BEFORE THE HEARING PANEL

UNDER	the Resource Management Act 1991
IN THE MATTER OF	a Notice of Requirement to construct and operate a new intermodal rail and freight hub on land between Palmerston North and Bunnythorpe
AND	a hearing by Palmerston North City Council pursuant to s 100A
REQUIRING AUTHORITY	KiwiRail Holdings Limited

LEGAL SUBMISSIONS ON BEHALF OF THE PALMERSTON NORTH CITY COUNCIL REPORTING OFFICERS

Dated 29 September 2021

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MAY IT PLEASE THE HEARING PANEL:

1 Introduction

1.1 Overview

[1] These submissions are provided to assist the Panel with the legal framework surrounding the issues identified by the parties to this hearing.

[2] We are privileged to have a knowledgeable Panel which has demonstrated over the course of the hearing that it has identified the key issues in question. Therefore, and as requested, these submissions focus on the remaining areas of tension.

[3] The Freight Hub project is significant in multiple ways, and it is worth acknowledging these areas of significance. It is a major piece of infrastructure providing strategic support to shipping and logistics at a national, regional, and local level. It represents a sizeable investment in the national rail system, the Manawatū-Whanganui region, and Palmerston North City. It demonstrates a national strategic vision for the move to rail, and a local strategic vision to establish Palmerston North as a distribution hub for the whole lower North Island. It is also expected to generate significant positive economic effects locally, regionally, and nationally.

[4] KiwiRail's NoR recognises that the Freight Hub will change the local community and affect its neighbours. KiwiRail submits that its NoR is supported by a comprehensive effects management package which appropriately addresses its actual and potential adverse effects.[1]

[5] However, accurate identification, classification, and assessment of scale and significance of potential effects of allowing the NoR has been a key issue for the reporting officers, and there are topics where there are remaining information 'gaps' as the planning for the NoR has only

[1] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 1.7.

developed to the concept design stage, and regional consents are not sought concurrently.

[6] This is what KiwiRail describes as its 'flexible' approach, where effects will be confirmed and addressed at a later stage. While this approach is not unusual in the designation process, it is not the standard either, and the approach has led to challenges understanding the degree of certainty attributable to the concept design, and what might arise from its implementation or potential variance.

[7] Apart from accurate assessment of effects being a fundamental requirement for robust decision making, uncertainty regarding aspects of the project and its adverse effects draws into question the reliance that can be placed on the outline plan process for effects management. The reporting officers consider that if the designation is confirmed, it should incorporate clear framing of the project through its conditions, to ensure that the Project will be developed in accordance with KiwiRail's desire to create an 'envelope' of effects, rather than a sieve.

[8] The separation of this NoR process from regional consent processes has been another challenge for reporting officers.[2] The reporting officers are aware of the issues of overlapping regional and territorial jurisdictions. However, the approach taken by KiwiRail of lodging its NoR, and waiting to until after its designation is confirmed apply for regional consents, adds to the uncertainty described above as to the effective management of the Freight Hub's effects. This sequential approach also, in the reporting officers' view, makes achieving integrated management all the more challenging and complex, including the development of appropriately targeted conditions.

[9] It is appropriate to also recognise that uncertainty has shaped aspects of the s 42A reports and in many cases has been iteratively made 'more certain' through this process and revisions of conditions (KiwiRail has put forward five versions of conditions to date). The

[2] KiwiRail anticipates that regional consents will be required for bulk earthworks, discharges from the disturbance of contaminated soil, stormwater discharge to existing streams from the stormwater management devices, stream works including the diversion of existing watercourses and installation of culverts.

Reporting Officers will offer the Panel an 'end of hearing' set of Conditions which, in their opinion, are appropriate conditions to recommend to KiwiRail, subject of course to the Panel applying its own collective knowledge and experience to the exercise while making its recommendations. The reporting officers do not profess to have achieved 'perfection' in their attempt to make sense of and work through conditions, but have certainly carefully thought through the issues and are willing to continue to provide any requested assistance.

[10] Finally, the Council's experts are extremely grateful for the opportunity to hear from KiwiRail's team, and all submitters who have appeared over this hearing – in particular, those most affected by the NoR. They hope that the officers' reports and summaries to the Panel demonstrate that the officers do not take those submissions lightly.

1.2 Reports

[11] The Council has commissioned 12 reports under s 42A of the RMA to assist the Panel in respect of information provided by KiwiRail in support of its NoR. The reporting officers are:

(a) Glen Wright (Lighting)

(b) David Arseneau and Reiko Baugham (Stormwater)

(c) Michael Than (Rail)

(d) Robert Van Bentum (PNCC infrastructure)

(e) Justine Quinn (Ecology)

(f) Shane Vuletich (Economics)

(g) Harriet Fraser (Transport)

(h) Deborah Ryan (Odour/Air quality)

(i) Nigel Lloyd (Noise and Vibration)

(j) Chantal Whitby (Landscape and Visual)

(k) Amelia Linzey (Social)

(l) Anita Copplestone and Phil Percy (Planning)

[12] The reporting officers have prepared thorough reports on matters within their expertise, including detailed executive summaries of their opinions. Summaries of their evidence have and will be given that include, where relevant, further consideration of the issues where there remain differences in expert opinion.

1.3 Structure of submissions

[13] **Part Two** of these submissions addresses the preliminary jurisdiction issue, as raised by submitters and addressed by KiwiRail.

[14] **Part Three** includes legal discussion on aspects of the designation process and consideration of the challenges to the evaluative task under s 171 that arise in relation to this NoR.

[15] **Part Four** addresses miscellaneous legal issues.

2 Jurisdiction

2.1 Overview

[16] Jurisdictional issues have been raised by some submitters. Ms Tancock, counsel for Drs Whittle and Fox, filed a memorandum with the Panel dated 8 July 2021 identifying concerns as to the extent of KiwiRail's ministerial approval as a Requiring Authority, which she expanded on in her oral submissions.[3] Those submissions consider the language of the Minister's approval of KiwiRail as a Requiring Authority ("**the Gazette notice**") and promotes a narrow interpretation of that approval, submitting that in the light of that approval there appears to be "*no lawful basis*" in the Gazette notice or the Act to allow for the wide range of activities proposed within the Freight Hub.[4]

[3] Submitters 59 and 47.

[4] Memorandum of counsel for Dr Whittle and Dr Fox (8 July 2021), Attachment 1 at 11 and 13.

[17] The Gazette notice in question reads (emphasis added):[5]

> 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**.

[18] KiwiRail, in its legal submissions dated 6 August 2021, submits that the "*Freight Hub is* clearly *within the scope of KiwiRail's powers as a requiring authority to designate land for the operation of its railway line*".[6]

[19] For further statutory context, the RMA permits a requiring authority, for the purposes of its approved network utility operation, to issue a notice of requirement for land both for a project or work and "*where a restriction is reasonably necessary for the safe or efficient functioning or operation of such a project or work*".[7]

[20] As such, the jurisdictional issue for the Panel to determine appears to be whether the full range of activities proposed to occur in the Freight Hub can be considered within the scope of the "*operation*" of KiwiRail's "*railway line*" per the Gazette notice, and/or *"reasonably necessary for the safe or efficient functioning or operation"* of that railway line.

[21] As a preliminary matter, it appears that the Panel has the jurisdiction to make such a determination.[8]

2.2 Interpretation of the Gazette notice

[22] Ms Tancock submitted originally that the appropriate definition of railway line to be used is from the Railways Act 2005.[9] That definition is fairly literal, stating that railway line means "*single rail or set of rails,*

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[5] "Resource Management (Approval of KiwiRail Holdings Limited as a Requiring Authority) Notice" (4 March 2013) 31 *New Zealand Gazette* 942 at 943.
[6] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 4.18.
[7] Resource Management Act 1991, s 168(2).
[8] *Malvern Hills Protection Society Inc v Selwyn District Council* EnvC Christchurch C105/07, 9 August 2007 at [30]–[31].
[9] Memorandum of counsel for Dr Whittle and Dr Fox (8 July 2021), Attachment 1 at 8.

having a gauge of 550 mm or greater between them, laid for the purposes *of transporting people or goods by rail*", including associated sleepers, ballast, tunnels, bridges, and land up to 5 metres from the centre of the line.[10]

[23] Ms Tancock submits that the Railways Act 2005 definition of railway line (or similar) should be preferred when interpreting the Gazette notice, as "*[the Railways Act 2005] and the RMA are interfacing pieces of legislation*". Quite what is meant by "*interfacing*" has not been further explained. Submitting at the hearing, Ms Tancock expanded on her preferred interpretation, stating that it is supported by the Ministerial reasoning leading to the requiring authority approval for the New Zealand Railway Corporation, which preceded the approval for KiwiRail, and by the fact that it would be what an ordinary reasonable member of the public would interpret the Gazette notice as meaning.[11]

[24] KiwiRail, in its legal submissions, highlights that the RMA does not define railway line or refer to the Railways Act 2005 definition (or the New Zealand Railways Corporation Act 1981 definition, in force at the time the RMA was enacted).[12] Despite this, the definition of network utility operator expressly incorporates the term 'railway line', suggesting (in KiwiRail's submission) that Parliament did not intend to limit the scope of 'railway line' by adopting a specific definition.

[25] Further, KiwiRail notes, the Minister chose not to incorporate a direct reference to a definition of 'railway line' in the Gazette notice.

