vesting Order, and other Orders in Council required to give effect to the restructure. The reasons for this are that the Orders have little or no effect on the public, and the waiver is sought to ensure this timeframe of implementing the restructure can be met. Similar reasons would apply to the requiring authority status coming into force.

Contact details

44. We trust that this letter provides sufficient information for you to progress the requested approval. We are of course happy to provide any further information that you or your officials may require, or to meet in person, if that would assist.

45. Please use Russell McVeagh as the first point of contact, as follows:

Attention: James Gardner-Hopkins / Emma Matheson

Address: Russell McVeagh
PO Box 10-214
Wellington 6143

Phone: 04 819 7870 / 04 819 7892

Email: james.gardner-hopkins@russellmcveagh.com
emma.matheson@russellmcveagh.com

46. We have **enclosed** the appropriate fee of $511.10 (as required under Schedule 2 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003).

47. Thank you for your consideration of this matter.

Yours sincerely,

Pam Butler
Senior RMA Advisor
On behalf of KiwiRail Holdings Limited
29 November 2012

Appendix 1 - Certificate of Incorporation

Departmental Notices

Business, Innovation and Employment

Crown Entities Act 2004

Appointment/reappointment to the New Zealand Tourism Board

Pursuant to section 28(1)(a) of the Crown Entities Act 2004, the Minister of Tourism has appointed

Jamie Grant Daniel Tuuta, of Wellington

as a member of the New Zealand Tourism Board for a three-year term commencing on 7 March 2013 and expiring on 7 March 2016; and reappointed

Richard Ian Leggat, of Auckland

as a member of the New Zealand Tourism Board for a second term commencing on 1 February 2013 and expiring on 1 February 2016.

Dated at Wellington this 5th day of March 2013.

RT HON JOHN KEY, Minister of Tourism.

go1453

Culture and Heritage

Crown Entities Act 2004

Appointment to the Arts Council of New Zealand Toi Aotearoa

Pursuant to section 28 and Schedule 5 of the Crown Entities Act 2004, I appoint

Dr Richard Grant, of Havelock North

as chair and as a member of the Arts Council of New Zealand Toi Aotearoa for a term commencing on 1 April 2013 and expiring on 31 December 2013 (or such earlier date on which the current council is abolished).

Dated at Wellington this 2nd day of March 2013.

HON CHRISTOPHER FINLAYSON, Minister for Arts, Culture and Heritage.

go1479

Education

Education Act 1989

Waipaoa Station School (2722) **Closure Notice**

Pursuant to section 154 of the Education Act 1989, I hereby declare that **Waipaoa Station School**, Gisborne/East Coast Region, will close on 5 May 2013 and will cease to be established on that day.

Dated at Wellington this 5th day of March 2013.

HON HEKIA PARATA, Minister of Education.

go1553

Te Puia Springs School (2699) **Closure Notice**

Pursuant to section 154 of the Education Act 1989, I hereby declare that **Te Puia Springs School**, Tairāwhiti, will close on 5 May 2013 and will cease to be established on that day.

Dated at Wellington this 5th day of March 2013.

HON HEKIA PARATA, Minister of Education.

go1554

Te Kura Kaupapa Māori o Waipiro (2724) **Closure Notice**

Pursuant to section 154 of the Education Act 1989, I hereby declare that **Te Kura Kaupapa Māori o Waipiro**, Waipiro Bay, will close on 5 May 2013 and will cease to be established on that day.

Dated at Wellington this 5th day of March 2013.

HON HEKIA PARATA, Minister of Education.

go1555

Notice of Direction to Appoint a Limited Statutory Manager for the Board of Trustees of Sir Douglas Bader Intermediate School, Mangere (1215)

Pursuant to section 78M of the Education Act 1989, I direct the Secretary for Education to appoint a limited statutory manager for the board of trustees of Sir Douglas Bader Intermediate School because of risks to the educational performance of its students and the operation of the school.

The following functions, powers and duties of the board are to be vested in a limited statutory manager:

- All functions, powers and duties of the board as an employer (whether statutory or otherwise);
- all functions, powers and duties of the board in curriculum management including teaching and assessment practice (whether statutory or otherwise); and
- all functions, powers and duties of the board to establish board systems and processes (whether statutory or otherwise) for school-wide self-review.

A limited statutory manager must also advise the board on the following:

- Effective financial management; and
- effective communication with its staff and community.

This notice takes effect on the day of publication.

Dated at Wellington this 5th day of March 2013.

HON HEKIA PARATA, Minister of Education.

go1242

Environment

Resource Management Act 1991

The Resource Management (Approval of KiwiRail Holdings Limited as Requiring Authority) Notice 2013

Pursuant to section 167 of the Resource Management Act 1991, the Minister for the Environment gives the following notice.

