

BEFORE INDEPENDENT COMMISSIONERS

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

on the Intensification Planning Instrument to the
Upper Hutt City District Plan

LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED

19 APRIL 2023

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1. INTRODUCTION

- 1.1 KiwiRail is a State-Owned Enterprise responsible for the management and operation of the national railway network. Its role includes managing railway infrastructure and land, as well as freight and passenger services within New Zealand. This infrastructure is of regional and national significance.
- 1.2 KiwiRail is a requiring authority under the RMA and is responsible for designations for railway purposes throughout New Zealand, including the Wairarapa Line, Melling Branch and Gracefield Branch which pass through the Upper Hutt City District and support the vital movement of freight and people through the country via rail. Mr Brown's evidence sets out the volume of freight and passenger rail traffic in the Upper Hutt City District.¹
- 1.3 KiwiRail supports urban development around transport nodes. However, such development must be planned and managed thoughtfully and prudently, with the safety and wellbeing of people and the success of the national rail network in mind.
- 1.4 KiwiRail has submitted on the Intensification Planning Instrument ("IPI") to ensure the safe and efficient operation of the rail network by development near the rail corridor being appropriately managed to minimise adverse effects on health and amenity of adjoining landowners and reverse sensitivity effects on KiwiRail's operations.
- 1.5 KiwiRail seeks the following:
- (a) matters to ensure the safe or efficient operation of the rail network be identified as a qualifying matter in accordance with s77I(e) and s77O(e) of the RMA;
 - (b) a 5m setback for all new buildings and structures on sites adjoining the rail corridor; and
 - (c) the introduction of noise and vibration controls.

2. QUALIFYING MATTER

- 2.1 The RMA includes a list of qualifying matters that may make the MDRS and the relevant building height or density requirements under Policy 3 of the National Policy Statement on Urban Development 2020 ("**NPS-UD**")

¹ Statement of Evidence of Michael Brown dated 19 April 2023 at [3.2] and [3.3].

less enabling of development in relation to an area in a relevant residential zone.²

- 2.2 The IPI has not recognised the inclusion of controls to ensure the safe or efficient operation of the rail corridor as a qualifying matter. This approach does not align with a number of other councils around the country which have provided for rail as a qualifying matter in their plans, including Porirua, Selwyn, Waipā and Auckland.
- 2.3 Under Sections 771(e) and s770(e) of the RMA a qualifying matter includes "a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure".³ The New Zealand rail network is nationally significant infrastructure.⁴ As noted in Ms Heppelthwaite's evidence, nationally significant infrastructure is defined under the NPS-UD 2020.⁵ The rail network is captured as both the "rail network" but also as a "rapid transit service".⁶
- 2.4 Matters to ensure the safe or efficient operation of KiwiRail's rail network in Upper Hutt City is clearly a qualifying matter. The Reporting Planner rejects this on the basis there is insufficient technical evidence in the submission to demonstrate that the assessment requirements for new qualifying matters have been met.⁷
- 2.5 In our submission, the controls sought by KiwiRail are matters to ensure the safe or efficient operation of the rail network and therefore constitute qualifying matters as expressly contemplated by the RMA. The evidence of Mr Brown, Ms Heppelthwaite and Dr Chiles for KiwiRail provides evidence for the need for these controls.

3. SETBACKS

- 3.1 Setbacks are a common planning tool used to ensure the safe and efficient operation of the rail network, particularly when it may come into conflict with adjacent land uses.
- 3.2 KiwiRail's submission on the IPI sought the following:⁸
- (a) an increase in the minimum setback from the rail corridor in the General Residential Zone, High Density Residential Zone,

² RMA, s771, s770 of the RMA provides that qualifying matters may modify the requirements of Policy 3 of the NPS-UD in an urban non-residential zone.

³ s771(e) and s770(e).

⁴ See definitions in the National Policy Statement for Urban Development at <https://environment.govt.nz/assets/publications/National-Policy-Statement-Urban-Development-2020-11May2022-v2.pdf>

⁵ Statement of Evidence of Catherine Heppelthwaite dated 19 April 2023 at [8.7].

⁶ Statement of Evidence of Catherine Heppelthwaite dated 19 April 2023 at [8.8].

⁷ Council's Evidence Report dated 6 April 2023 at [1109].

⁸ KiwiRail's Submission on the Intensification Planning Instrument – Intensification to the Upper Hutt City Council dated 30 September 2022.

Neighbourhood Centre Zone, Local Centre Zone, Mixed Use Zone, Town Centre Zone and City Centre Zone to 5m; and

(b) the introduction of a new matter of discretion in the zones listed in (a) above.