[26] Counsel's view aligns with KiwiRail on this point. First, it is not obvious why the question of what an "ordinary reasonable member of the public" would think should apply to interpretation of the Gazette notice. It is not a designation, even if it may lead to one. Nor does the Gazette notice necessarily serve the function of notifying the public of the scope of authority provided to the requiring authority. By virtue of being the body providing recommendations under s 171, the primary user of the

[10] Railways Act 2005, s 4.
[11] Submissions of counsel for Dr Whittle and Dr Fox (14 September 2021) at 27–32 and 37–38.
[12] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 4.11.

Gazette notice aside from the requiring authority is likely the relevant territorial authority.

[27] Second, the Gazette notice provides KiwiRail the power to designate for a broad range of purposes related to its 'railway line', including operation, maintenance, upgrading, and improvement. The Ministerial approval for this broad range of purposes indicates against the strict application of a narrow definition of 'railway line', such as the definition from the Railways Act 2005, in the absence of any other indication that it should apply. It is unlikely to have been the intention of the Minister in granting KiwiRail approval to designate for the purpose of providing for its railway line operations, that KiwiRail should not be able to continue to provide for those operations as the demands on a modern railway operator changed over time.[13]

[28] However, if the Railways Act 2005 definition does not apply, then what definition does? On its face, a 'railway line' extends *at least* to wherever tracks extend, capturing much of the proposed designation extent.[14] What range of other activities though, if any, should be included in that term?

[29] On this point, KiwiRail highlights that its application for requiring authority status detailed a broad range of activities that it considered to fall within the "*construction and operation […] of its railway line*", including *"provid[ing] for track slews and realignments, maintenance, and upgrading, to providing facilities for modal transfer (yards and sidings)*".[15]

[30] On one hand, the Minister's decision to grant a network utility operator's application for requiring authority status is not restricted or expanded by the scope of that application – the Minister may grant requiring authority status on whatever terms they see fit.[16] Equally,

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[13] See the approach taken to the changing nature of operations ancillary to 'aerodromes' in *McElroy v Auckland International Airport Ltd* [2008] 3 NZLR 262 (HC).

[14] See Lisa Rimmer *Statement of Evidence: Landscape and Visual* (9 July 2021), Appendix B at page 101.

[15] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 4.6–4.7.

[16] *Malvern Hills Protection Society Inc v Selwyn District Council* EnvC Christchurch C105/07, 9 August 2007 at [16]–[20].

however, counsel does not support Ms Tancock's submission that the application document is completely irrelevant to interpreting the Gazette notice. The Minister's consideration of whether and how to grant requiring authority status must, to some extent, be guided by what is applied for. The application, while not determinative, may be able to act as an extrinsic interpretation aid to the Gazette notice where there is ambiguity.[17]

[31] Here, in the context of an expansive description of the activities KiwiRail supplied to justify its application for requiring authority status, the Minister's approval in the Gazette notice is expressed in reasonably unrestricted terms. The lack of terms and conditions expressly restricting KiwiRail's requiring authority powers, even after the application put the Minister on notice of all the activities KiwiRail considered relevant to its network utility operations, could suggest that the Minster did not intend to constrain KiwiRail's requiring authority powers to exclude those activities.

[32] It is also noted that a narrow, literalist interpretation of 'railway line', similar to the Railways Act 2005 definition, would only allow KiwiRail to designate land under or directly adjacent to actual tracks. This poses a particular problem in the context of the RMA, as such a narrow designation extent would leave insufficient area for works to mitigate the effects of the primary works – a conclusion likely to be inconsistent with the RMA's sustainable management purpose.

[33] Accordingly, counsel considers it likely that for the purposes of the RMA and the Gazette notice that the term 'railway line' means something broader than simply 'tracks'. Further, the wording of the Gazette notice allows for works for the "*operation*" of KiwiRail's line, as well as "*improvement and extension*". As KiwiRail highlights, the operation of a railway line necessarily includes marshalling, and transit, loading and unloading of freight.[18]

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[17] *Malvern Hills Protection Society Inc v Selwyn District Council* EnvC Christchurch C105/07, 9 August 2007 at [27].

[18] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 4.13.

[34] Finally, the RMA permits KiwiRail to designate for land *"reasonably necessary for the safe or efficient functioning or operation"* of its approved purposes.

[35] As such, a range of activities ancillary to railway lines could conceivably fall within KiwiRail's powers of designation, and there is unlikely to be a clear demarcation of activities intra and ultra vires. It would seem sensible then for the Panel to adopt a 'scale and degree' approach to the extent of KiwiRail's approval as a requiring authority and determine whether any particular activity in question is sufficiently connected to the central 'railway line' activity to be within KiwiRail's approved authority.

[36] Some activities proposed for the Freight Hub seem reasonably distant from the literal meaning of 'railway line', particularly the freight forwarders and distribution centres. However, terms in enactments apply to circumstances as they arise.[19] Additionally, the adoption of an ambulatory approach in interpreting the wording of grants of authority to undertake public works finds support in relevant case law.[20] The freight forwarders and distribution centres are so-called 'level one users', to use CEDA's terminology,[21] requiring a railhead location. They are an adjunct to the core facilities of the Freight Hub.

[37] During this Hearing, the Panel has also heard from experts from KiwiRail that all the activities proposed for the Freight Hub, including the freight forwarders, are necessary for the effective operation of a modern railway operation.[22] If the Panel accepts that evidence, it may be open for the Panel to conclude that all the activities proposed for the Freight Hub fall within KiwiRail's powers of designation.

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[19] Interpretation Act 1999, s 6.

[20] *McElroy v Auckland International Airport Ltd* [2009] NZCA 621 at [58]–[78].

[21] Central Economic Development Agency *Distribution Hub Strategy: Serving the Distribution Needs of the Lower North Island* (April 2021) at 53.

[22] Oral submissions of Mr Skelton, Mr Moyle, and Ms Poulsen.

3 Designation Process

3.1 The process and information requirements generally

3.1.1 Overview

[38] KiwiRail's NoR is advanced with the acknowledgement that it includes degrees of flexibility and some uncertainty as to its final form and impact. KiwiRail explains that its NoR allows for "*a number of features*" to change at the detailed design stage and, accordingly, it places significant reliance on management plans and the Outline Plan mechanism to address adverse effects.

[39] This section considers the appropriateness of that approach in the context of a designation for a large project, and considers the application of relevant principles from case law that may be helpful to the Panel's evaluation.

[40] As a preliminary point, it is acknowledged that does not appear that there is a fundamental difference of legal opinion as to the relevant principles. Differences between KiwiRail's submissions and the considerations set out here may be described as 'matters of emphasis'.

[41] For example, KiwiRail invites the Panel to rely on the Outline Plan process as a further opportunity for refinement of a project. The reporting officers do not share KiwiRail's confidence that Outline Plans can be a complete solution to appropriately address adverse effects, particularly where there is uncertainty in the technical assessments on various topics about the scale and significance of those adverse effects.

3.1.2 Information standards and balancing flexibility with certainty

[42] Designations have been fairly described in this hearing as a 'unique beast'. Although they are a standard RMA tool to enable large infrastructure projects, they are designed to be more 'flexible' than more common RMA permissions and processes. Part 8 sets out the process for a requiring authority to give notice of its requirement, the evaluative processes, and the effect of the designation.

[43] Designations have two primary functions under the RMA – 'enabling' and 'protecting'. The enabling function is commonly described as a 'spot-zoning' in a district plan, which enables activities on the relevant land following an outline plan process. The protective function of the designation prevents any other development from establishing within a designated area that would be incompatible with the public work.[23]

[44] Although the designation process bears some similarities to a resource consent application process, there are some key procedural differences which set it apart and elevate a requiring authority to something of a 'privileged' position under the RMA. For example:

(a) Although there is a requirement in form 18 to describe effects that the project will have on the environment, compliance with the requirements of Schedule 4 to the RMA is not mandated to for a NoR.

(b) There is no power analogous to s 88(3) of the RMA to allow a territorial authority to return a NoR that it considers incomplete.

(c) There is no power not to proceed to hearing a NoR if the territorial authority determines that other resource consents are required.

(d) Instead of a 'decision', a territorial authority gives recommendations, with the final decision reserved for the Requiring Authority, a privilege not afforded to a resource consent applicant.

(e) There is no provision in s 171 corresponding to s 104(6) of the RMA to allow a territorial authority to refuse to confirm a NoR if it finds that it had inadequate information to determine it.

[45] Therefore, the statutory scheme makes it possible for requiring authorities to give their NoRs in more general terms than what is

[23] Noting though that this is not an absolute prohibition on such activities, as requiring authorities may provide written consent for such an activity and there is a right of appeal to the Environment Court if consent is refused: Resource Management Act 1991, ss 177(1) & 179.

expected and required for a resource consent application. While the trend for responsible requiring authorities is to provide increasing levels of detail provided with NoRs, those evaluating a NoR under s 171 (such as the Panel here) are obliged to make recommendations on the information available to them.

[46] There are policy reasons why requiring authorities are not held to the same standards as resource consent applicants. For instance, requiring authorities (that are not Ministers of the Crown or local authorities) have already been 'vetted' by the Minister under s 167 as meeting the criteria to be given requiring authority status. The prospective requiring authority must be a network utility operator, responsible for significant infrastructure. Their projects have, by nature, elements of public good. Further, the Minister must be satisfied that the prospective requiring authority will "*satisfactorily carry out all the responsibilities … of a requiring authority under this Act and will give proper regard to the interests of those affected and to the interests of the environment*."