Notice

1. Title and commencement—(1) This notice may be cited as the Resource Management (Approval of KiwiRail Holdings Limited as a Requiring Authority) Notice 2013.

(2) This notice shall come into force on the 7th day after its publication in the *New Zealand Gazette*.

2. Approval as a requiring authority—KiwiRail Holdings Limited is hereby approved as a requiring authority under section 167 of the Resource Management Act 1991, for its network utility operation being the construction, operation, maintenance, replacement, upgrading, improvement and extension of its railway line.

3. Revocation—This notice revokes the Resource Management (Approval of the New Zealand Railways Corporation as Requiring Authority) Notice 2004 (dated the 16th day of September 2004 and published in the *New Zealand Gazette,* 23 September 2004, No. 124, page 3070).

Dated at Wellington this 4th day of March 2013.

HON AMY ADAMS, Minister for the Environment.

go1447

Health

Medicines Act 1981

Consent to the Distribution of New Medicines

Pursuant to section 20 of the Medicines Act 1981, the Minister of Health hereby consents to the distribution in New Zealand of the new medicines which were referred to the Minister of Health under the provisions of section 24(5) of the Act and are set out in the Schedule hereto:

Schedule

Product:	**Enbrel**
Active Ingredient:	Etanercept 25mg
Dosage Form:	Powder for injection with diluent
New Zealand Sponsor:	Pfizer New Zealand Limited
Manufacturer:	Boehringer Ingelheim Pharma GmbH & Co KG, Biberach an der Riss, Germany
Product:	**Enbrel**
Active Ingredient:	Etanercept 50mg
Dosage Form:	Powder for injection with diluent
New Zealand Sponsor:	Pfizer New Zealand Limited
Manufacturer:	Boehringer Ingelheim Pharma GmbH & Co KG, Biberach an der Riss, Germany
Product:	**Enbrel**
Active Ingredient:	Etanercept 25mg
Dosage Form:	Solution for injection
New Zealand Sponsor:	Pfizer New Zealand Limited
Manufacturers:	Vetter Pharma-Fertigung GmbH & Co Kg, Langenargen, Germany Pfizer Ireland Pharmaceuticals, Dublin, Ireland Boehringer Ingelheim Pharma GmbH & Co KG, Biberach an der Riss, Germany
Product:	**Enbrel**
Active Ingredient:	Etanercept 50mg
Dosage Form:	Solution for injection
New Zealand Sponsor:	Pfizer New Zealand Limited
Manufacturers:	Vetter Pharma-Fertigung GmbH & Co Kg, Langenargen, Germany Pfizer Ireland Pharmaceuticals, Dublin, Ireland Boehringer Ingelheim Pharma GmbH & Co KG, Biberach an der Riss, Germany

Dated this 7th day of March 2013.

DR DON MACKIE, Chief Medical Officer, Clinical Leadership, Protection and Regulation Business Unit, Ministry of Health (pursuant to delegation given by the Minister of Health on 6 July 2001).

go1516

Consent to the Distribution of New Medicines

Pursuant to section 20 of the Medicines Act 1981, the Minister of Health hereby consents to the distribution in New Zealand of the new medicines set out in the Schedule hereto:

The Resource Management (Approval of Queenstown Airport Corporation Limited as Requiring Authority) Notice 2019

Pursuant to section 167 of the Resource Management Act 1991, the Minister for the Environment gives the following notice.

Notice

1. Title and commencement

(1) This notice is The Resource Management (Approval of Queenstown Airport Corporation Limited as a Requiring Authority) Notice 2019.

(2) This notice shall come into force on the 28th day after its publication in the *New Zealand Gazette*.

2. Application of notice

This notice shall apply in addition to, and not in substitution for, The Resource Management (Approval of Queenstown Airport Corporation Limited as Requiring Authority) Order 1992 and The Resource Management (Approval of Queenstown Airport Corporation Limited as Requiring Authority) Notice 1994 (as published in the *New Zealand Gazette*, 1 September 1994, page 2690).

3. Interpretation

In this notice, unless the context otherwise requires, “airport” has the same meaning given to that term by section 2 of the Airport Authorities Act 1966.

4. Approval as requiring authority

Queenstown Airport Corporation Limited is hereby approved as a requiring authority, under section 167 of the Resource Management Act 1991, in respect of the following network utility operation:

- The operation, maintenance, expansion and development of the airport known as Wanaka Airport for all the land that is bound by:
  - State Highway 6;
  - State Highway 8A;
  - The true right bank of the Clutha River; and
  - The eastern boundary of the property legally described as:
    - Section 1 Lower Wanaka Survey District, OT14C/457;
    - Section 67 Lower Wanaka Survey District, OT14C/457.

Dated at Wellington this 5th day of August 2019.

HON DAVID PARKER, Minister for the Environment.

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