[47] With that said, 'good practice' exists in respect of assessment of environmental effects, even for NoR's consistent with the expectation of requiring authorities to give "*proper regard to the interests of those affected and to the interests of the environment*". The Board of Inquiry in the Basin Bridge NoR, for example, accepted the relevance of the following principles established in a case concerning resource consents – *AFFCO New Zealand Limited v Far North District Council*:[24]

> From those provisions we infer that it is intended that the proposed activity the subject of the resource consent application is to be described with sufficient particularity to enable those various functions to be performed. The proposed activity has to be described in detail sufficient to enable the effects of carrying it on to be assessed in the way described by the Fourth Schedule. The description is intended to include whatever information is required for a consent authority to understand its nature and the effects that it would have on the environment. The description is

[24] *AFFCO v Far North District Council (No 2)* [1994] NZRMA 224 (PT).

> expected to be full enough that a would-be submitter could give reasons for a submission about it and state the general nature of conditions sought. The application needs to have such particulars that the consent authority would need to be able to have regard to the effects of allowing the activity, and to decide what conditions to impose to avoid, remedy or mitigate adverse effects without abdicating from its duty by postponing consideration of details or delegating them to officials.

[48] Generally, these 'good practice' principles are critical to the ability of decision makers to reach informed decisions, even if they must be adapted to respond to the scheme of Part 8 (for example, where regional consents are deliberately excluded, as is the case here). Their underlying importance is reinforced in *Sustainable Matatā v Bay of Plenty Regional Council,* a cautionary tale about NoRs that aspire for maximum flexibility at the expense of accurate effects assessment and demonstratively achievable controls through conditions. That case is relevant to understanding of the desirable approach when faced with NoRs pitched on the basis that flexibility is required:[25]

> A fundamental issue which arises in this case is a desire on the part of the applicant for maximum flexibility. This is not uncommon; many cases before the Court are prepared on the basis that the final design is not known. In this case there is a desire to use a design-build-operate system, and thus retain maximum flexibility for the successful tenderer.
>
> In many cases there are other contingencies that may lead to variations in the design. The designation process itself recognises this need for flexibility, and utilises the concept of Outline Plans. Nevertheless, the Act recognises that effects which are identified can be dealt with as part of the designation process, and in general consents require sufficient details for the Court to accurately be able to understand the nature and scale of effects created.

[25] *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [45]–[47].

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

[49] *Minister of Corrections v Otorohanga District Council* also highlights the need for accurate effects assessment at the NoR stage while acknowledging the inherent flexibility allowed by the NoR process. In holding that 'flexible' NoR's cannot permit activities beyond those that are considered as acceptable at the primary stage of s 171 evaluation, the Court identifies 'scope' concerns and procedural fairness considerations as reasons why:[26]

> Because designations are flexible devices this necessitates careful attention is given to the conditions of the designation and, in particular, to those conditions the purpose of which is to constrain development within the limits/boundaries of effects that are considered acceptable by the expert witnesses and ultimately the court. As noted, few design parameters were proposed in the notice of requirement. […]
>
> The flexibility of the designation process does not extend to enabling adverse effects on the environment that are different in substance or materially greater than those effects assessed by the decision-maker and considered subject to Part 2. Whether the effects are different in substance or materially greater is a question of scale and degree. A decision to confirm the designation that is enabling in this way is unfair to persons who did not make a submission.

[50] The Board of Inquiry decision on Transmission Gully also has relevance. Advanced with a 'flexible' approach and an effects management regime dependent upon 12 management plans covering effects that were 'uncertain' at that stage, the Board proceeded to

[26] *Minister of Corrections v Otorohanga District Council* [2018] NZEnvC 25 at [10]–[11].

consider the approach as a form of 'adaptive management technique', which it described as:[27]

> …a system for managing the effects of (generally) large projects where the nature and extent of those effects is uncertain and the outcome of methods proposed to avoid, remedy or mitigate them is similarly uncertain adaptive management regimes are commonly established through conditions of consent incorporating management plans which seek to manage the effects of any given activity in a flexible and responsive manner.

[51] The Board confirmed that the use of an 'adaptive management framework' can be an appropriate means of managing environmental effects, saying "*[…] The essential test of any method of managing effects under RMA is whether or not it achieves the purpose of the Act set out in s 5(2). There is no reason why an adaptive management regime cannot achieve that purpose*".[28] However, as with other authorities considering 'flexible' approaches, the Board explained the trade-off that adopting a flexible approach will require:[29]

> We also emphasise the importance of conditions of consent if adaptive management regimes are to operate properly. In his advice to the Board, Mr Milne identified the need for conditions to be clear, certain and enforceable. Conditions need to contain quantifiable standards and performance criteria against which proposed management plans can be assessed and subsequent operation of the management plans measured. The Board considered that the conditions proposed by the Applicants at the conclusion of the hearing generally achieved those objectives.

[52] While the appeal of a 'flexible' process for an NoR is acknowledged, standards of information that can be expected or required in relation to 'effects on the environment of allowing an NoR' do not differ substantially from those which apply in other situations under the RMA.

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[27] Board of Inquiry into the Transmission Gully Proposal *Final Decision and Report* (June 2012) at [170].
[28] At [180].
[29] At [187].

Indeed, the sequencing within s 171(1) to consider the "*effects on the environment of allowing the requirement*" first speaks to its importance as the source of the assessment from which the evaluation must flow, with matters requiring 'particular regard' falling out of that in subsections (a)-(d).

[53] Finally, the consideration of the effects of a proposal on the environment under s 171 is "*subject to Part 2*".[30] The approach of the Basin Bridge Board to this issue was, prior to considering the matters in s 171(1)(b)–(d):[31]

> […] to consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents […]

[54] A similar conceptual approach was taken in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*, where Whata J described the framing and cascade of s 171 in this way:[32]

> It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them. Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[55] Assessing whether a proposal fits within the Part 2 'frame' for the consideration of the effects on the environment, to use Whata J's

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[30] Resource Management Act 1991, s 171(1).

[31] Set out and affirmed in *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [77] and [118].

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

analogy, would be highly challenging without a sufficient level of information to reliably assess a proposal's effects.

3.1.3 Principles for application

[56] In Counsel's submission, the discussion above can be distilled into a set of principles for the Panel to apply when considering this NoR and formulating recommendations. Those are:

(a) The Panel must have enough information to be able to understand the scale and significance of the various adverse effects to effectively undertake its tasks under s 171 of the RMA.

(b) While designations are flexible devices, NoRs framed to maximise that flexibility call for careful attention to ensure that conditions set boundaries for the proposed activity in ways appropriate to manage its effects.

(c) Conditions cannot enable adverse effects that are different in substance, or materially greater than those assessed under s 171 and considered subject to Part 2. To do otherwise would result in unfairness.

[57] The Panel may like to utilise these principles to navigate some of the key issue areas in this case, where there are identifiable gaps in the information and assessment of effects of allowing the NoR.

3.2 Interactions with regional consenting

3.2.1 Overview

[58] Some areas of identified uncertainty with the effects of the Freight Hub are on topics where there are overlapping RMA functions between the territorial and regional authorities. We consider that overlap in terms of ecological considerations are a 'special case'. This section focuses on framing the legal and factual issues concerning evidence of the technical experts and planners in relation to ecological values. We then briefly address other areas of jurisdictional overlap.

[59] There are broadly three issues that are not resolved between the reporting officers and KiwiRail in relation to ecological issues:

(a) What is the correct approach to considering these effects?

(b) What are the effects of the freight hub on ecological values?

(c) How should effects on the above be managed (if at all) at this stage?

3.2.2 The approach

[60] Relevant to all questions here is that KiwiRail has identified that Regional Consents will be required to the freight hub, and that those consents will be applied for in "*due course*", prior to submitting its Outline Plan to Council.[33] While it can, as above, be regarded as a matter of good practice to seek necessary regional consents concurrently, the scheme of Part 8 allows for separate processing.

[61] KiwiRail submits that in circumstances where regional consents are required but are not concurrently sought, the s 171 enquiry is limited in nature to whether the Panel can be satisfied that that the effects of the environment could sensibly be addressed and concluded at the subsequent stage.[34] That is the correct approach.

[62] It is therefore assumed that KiwiRail's technical reports on these issues are to demonstrate that the Panel can be satisfied of this enquiry, however KiwiRail's submissions are a little contradictory about the correct approach to take. KiwiRail discusses its approach of not seeking regional consents at this stage, submitting that effects of those activities that will also require regional consents are not properly considered as effects of 'allowing the requirement' for the purpose of s 171(1), suggesting that they do not need to be assessed at all.[35]

[63] We respectfully disagree. While the effects on the ecological and natural character values of any wetlands and rivers and their margins

[33] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.13.
[34] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.14–7.15.
[35] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 4.27.

will need to be directly assessed in future s 104 processes, the Freight Hub proposal involved a co-dependence between this NoR and those other consents. The reality is that the Freight Hub project cannot proceed in its current form without '*allowing the requirement*' under s 171 and '*allowing the activity'* under s 104. There is inherent risk of 'missing' potentially relevant effects from consideration arises where all required permissions are not sought concurrently, and 'excluding' effects from consideration in this way would be somewhat artificial.

[64] In this context, KiwiRail's other submission should be preferred – the effects are relevant as a mandatory consideration for the Panel, but that the nature of the enquiry on these 'effects' can be limited in nature, allowing a lesser degree of specificity in recognition that future processes will address those effects in a more direct and specific way.

3.2.3 'Framing' documents

[65] In relation to the 'limited' assessment, the most relevant documents to 'frame' the assessment (as discussed above) of adverse effects here are the Horizons Regional Council's One Plan and the National Policy Statement for Freshwater Management 2020.

[66] The Panel is aware that in this Regional Council has allocated to itself the responsibility of managing land use, including through rules, for the purpose of maintaining or enhancing indigenous biological diversity. This allocation of responsibility is set out Policy 6-1 in the Regional Policy Statement of the One Plan. Here, Ms Quinn and Ms Copplestone acknowledge that the Regional Council has the '*primary role'* in relation to ecological matters.

[67] Despite this, it is nevertheless submitted that the territorial authority, here the Panel, does have '*some role'* in ecological matters that calls for measured consideration of these matters. This role derives from its statutory function under s 31, s 171, the One Plan, and the NPSFM. The following discussion considers what the role could be, by reference to the policy documents.

[68] Under the RPS part of the One Plan, Policy 6-1(c) is relevant, as below:

(c) Both the Regional Council and Territorial Authorities must be responsible for:

(i) recognising and providing for matters described in s 6(c) RMA and having particular regard to matters identified in s 7(d) RMA when exercising functions and powers under the RMA, outside the specific responsibilities allocated above, including when making decisions on resource consent applications.

[69] Section 7(d) of the RMA requires those exercising functions and powers to consider the intrinsic value of ecosystems.

[70] There is also the NPS-FM, a more recent, and higher-level policy document.[36] Despite KiwiRail's submission that the NPSFM is a 'plan-making' policy and that its application here is difficult, the Environment Court has held that it must be considered in the evaluation of an NoR.[37] Case authority suggest that an evaluation can, at least, be carried out to the level of considering a proposal in respect of its Part 2 Objectives and Policies.[38] Logically, this must include defined terms in the NOR, to the extent those definitions are necessary to understand the objectives and policies.

[71] The NPSFM expressly provides that it has some application now in this context. It commences by directing users to Part 4, "*about the timing and implementation*" of the NPS statement, and Part 4 immediately specifies the "*timing*" as "*Every local authority must give effect to this National Policy Statement as soon as reasonably practicable*." There is no reason to read this down.

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[36] Which postdates and has not yet been incorporated into the One Plan, so its provisions should be weighted carefully as there can be no assurance that the One Plan currently gives effect to the NPS: *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 36.

[37] *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 at [25].

[38] *Rangitane o Tamaki Nui-a-Rua Inc v Manawatu-Wanganui Regional Council* [2021] NZEnvC 52.

[72] The reporting officers are not seeking to reclaim consenting responsibilities for the management of freshwater or indigenous biological diversity. It is, however, submitted that in answering whether the effects on these matters can 'sensibly be assessed at a later stage', the Panel must consider that question by reference to the NPSFM and the One Plan as the relevant framing documents for that assessment.

3.2.4 The effects on ecological values

[73] A detailed assessment of ecological values has not been carried out. KiwiRail says that will be carried out at the appropriate time, being when it seeks its regional consents. Notwithstanding the absence of a sufficiently detailed values assessment, Mr Garrett-Walker remains confident that he has "*assessed appropriate values to the ecological features across the landscape*" and is "*confident the various ecological features have been accurately assessed.*"[39] Mr Garret-Walker considers there will be a very low level of effect on ecological values, and that there will not be any 'permanent adverse effects on ecological values if effects are managed properly' and he considers they can be.

[74] Ms Quinn disagrees with the effects assessment. While she does not consider that the site is ecologically 'inappropriate' for the Freight Hub, she does not consider that there is sufficient information available to support the evidential conclusions of Mr Garrett-Walker with confidence. Nor does she consider he has applied the correct assessment methodology to conclude as he has in any case, when considering the NPSFM and One Plan.

[75] Generally, Ms Quinn and Ms Copplestone consider that KiwiRail's information and evidence underestimates the potential impact of the NoR on ecological values. Accordingly, there is a live question as to whether the NoR does demonstrate that ecological effects of the environment could sensibly be addressed and concluded at the regional council stage. There are concerns about wetlands, loss of

[39] Jeremy Garrett-Walker *Statement of Evidence: Ecology* (9 July 2021) at 11.8.

stream length, the absence of information concerning te mana o te wai, and implications of all of this on the effects management hierarchy.

[76] These matters of evidence, including the weighting to be given to this consideration in the overall evaluation, are for the Panel.

3.2.5 Management of ecological effects at this stage

[77] These issues leave the question for the Panel – how should ecological issues be managed, if at all, at this stage? The management response now recommended by reporting officers is to require ecological surveys, (this is adjusted from its 'start of hearing' condition set). This recommendation is designed to respect the overlap in functions in a way that assists, without interference or pre-emption, the performance by the regional council of its consenting role under the One Plan for these activities, including the rule framework that it has reserved itself.

[78] It is submitted that such a response is modest and shaped to the nature of the problem, whereby there is insufficient information in respect of a potentially significant issue viewed through the frame of the relevant One Plan and NPSFM.

[79] At the hearing, Mr Garrett-Walker spoke about opportunities to provide further mitigation on-site through detailed design, without specifics. Further, his evidence acknowledges in evidence that a consequence of the further assessment is that the mitigation and offset package may extend outside the NoR site, indicating the possibility of future modifications to the designation boundaries for further land requirements,[40] with further social upheaval and uncertainty.

[80] In these circumstances, it is respectfully submitted as open to the panel to recommend that the surveys (which KiwiRail says will be doing anyway) are completed as soon as possible and at least in such time that detailed site information is available to inform detailed design of the Freight Hub.

3.2.6 Other areas of overlapping jurisdiction

[40] As above, at 11.8.

[81] Other areas of jurisdictional overlap have been discussed in this hearing, with a focus on recommended conditions regarding sediment control, discharges to air, and stormwater management.

[82] While the reporting officers have been clear to acknowledge that some of the issues addressed will also be subject to management by the regional council at a later stage through detailed design, management of these issues also fall legitimately within the functions of the territorial authority. Management of sediment from earthworks, and nuisance effects arising from discharges to air fall within the Council's functions under s 31(1)(b): "*the control of any actual or potential effects of the use, development, or protection of land*", while stormwater management falls within s 31(b)(i) relating to "*the avoidance or mitigation of natural hazards*".

[83] Due to KiwiRail's preference for a flexible approach, these are factors that are at risk of being overlooked, unless they are adequately addressed by one of the two local authorities with overlapping functions. In the light of this approach by KiwiRail and the rick of effects being left unmanaged, the reporting officers consider that it is incumbent on KiwiRail to provide the Panel with a level of comfort that all the potential effects that the territorial authority has an interest in will be appropriately managed.

[84] As KiwiRail asserts that overlapping effects will be managed by the regional council following detailed design of the Freight Hub, ideally KiwiRail would have given some particularity as to the subsequent consenting processes that it would need to follow to provide that comfort to the reporting officers and the Panel.

[85] However, in this case the reporting officers have had to undertake some of that task through requests for further information, and planning and technical analysis of claims by KiwiRail. Some information gaps remain, leading to the cautious approach taken by the reporting officers to some issues. It is open to the Panel to conclude that the approach taken should have been more or less

cautious in some areas, but the reporting officers invite the panel to reach their conclusions in those areas with a high degree of certainty.

[86] The officers wish to emphasise that they are not seeking to usurp the role of the regional council, but rather they are seeking to alleviate the uncertainty described above and ultimately ensure that there are no gaps in the holistic management of the Freight Hub's effects.

3.3 Noise issues

3.3.1 Introduction

[87] KiwiRail's NoR raises a serious issue about noise. This is perhaps the resource management issue that most sharply brings into focus the evaluative principles discussed earlier in these submissions. This has been the most talked about effect by submitters, and it is the most important effect for KiwiRail to have gotten right in its assessment of effects.

[88] The Panel has now heard many intelligent and emotional critiques of the noise assessment and the impact that the Freight Hub will have on the lives of the neighbouring community. With those submissions front of mind, the Panel will have to carefully consider the noise evidence that it has available to it, drawing on its own evaluative expertise to make an appropriate judgment.

[89] In the context of KiwiRail's flexible approach to this designation, the evaluative exercise will require giving special attention to the conditions so as to clearly establish appropriate bottom lines for noise effects. This task engages with the Panel's discussion with Ms Tancock about whether KiwiRail's proposed conditions set out "hard limits" or only "soft limits". In other words, the Panel must consider whether the conditions establish standards that truly capture the approach that KiwiRail says it intended to achieve when it discusses how its NoR sets an "envelope" of effects.

[90] As to conditions, Mr Lloyd has exhaustively reviewed the noise evidence, with many recommendations arising in relation to appropriate conditions. While many of Mr Lloyd's recommendations have been adopted by KiwiRail over multiple iterations of the

conditions, differences of opinion remain about some aspects, which are appropriately addressed by Mr Lloyd. As correctly observed by Ms Tancock, however, Mr Lloyd has done the best with what was available to him.

[91] Ultimately, following consideration of the evidence and what mitigation can be appropriately achieved through conditions, there is an overall question of the acceptability of the noise effects on the receiving environment that must be determined.

[92] In undertaking its evaluation, the Panel might find some assistance in the following discussion, which addresses some of the issues that have been discussed.

3.3.2 Dealing with noise from the North Island Main Trunk

[93] The recently completed joint witness statement on acoustics confirms that the noise model used by KiwiRail does not include noise from the North Island Main Trunk ("**NIMT**").[41] The joint witness statement goes on to acknowledge that the proposed Noise Management Boundary would likely need to expand slightly if noise from the NIMT were included in the model, but the NIMT noise has never been assessed.

[94] It is not entirely clear whether KiwiRail considers the presence of the NIMT and its noise effects as part of the receiving environment, as part of a permitted baseline, or both.[42] However the Panel prefers to conceptualise this, it is relevant to the assessment of the designation's noise effects on the environment that there is an existing major railway line within the designation extent, sitting within its own designation. However, the size and scale of the noise and vibration effects of the proposed Freight Hub will be greater than those of the NIMT currently, perhaps by orders of magnitude.

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[41] Steven Chiles and Nigel Lloyd *Joint Statement of Acoustics Experts* (19 August 2021) at 4.1; confirming Steven Chiles *Statement of Evidence: Acoustics* (9 July 2021) at 4.3.

[42] KiwiRail's legal submissions refer to the NIMT in its section titled 'receiving environment' at 5.11, suggesting the former.

[95] While a permitted baseline may apply to a designation, it is submitted to be a discretionary consideration.[43] Counsel proposes that the approach when considering whether to apply a permitted baseline, adapting *Lyttleton Harbour*, is for the Panel to:[44]

(a) Formulate its recommendations based on the facts of this specific designation;

(b) Decide if there is reasonable comparability between the permitted activity and the proposed activity, so as to justify the application of the baseline;

(c) Require detailed evidence of any theoretical permitted activities;

(d) Determine whether the baseline activity is similar in purpose to that which is proposed having regard to the planning framework; and

(e) Decide whether or not application of the baseline will nevertheless serve the overall purpose of the RMA.

[96] The effects of the existing NIMT designation are not discussed in great detail in the noise context, as they have not been assessed. However, the difference in the nature and scale of the noise and vibration effects from the Freight Hub, as compared to the NIMT currently, could suggest that it is inappropriate (based on factors (b), (d) and (e) above) to apply a permitted baseline here. Nevertheless, the Panel may consider otherwise.

[97] In terms of forming part of the receiving environment, the NIMT exists within the proposed designation extent and currently generates noise and vibration effects. However, KiwiRail notes that the NIMT will need to be relocated within the Freight Hub.[45] Moving the NIMT is a core part of the project, and not part of the receiving environment. Further,

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[43] Acknowledging, however, that the law in the area is unclear. See *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104 at [20] and [49].
[44] *Lyttleton Harbour Landscape Protection Association Inc v Christchurch City Council* [2006] NZRMA 559 (EnvC) at [21].
[45] Karen Bell *Statement of Evidence: Planning* (9 July 2021) at 9.13.

KiwiRail anticipates that the Freight Hub will generate additional rail traffic along the NIMT through shunting on the NIMT.[46] Together with the movement of the track, this will generate different noise and vibration effects (originating both within and outside the designation extent) to the ones currently experienced by neighbouring properties.

[98] The concept of the existing environment is essentially about measuring the 'change' to an environment that will be caused by a proposal, where the 'effects' to be measured are those which are not already impacting on the receiving environment.[47] Conceptually it does not fit well to entirely disregard the noise effects of the NIMT when the proposal is to move it, causing a change to the receiving environment in conjunction with other 'noisy' aspects of the proposal. To disregard the effects of the NIMT altogether deprives the Panel of information necessary to measure the change.

[99] In any case, when assessing the effects of the designation on the environment, the Panel is entitled to consider the impacts of the Freight Hub in combination with the existing NIMT where the two activities create cumulative noise impacts.[48]

[100] As the noise effects of the NIMT have not been modelled by KiwiRail, it is difficult to assess its noise and vibration effect in combination with the effects of the proposed Freight Hub. The confirmation from Dr Chiles that the Noise Management Boundary would need to move out if the NIMT were factored into his model suggests that, at least at some of the time, there will be synergistic noise effects between the two.[49] If this is the case, it will be worth the Panel considering these cumulative effects as an effect of the designation on the environment. This follows even more strongly than it otherwise might in the context of the noise conditions, as the specific mitigation method proposed (a noise

[46] Oral evidence of Mr Skelton for KiwiRail.
[47] *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZRMA 1 (HC).
[48] *Kuku Mara Partnership v Marlborough District Council* (2005) 11 ELRNZ 466 (EnvC) at [52]–[53]; and *Outstanding Landscape Protection Soc Inc v Hastings District Council* EnvC Wellington W024/07, 13 April 2007 at [50]–[53].
[49] Steven Chiles and Nigel Lloyd *Joint Statement of Acoustics Experts* (19 August 2021) at 4.1.

boundary) is formulated to avoid an environmental 'bottom line' from being crossed in the area.[50]

[101] As such, it is submitted that the Panel can take into account what will actually be experienced by people in the area, factoring in the effects of the NIMT, when considering its recommendations on the formulation of condition 85 and the proposed condition set more broadly.

3.3.3 Designating more land

[102] While discussing the broader questions as to noise, the Panel will recall discussion about Mr Lloyd's suggestion that the designated boundaries should have been drawn more broadly to account for noise effects and cannot be internalised.

[103] For clarity, the reporting officers have not advised the Panel that it should recommend expanding the designation. Such a recommendation would engage challenging questions of scope and the magnitude of any extensions that are not suitably addressed in this forum. In that context, considering the narrow question of 'whether the designation should be broadened' is something of a red herring.

[104] With that said, the suggestion from Mr Lloyd draws focus to issues that remain relevant, concerning the effectiveness of the mitigation proposed by KiwiRail, the overall noise assessment, and what this all means for the people who will be affected. For example, some of the concerns expressed by various submitters and Mr Lloyd are that:

a. The proposed noise mitigation method of offering additional home insulation upgrades and ventilation will not necessarily be suitable or desirable, in particular for those who enjoy opening their windows at night-time;

b. Even accounting for the above mitigation, submitters observed that their rural or rural residential lifestyles include enjoying the entirety of their properties. Ms Tancock made this submission by reference to the Environment Court's *West-Wind* decision.[51]

[50] Including the 65 dB level said to be "inconsistent with residential use".
[51] Submissions of counsel for Dr Whittle and Dr Fox (14 September 2021) at 95–96.

c. Residents within the 55 dBA noise boundary are predicted to experience noise that is incompatible with residential activity.[52]

d. While attention can be given to conditions to ensure that 'hard limits' are fixed at noise management boundaries, there is residual uncertainty about what noise generating activities will actually take place on the site.

[105] Ultimately, the Freight Hub operation will markedly change the aural amenity experienced by existing neighbours. This is a noise effect with broad applicability in this context taking into account the amenity values, which includes *the physical characteristics of the area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes*.[53]

[106] The RMA intends to manage effects arising from the use of land on the principle that the person undertaking the activity bears the responsibility for avoiding, remedying or mitigating the effects of the activity. In this case, however, KiwiRail seeks to redistribute that responsibility by imposing the obligation to absorb noise effects within the receiving environment.

[107] Those left to absorb the effects will be left in an unenviable position, either with their amenity compromised by the noise effects or with few options to relocate if they reach the subjective decision that they are not prepared to accept the reduced amenity. It is relevant to consider that in circumstances where 'first order' effects such as noise cannot be internalised, it is logical to assume that 'second order' effects will arise, such as effects on land valuation or the viability of these locations for residential dwellings.

[108] While a broader NoR would not ultimately have decreased the amount of noise coming from the freight hub, it would have provided those persons affected by the noise but outside of the designation the

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[52] Nigel Lloyd *S42A Technical Evidence: Noise* (18 June 2021) at 14–19.

[53] "*Amenity values means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes*": Resource Management Act 1991, s 2.

agency to choose between more options should they find they were unable to accept that reduced amenity. It could also have formed an effective restriction on further establishment of inconsistent residential activity.

[109] In this context, the Panel has enquired whether a claim for 'injurious affection' would be available for those people even if their land is not designated. Section 63 of the Public Works Act 1981 provides limited assistance, allowing for circumstances where land is not taken but there is substantial injurious affection to a person's land caused by "*the construction (but not the maintenance or operation) of a public work*".[54] This does not appear to be a statutory tool that would effectively respond to the noise effects arising from the operation of the Freight Hub, although it has some potential utility for the construction phase.

[110] In summary, the concerns with the noise effects are the level of effect that will be experienced by neighbours beyond the boundaries of the designation, and the limitations of the conditions at addressing those effects, particularly given that the remedies of s 185 are not available.

[111] Further to the need to control noise through hard limits at established noise management boundaries, should the Panel consider that these matters and the views expressed by submitters require addressing, it may like to express to KiwiRail that an *Augier* condition would be one way to address those concerns. Such an approach may better align to KiwiRail's 'good neighbour' responsibilities as a requiring authority, to have *proper regard to the interests of those affected*.

3.4 Assessment of alternatives

[112] Issues regarding the acceptability of KiwiRail's assessment of alternatives have been raised with the Panel by a range of submitters.

[113] As the Panel will be aware, KiwiRail should be able to show that its assessment of alternatives was "*adequate*".[55] However, it does not

[54] Noting that any person or body (however designated) having authority, under any Act, to undertake the construction or execution of any public work is deemed to be a "local authority" for the purposes of the Public Works Act 1981 (s 2).
[55] Resource Management Act 1991, s 171(1)(b).

need to show that it undertook exhaustive or meticulous consideration of alternatives.[56] Assessment can also be an iterative process, refined throughout the hearing and after.[57]

[114] Ms Copplestone's s 42A report expresses the reporting officers' views, where she notes that KiwiRail's analysis "…*appears to be comprehensive, and we are of the view that this represents an adequate consideration of the alternative sites*." Despite having some specific concerns about certain aspects, Ms Copplestone was not of the view on the information provided by KiwiRail that the assessment of alternatives process was disingenuous.[58]

[115] In contrast, Drs Whittle and Fox provided information intended to demonstrate that KiwiRail's assessment of alternatives was not genuine. Counsel for Drs Whittle and Fox submitted accordingly that the Panel cannot have confidence that there was a robust consideration of alternatives.[59] The specific criticisms of Drs Whittle and Fox appear to be that:[60]

(a) KiwiRail's consideration of alternatives sites was not genuine as its outcome was predetermined, as evidenced by its Provincial Growth Fund application and other documents; and

(b) KiwiRail failed to consider the obvious and feasible alternative options of an intermediate-sized site due to its starting assumption that a site larger than 120-ha was necessary.

[116] These points will be considered in reverse order.

[117] In terms of options of other sizes, the feasibility of those options should be viewed in the context of the requiring authority's proposed activity. The requiring authority must only consider realistic alternatives.[61] This

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[56] *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at [153].
[57] *North Eastern Investments Ltd v Auckland Transport* [2016] NZEnvC 73 at [182].
[58] Anita Copplestone and Phillip Percy *S42A Technical Evidence: Planning* (18 June 2021) at 896.
[59] Submissions of counsel for Dr Whittle and Dr Fox (14 September 2021) at 3–26.
[60] Submissions of counsel for Dr Whittle and Dr Fox (14 September 2021) at 25.
[61] *Nelson Intermediate School v Transit New Zealand* (2004) 10 ELRNZ 369 (EnvC).

principle cuts both ways. In the same way that a requiring authority cannot simply set up false alternatives to artificially bolster the case for its selected option, it cannot be said that a requiring authority has conducted an inadequate assessment because it ignored unrealistic alternatives that do not meet its project objectives.

[118] As such, it is submitted that it would be appropriate for the Panel to consider the realistic spatial requirements of the elements of KiwiRail's proposed activity as a whole as a starting point for what 'sized' site could constitute a realistic alternative. It would likely approach requiring "exhaustive" consideration if KiwiRail were required to assess alternatives that only could accommodate trains half of the length sought, or with no log yard, for example. It will be for the Panel to assess whether, based on the evidence presented, the size requirements for inclusion in KiwiRail's multi-criteria analysis was an appropriate limit or one that excluded realistic options in an arbitrary and cursory manner.

[119] Naturally, there will be a logical limit to this somewhere. The jurisdiction discussion above may be engaged at a certain point, if a requiring authority were to state its objectives so widely that it could designate for activities as widely as it pleased and claim that sites not accommodating all its fanciful requests were 'unrealistic'. Whether that has happened here is for the Panel to determine, however, it would be suggested that there is no evidence of that.

[120] On the point of predetermination, the funding arrangement for the Freight Hub does not necessarily shows that KiwiRail's multi-criteria analysis process was flawed from the outset.

[121] First, to counsel's knowledge, a requiring authority is permitted to have a preference going into its assessment of alternatives – that is, it is not required to assess alternatives tabula rasa. Nor is the requiring authority prevented from ultimately picking its initial favourite. It is not even required to show that its preferred option is the best option.[62]

[62] *Moran v Transit New Zealand* EnvC Wellington W055/99, 30 April 1999 at 1232.

What the requiring authority must show is that it has given more than cursory consideration to options other than that preferred one.[63]

[122] In terms of the Panel's review of KiwiRail's assessment of alternatives, Drs Fox and Whittle argue that there has been no adequate consideration of alternatives, as the assessment was tainted by predetermination. They assert that extrinsic evidence – funding arrangements relating to the Provincial Growth Fund – shows that KiwiRail was never honestly open to any other alternative sites.

[123] Cabinet approvals, non-public correspondence, and funding arrangements between the Crown and KiwiRail are not, prima facie, relevant (or even usually available) to the task of verifying whether KiwiRail has undertaken an adequate assessment of alternatives. However, to the extent that those documents are presented to substantiate a lack of appropriate consideration, they should be reviewed.

[124] Here, the documents presented as evidence do not appear to show that the assessment of alternatives undertaken by KiwiRail was inauthentic. As explored by the Panel with Drs Whittle and Fox themselves, KiwiRail has not been strictly constrained by the outline of the project in the business case agreed to by Cabinet. That fact is incompatible with an allegation that the PGF funding arrangement caused the outcome of the alternatives assessment to be predetermined.

[125] Finally, some questions arise in response to an assertion of predetermination, being:

(a) Which scores in the multi-criteria analysis are incorrect; and

(b) What other sites are feasibly available?

[126] A convincing answer to these questions has not, in counsel's opinion, been provided to the Panel. Prima facie, KiwiRail's multi-criteria

[63] *Boulder Trust v New Zealand Transport Agency* [2015] NZEnvC 84 at [61].

analysis and site selection do not appear suspicious, flawed, or obviously wrong.

[127] This point is not raised to imply that it is the role of a person who identifies procedural errors to cure them by teasing out the elements of the decision arising from the flaws. Rather, it is made to highlight the fact that where procedural errors are alleged, one would expect that some evidence of those errors would be identifiable in the impugned process. The absence of clearly identifiable flaws in the MCA somewhat undermines the assertion of predetermination in this case.

[128] From the reporting officers' point of view, no fundamental problems with the multi-criteria analysis process have been identified. The process does not appear to be disingenuous in terms of the methodology used, nor in the expertise employed in undertaking it. The reporting officers have not identified evidence that the alternative sites were 'straw-men' sites. To use a term employed during the hearing, a 'golden thread' of predetermination does not appear to be present.

3.5 Relevance of strategic planning documents

[129] A question as to the role of strategic planning and its relevance to the Panel's task has raised by some submitters – particularly, how do the wider transportation network upgrades (including the Regional Ring Road) fit into the Panel's consideration under s 171?

[130] Ms Tancock submitted, and engaged in discussion with the Panel, on the question of whether the advantages that would potentially arise from the co-location of the Freight Hub with the proposed ring road could be taken into account. Ms Tancock highlights that many of the positive effects of the proposal are reliant on completion of, and the Freight Hub's integration with, the PNITI and other roading projects which are all reliant on future processes. Accordingly, she considers

that the positive effects of the Freight Hub arising from integration with those transport networks should be disregarded.[64]

[131] In strict legal sense, the proposition that one cannot take into account positive effects of a proposal which are reliant on other projects not yet part of the environment (in a *Hawthorne* sense) appears correct. Similarly, KiwiRail's submissions are likely legally correct in saying that the negative effects of the Freight Hub cannot be assessed as cumulative with PNITI projects which are not yet part of the environment.[65]

[132] However, while this is likely correct in terms of *effects*, a broader picture could be taken to include the strategic advantages of a site. The principles articulated in *Hawthorne* regarding which effects can be taken into account are not, in counsel's submission, intended as a limitation on the ability for strategic planning documents to be used to guide RMA processes.

[133] This point is made as the Panel is required to take into account any other matter it considers reasonably necessary in order to make a recommendation on the requirement.[66] Strategic planning documents, such as Council's growth and economic development plans, and local, regional and national road transport planning, are submitted to be reasonably necessary for the Panel to consider making a recommendation. The is some precedent for the Court finding these sorts of non-statutory plans contextually useful in matters of transport strategy and community connectivity.[67]

[134] This is not to say that these plans should be afforded great weight in terms of the s 171 exercise. However, consistency with those plans, while perhaps not a direct 'effect on the environment', can still frame the Panel's assessment in terms of positive strategic outcomes, which would ultimately be consistent with achieving the RMA's sustainable

[64] Submissions of counsel for Dr Whittle and Dr Fox (14 September 2021) at 53–67.
[65] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.38–7.43.
[66] Resource Management Act 1991, s 171(1)(d).
[67] *Kiwi Property Holdings Ltd v Christchurch City Council* [2012] NZEnvC 92 at [99]–[103].

management purpose. The Panel should not be artificially blinded from considering consistency with strategic planning documents under the guise of discounting purely hypothetical positive effects.

[135] The Freight Hub should, at least, not be inconsistent with the relevant Council strategic plans, and the degree of that consistency should be maximised by imposing conditions, to the extent that those such conditions would be appropriate.

[136] The Panel can, and should, undertake its task with an eye to cohesive strategic planning. Determining the appropriate amount of weight to be afforded to that consideration will, however, be a matter for the Panel.

3.6 Part 2 assessment

[137] The RMA states that the Panel's consideration of a requirement and submissions received must be "*subject to Part 2*".[68] Part 2 prevails in the event of a conflict between it and the other matters in s 171(1).[69]

[138] Part 2 incorporates a cascade of considerations, through which the overarching principle of sustainable management can be interpreted. The application of these considerations to a proposal is a holistic exercise that must be undertaken honestly and thoroughly.[70] The matters in Part 2 should not be considered as binary 'checkboxes' that must be met for a proposal to succeed.

[139] KiwiRail's submissions hint, at times, at this type of binary consideration of Part 2 issues. The result of this is that its submissions occasionally attempt to 'tick the boxes' by making some perplexing claims about the Freight Hub's effects. These include:[71]

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[68] Resource Management Act 1991, s 171(1).

[69] N*ew Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [112]; and *Minister of Corrections v Otorohanga District Council* [2018] NZEnvC 25 at [22].

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

[71] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 5.49–5.54.

(a) Regarding s 6(a): "*The Freight Hub has the potential to enhance the natural character of the Mangaone Stream environs*". The matter of national importance in s 6(a) is "preservation of the natural character of […] wetlands […] and rivers and their margins". The submission that the removal and culverting of the waterways within the designation extent "enhances the natural character" of the Mangaone Stream and its margins is somewhat farfetched and applies s 6(a) incorrectly. The Panel is referred to the evidence of Ms Quinn, Ms Whitby, and Mr Arseneau.

(b) Regarding ss 6(d) and 7(d): "*Public access to waterways will be enhanced through the provision of recreational tracks around the stormwater ponds*"; and "*the proposed planting, stormwater management, watercourse and culvert design will respect and enhance the intrinsic values of the ecosystems*". This submission misunderstands what these provisions are seeking to protect and in doing so seeks to equate unlike with like. Public access to waterways is not substitutable for access to artificial stormwater ponds – again, a matter discussed by Ms Whitby. By definition, by removing streams and wetlands those ecosystems' 'intrinsic' values are lost.

(c) Regarding s 7(g): "*There are no finite characteristics of natural and physical resources identified*". The proposed Freight Hub has a total footprint of 177.7 hectares.[72]

[140] One matter on which the Panel has received a range of submissions, and has indicated is a matter of significant interest, is mana whenua engagement. KiwiRail claims that "*the mana whenua engagement framework will ensure the Project is consistent with sections 6(e), 7(a) and 8 of the RMA. In our submission, these conditions will provide ongoing opportunities for iwi groups to develop more contextual mitigation*".[73]

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[72] Stantec *Regional Freight Hub - Design, Construction and Operation* (23 October 2020) at page 14.

[73] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.12.

[141] As the Panel and submitters have noted and discussed with submitters and witnesses, no cultural values assessment has been undertaken in respect of the proposed Freight Hub. A partnership framework with local iwi and hapū has not been finalised to counsel's knowledge although it is understood that discussions are ongoing.

[142] In his oral submissions for Aorangi Papakāinga,[74] Sir Mason Durie articulated the requirements of the Treaty of Waitangi principles of partnership, participation, active protection and rangatiratanga.

[143] For Ngā Kaitiaki o Ngāti Kauwhata Inc,[75] Mr Emery stated that, despite the archaeological report from KiwiRail, there were potentially wāhi tapu within the designation extent. Further, there are puna and wetlands within the designation extent. That these matters had not been identified or planned for by KiwiRail demonstrated the need for engagement with iwi.

[144] Mr Emery contrasted KiwiRail's approach to date with the framework adopted by Waka Kotahi for the Te Ahu a Turanga project, which he considered provided the sort of collaboration, cooperation and access to the Māori worldview necessary for a decision-maker under the RMA to have regard to their Treaty obligations.

[145] Mr Emery also highlighted that without a cultural values assessment, iwi could not have a meaningful input into a condition set for the Freight Hub, as they would not know what needed to go into the framework for management.

[146] Mr Procter, for Rangitāne o Manawatu,[76] was blunter, stating that there was no evidence on cultural values before the Panel.

[147] A common overarching concern among mana whenua submitters appeared to be the lack of certainty that their concerns about cultural impacts would be satisfactorily allayed in the absence of any sort of

[74] Submitter 3.
[75] Submitter 14.
[76] Submitter 69.

agreed position on how cultural impacts would be dealt with once the project was underway.

[148] Returning to Part 2, and given the concerns summarised above, the confident submission of KiwiRail that its mana whenua engagement framework will ensure that the Freight Hub is consistent with ss 6(e), 7(a) and 8, seems premature.

[149] This issue, and the other Part 2 issues identified above, are not necessarily fatal to KiwiRail's proposal. It is necessary to compare the conflicting considerations in Part 2, in accordance with their scale and degree and relative significance or proportion, in arriving at a final outcome,[77] and even a proposal with serious adverse effects contrary to some ss 6–8 considerations may be appropriate overall. However, the reporting officers submit that Part 2 considerations must be confronted realistically.

[150] As noted above, the principles from that Part 2 analysis form the basis for the overall appropriateness of the proposal.[78] There is evidence that the overall requirements of Part 2 could be met by the proposed Freight Hub, and the solutions proposed by KiwiRail may prove to be effective mitigation or compensation for the proposal's adverse effects. However, given the informational issues highlighted in these submissions, the Panel might not be able to reach fixed or firm conclusions on some Part 2 matters.

4 Other issues

4.1 Lapse date

[151] KiwiRail seeks that it be assigned a period of 15 years to give effect to its designation, should the NoR be confirmed. KiwiRail submits that the complexity and scale of the project justifies this extended lapse period.[79] On the other hand, Ms Copplestone has recommended a

[77] *North Shore City Council v Auckland Regional Council (Okura)* [1997] NZRMA 59 (EnvC) at 46.
[78] See section 3.1.1 of these submissions; *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [68].
[79] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.56.

lapse period of 10 years. Further still, Commissioner Maassen has invited consideration of whether there are opportunities to think 'outside the square' about lapse and adapt the 'tool' to find some suitable balance. This section addresses underlying legal principles relevant to lapse, before offering some an idea as to what a more sophisticated approach could be.

[152] While the RMA sets a default lapse period of 5 years, there is not necessarily a presumption towards this lapse period length, with a wide discretion afforded to the Council.[80]

[153] The Environment Court has confirmed that the length of time to reasonably complete the project, given its complexity and scale, needs to be balanced against the prejudicial effects to directly affected property owners who are required to endure the "*planning blight*" effects on their properties for an indeterminate period.[81]

[154] The well-known dicta of Judge Moore in *Katz v Auckland City Council*, conceptually setting out why planning permissions (of any type) should lapse after time provides guidance here:[82]

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. Likewise, changing circumstances may

[80] Resource Management Act 1991, s 184.
[81] *Beda Family Trust and Ors v Transit New Zealand* EnvC Auckland A139/2004, 10 November 2004, at [111]–[116].
[82] *Katz v Auckland City Council* (1987) 12 NZTPA 211 (PT).

> render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary.

[155] Ultimately, the lapse period recommended by the Panel should be one determined in the interest of fairness to all parties, with these principles in mind.[83]

[156] Evidence before the Panel suggests that a lengthy lapse period has the potential to both heighten negative effects of the NoR, and squander its positive effects.

[157] Across the hearing, the Panel has heard submitters speak on the heavy social impact of the NOR. The effects of these impacts, compounded by the uncertainty of an extensive lapse period, are articulated in Ms Linzey's evidence (emphasis added):[84]

> In my experience, a lack of certainty around projects such as this can lead to fear, stress and anxiety amongst communities due to an inability to clearly understand what sort of changes will be occurring in the community. The consequences of such uncertainty can mean that families with the resources to do so leave the area, and this itself can result in the community and its sense of place / identity being impacted. **I also consider this potential loss of identity will likely increase in severity the longer uncertainty is not resolved (e.g. the longer the duration of construction and staged development if this is not clearly communicated to the community)**.

[158] On the economic benefits of the Freight Hub, Mr Vuletich highlights (emphasis added):[85]

> A long wait for certainty regarding KiwiRail's plans would risk delaying or deterring private investment, as well as public investments with a dependency on the Freight Hub such as the Ring Road. **A long lapse period would also prolong**

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[83] *Beda Family Trust and Ors v Transit New Zealand* EnvC Auckland A139/2004, 10 November 2004, at [113].
[84] Amelia Linzey *S42A Technical Evidence: Social Impacts* (9 August 2021) at 47.
[85] Shane Vuletich *S42A Technical Evidence: Economic impacts* (9 August 2021) at 18.

> **the uncertainty facing owners of nearby residential properties, potentially impeding their ability to make long term investments in their properties or divest and move on**.

[159] Further, the Panel is entitled to have recourse to Part 2 in consideration of an appropriate lapse date. In that regard, the Panel may wish to have particular regard to s 7(b) and the efficient use and development of a significant tract of the available industrial land reserves in Palmerston North.

[160] KiwiRail makes a number of submissions to justify its desired lapse period. It submits that the Transmission Gully and East West Link proposals were granted 15 year lapse periods based on their major scale and submits that the Freight Hub is of a similar scale, therefore justifying a similar lapse period.[86]

[161] KiwiRail also submits that the confirmation of the NOR itself "provides the community and key stakeholders with greater certainty as to [the Freight Hub's] location".[87] While this may be true for some, it will provide little assistance to those whose personal, business, or strategic decisions will likely be guided by whether the project will be completed, in particular those whose land will be directly affected by the designation. The argument also, respectfully, misses the point. The Freight Hub's location, assuming that the length of lapse period is a relevant consideration, will be somewhat of a moot point – the lapse date is a separate, and logically subsequent, consideration to the confirmation of the NOR.

[162] The approach of the Environment Court to a similar request in *Meridian 37 Ltd* is instructive:[88]

> Balancing the positions as best we are able, we have the view that to expect a landowner to endure such a *planning blight* on a not insubstantial portion of otherwise valuable land, and for such a long period, is unreasonable and unfair.

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[86] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.64.
[87] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 7.61.
[88] *Meridian 37 Ltd v Waipa District Council* [2015] NZEnvC 119 at [31]–[32].

> That is not because we see the *proposed*, or perhaps more accurately envisaged, runway extension and [High Intensity Approach Lights] installation as unimportant. That is not the case at all. But it should not be that a private landowner has the use of its land significantly limited for such a long period (ie a total of three times the statutory default period) because of a possible third-party requirement that, literally, may never happen.
>
> **In such a situation, we consider that the fairness of the situation calls for that burden of uncertainty to be borne by the party which wishes to keep its options open for such a length of time**. In practical terms, that will mean that unless the parties can agree on a use of the affected land that is satisfactory to both, [Waikato Regional Airport Ltd] could consider buying the land and assuming the risk and uncertainty itself, rather than imposing it on the present owner for such an extended period.

[163] The relevant principle here is that the more hypothetical a project is (for example lack of regional consents, in WRL's case, lack of a business case, a lack of funding), the more uncertain they are. This is the 'certainty' that the Courts have referred to in relation to lapse dates, and what Meridian 37 makes clear is that it is the burden of the requiring authority to bear in the interests of fairness, not that of the landowners subject to the designation.

[164] Ms Bell's planning evidence sets out a list of activities which she considers are required before KiwiRail can even begin construction:[89]

> a. obtain funding commitments to undertake the bulk earthworks to enable this to occur;
>
> b. relocate the NIMT […];
>
> c. acquire all the land within the Designation Extent;
>
> d. stop the legal roads within the Designation Extent and arrange access to properties affected by road closures (in conjunction with Palmerston North City Council);

[89] Karen Bell *Statement of Evidence: Planning* (9 July 2021) at 4.7.

e. undertake further site analysis and on site surveys and investigations to inform the development of the detailed design for the Freight Hub including earthworks and trackwork, building layout, services and stormwater;

f. undertake further engagement and ongoing consultation with stakeholders and community;

g. obtain other relevant approvals including regional resource consents and archaeological authority;

h. prepare the Outline Plan of Works;

i. tender and award the construction contract(s), and prepare management plans to comply with the designation and any regional consent conditions;

j. source fill material required for the bulk earthworks;

k. pipe and divert existing watercourses and undertake bulk earthworks to establish the Site;

l. allow sufficient time for the works to stabilise prior to relocating the rail track for the NIMT and commencing construction of the Freight Hub and perimeter road; and

m. install permanent noise barriers and vegetation where appropriate.

[165] This program of undoubtedly necessary activities will take some time to complete. However, many of these activities will occur concurrently, not consecutively. KiwiRail's own indicative construction program indicates a minimum completion time for all the activities listed by Ms Bell of 6.5 years.[90] Even giving a generous allowance for delays, a lapse period of 15 years would be an indulgence, noting that KiwiRail must only "*give effect to*" its designation within its lapse period.[91]

[166] On that point, the Panel has referred to the concept of "*establishment*" and "*implementation*" conditions.[92] This, perhaps, is the opportunity

[90] Stantec *Regional Freight Hub - Design, Construction and Operation* (23 October 2020) at page 22.
[91] Resource Management Act 1991, s 184.
[92] From *Koha Trust Holdings Ltd v Marlborough District Council* [2016] NZEnvC 152.

through which a more sophisticated approach to lapse can take shape, considering Ms Bell's apparent assumption that all of the items listed as well as actual construction of the Freight Hub would need to be fully completed in order for the NoR to be "given effect".

[167] In our submission it is open to the Panel to provide guidance through its written recommendations and/ or conditions as to what it considers to be necessary to 'establish' the Freight Hub project, with the decision forming a record for submitters, enforcement officers and KiwiRail as to its view on that matter. A practical way to help this might be if KiwiRail in its reply set out the combination of activities (such as those matters identified by Ms Bell) and conditions that it considers would be sufficient to 'give effect' to the NoR. The Panel, upon considering the items on that list may incorporate appropriate guidance in respect of what it deems to be necessary. This could also involve the Panel identifying and labelling conditions on the NoR as 'implementation' conditions.

[168] While the above approach may not totally prevent later argument from all quarters about lapse as a matter of law under s 184, the recorded views of the Panel would in our submission carry significant weight if any issue subsequently arose and would, at least, clarify matters as between the Council and KiwiRail.

[169] Ultimately, we see no escape from the Panel needing to specify a lapse date if the Panel considers that the default should not apply. To shift from the default 5 years, s 184 requires the designation to 'specify a different period when incorporated in the plan' where the 'period' is a time that must be set. Given this, the Panel should carefully consider any rationale for an extended lapse period presented by KiwiRail and recommend only what they consider the minimum appropriate lapse period after taking into account the competing factors, and the practical benefits that the Panel can provide about what steps are required to implement or 'give effect' to the designation.

4.2 Council infrastructure issues

[170] For some time now, the Council's infrastructure department and KiwiRail have been working on the development of a project agreement to address the issues summarised in Mr van Bentum's report at paragraph [22]. Mr van Bentum's said that "*the parties intend to have an agreement executed prior to the hearing*", however the optimism has not been rewarded. While Mr van Bentum explains that it would be desirable for them to be addressed through the project agreement, the lack of agreement leaves some resource management issues unresolved.

[171] Some of Mr van Bentum's issues are well suited for a project agreement, for example:

(a) Arrangements for the water bore facility including provision for the Council's planned upgrade;

(b) Arrangements for remediation and compensation of local roads that will have their life span decreased by construction traffic;

(c) Any matter relating to 'vesting' of infrastructure;

(d) Permissions from the Council as Road Controlling Authority concerning any primary designation.

[172] In relation to (a) and (b), despite both involving genuine 'resource management' issues appropriate for conditions, their suitability for side agreement arises partly from condition complexity and because they are matters that are best suited to the flexibility of a contractual relationship.

[173] The Panel may consider these to be genuine resource management issues requiring attention, which raises the prospect of conditions being needed in the absence of a project agreement. The reporting officers will be tabling some revised condition recommendations on each issue, informed by Mr van Bentum's expertise in this area – even if these are not necessarily 'perfect' or simple conditions.

[174] KiwiRail, citing *Norsho Bulc*, submits that it would be inappropriate to impose a condition in relation to (b) above, as it will be difficult to attribute damage to roads to KiwiRail, and there are other tools available to Council to address road life span matters as part of its broader road controlling authority functions.[93]

[175] First, it is worth noting that the Court in *Norsho Bulc* acknowledged that roads are finite physical resources and that the use of roads is a use of land.[94]

[176] Second, *Norsho Bulc* concerned (in part) the proposed inclusion of an additional purpose in a review condition to a resource consent, being:

> To consider the effectiveness of consent conditions relating to the effect of truck movements on the pavement along Blackbridge Road and the need for any upgrading works to be undertaken and the consideration of limiting truck movements to the [activity site] until such improvements have been completed.

[177] Given its materially different subject matter, the commentary in *Norsho Bulc* is not easily applicable to this NoR. Council's concerns are broader than the effects of the proposal on one specific stretch of local road. As such, many of the 'options' identified by the Court and referred to by KiwiRail are, in this case, illusory. For example:

(a) Making directions under s 16A of the Land Transport Act 1998 (or reg 10 of the Heavy Motor Vehicle Regulations 1974) restricting heavy traffic from accessing the Freight Hub is not feasible (nor, one would assume, desirable to KiwiRail); and

(b) A Class C classification under reg 3 of the Heavy Motor Vehicle Regulations 1974 would have no effect, as the traffic of concern coming in and out of the Freight Hub will likely be delivering or collecting goods.

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[93] Legal submissions on behalf of KiwiRail Holdings Ltd (6 August 2021) at 6.17.
[94] *Norsho Bulc Ltd v Auckland Council* [2017] NZEnvC 109 at [92].

[178] The question therefore arises – what are the "*other tools*", apart from conditions, that KiwiRail proposes that Council use to remediate the effects of the Freight Hub on Council's roads? If the tool in question is a side agreement, can KiwiRail commit to entering into one with Council to satisfactorily remediate these effects?

[179] Absent a clearly available and appropriate tool or agreement that addresses these issues better, the reporting officers recommend conditions.

4.3 Development contributions

[180] The Panel has asked whether KiwiRail could be liable for a payment of development contributions. The answer is yes, it could be.

[181] The Local Government Act 2002 ("**LGA**") does not exempt requiring authorities from potential development contribution liability.

[182] Even though resource consents are not required from the Council, requirements for development contribution can be 'triggered' under s 198 LGA upon the grant of a building consent for building work within the district, which will occur here.

[183] Section 199 LGA provides that development contributions may be required in relation to developments if the effect of the development is to require new or additional assets or assets of increased capacity, leading to the Council incurring capital expenditure.

[184] That is not to say that the existing development contributions policy for the Council is set up to deal with the Freight Hub's existence. It will have been prepared considering anticipated growth from the existing extent of the NEIZ without specific consideration of the Freight Hub or the capital projects that its growth beyond that zone might require. This will be a matter for the Council to review.

4.4 Conditions

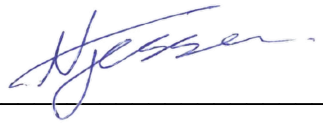
[185] The provision of several different condition sets by KiwiRail since the beginning of this process sets speaks to the evolving base of information since the NoR was lodged, and to KiwiRail's openness to

take on board technical and planning recommendations, including many of those recommended in the reporting officers' reports.

[186] While the issues in contention for conditions has narrowed considerably, including over the course of the hearing, there are remaining areas of disagreement or concern between the reporting officers and KiwiRail's experts that will not be resolved. The reporting officers have advanced one set of conditions at the start of the hearing, and Ms Copplestone will do that again when she addresses the Panel. It is understood there will be a further set from KiwiRail in its reply.

[187] As a matter of procedural fairness to submitters who have already appeared, it is hoped that KiwiRail's next set of conditions will not include further changes that 'weaken' or otherwise materially change mitigations it has already offered in previous sets. As mentioned previously, further additions that address effects of concern may be welcomed.

Dated 29 September 2021



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