- 3.3 Activities that comply with this control would be permitted, while activities that do not comply would require resource consent as a restricted discretionary activity. KiwiRail is not opposed to intensification near the rail corridor, providing the interface between noise sensitive activities and the rail corridor are carefully managed. The proposed setback controls would not create a "no build zone", but rather provide a nuanced approach to development along the rail corridor.
- 3.4 Providing a physical setback for buildings adjacent to the railway corridor boundary is a safety control to manage the interface between operations within the railway corridor and activities on adjoining sites. A building setback acts to reduce the potential conflict between the safe enjoyment and maintenance of buildings on adjacent properties and the operational rail corridor. This has safety benefits for: users of the land adjoining the rail corridor; the users of the rail corridor; and efficiency benefits for rail operations by mitigating against the risk of train services being interrupted by unauthorised persons or objects entering the rail corridor.
- 3.5 As detailed in Mr Brown's evidence, the risks associated with the rail corridor are very different from property used for residential or other uses, and heightened on those parts of the rail network that are electrified - if a person or object encroaches on the rail corridor there is a risk of electrocution where there are electrified lines and / or risk of injury or worse from rail activities.⁹
- 3.6 As set out in the evidence of Mr Brown, 5 metres is an appropriate distance for buildings and structures to be set back from the boundary of the railway corridor.¹⁰
- 3.7 A setback of 5 metres ensures that there is sufficient space for landowners and occupiers to safely conduct their activities, and maintain and use their buildings, while minimising the potential for interference with the rail corridor. This allows for the WorkSafe Guidelines on Scaffolding in New Zealand to be complied with, as well as accommodating other mechanical access equipment required for maintenance, and space for movement around the scaffolding and equipment.¹¹

⁹ Statement of Evidence of Michael Brown dated 19 April 2023 at [5.9] – [5.10].

¹⁰ Statement of Evidence of Michael Brown dated 19 April 2023 at [5.1] – [5.10].

¹¹ Statement of Evidence of Michael Brown dated 19 April 2023 at [5.6] – [5.9].

3.8 Ms Heppelthwaite also considers that the setback is the most efficient outcome from a planning perspective.¹² The 5 metre setback proposed by KiwiRail protects people from the potential safety risks of developing near the railway corridor and allows for the continued safe and efficient operation of nationally significant infrastructure.

4. RAIL NOISE AND VIBRATION

4.1 Trains are large, travel at speed, and generate noise and vibration as part of their operation. Exposure to activities that create noise and vibration can give rise to annoyance and adverse health effects for people living near noisy sources. As Dr Chiles has outlined in his evidence for KiwiRail, noise and vibration from rail networks have the potential to cause adverse health effects on people living nearby. These effects have been documented by bodies such as the World Health Organisation and are underpinned by robust scientific research.¹³

4.2 Reverse sensitivity is a well-established concept and is an adverse effect for the purposes of the RMA.¹⁴ It refers to the susceptibility of lawfully established effects-generating activities (which cannot internalise all of their effects) to complaints or objections arising from the location of new sensitive activities nearby those lawfully established activities. Such complaints can place significant constraints on the operation of established activities, as well as their potential for growth and development in the future.

4.3 The RMA does not require total internalisation of effects, although effort must be taken to ensure adverse effects beyond boundaries are not unreasonable.¹⁵ KiwiRail is required to undertake measures to ensure compliance with Sections 16 and 17 of the RMA in particular.

4.4 A key concern for KiwiRail in respect of this plan change is to ensure that the development of sensitive activities near the rail corridor does not give rise to health effects on adjoining residents or reverse sensitivity effects that may compromise the safe and efficient operation of the rail network.

4.5 Reverse sensitivity is also a significant issue for transport infrastructure, including the rail network. The Environment Court has recognised the importance of protecting regionally significant infrastructure from reverse sensitivity effects, and has declined applications for resource consent

¹² Statement of Evidence of Catherine Heppelthwaite dated 19 April 2023 at [11.5].

¹³ Statement of Evidence of Stephen Chiles dated 10 March 2023 at [4.1] – [4.4].

¹⁴ See *Affco New Zealand v Napier City Council* NZEnvC Wellington W 082/2004, 4 November 2004 at [29] as cited in *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673 at [60].

¹⁵ *Waikato Environmental Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431 (EnvC) at [184] – [186] following *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48 (EnvC) and *Wilson v Selwyn District Council* EnvC Christchurch C23/04, 16 March 2004.

where developments have the potential to give rise to such effects.¹⁶ Case law has also found that the vulnerability of an activity to reverse sensitivity effects is enough to warrant the implementation of protections for the activity in question.¹⁷ In considering the rail network, it is in our submission appropriate for KiwiRail to consider the prospect of reverse sensitivity effects manifesting at the interface between the rail corridor and nearby land.

4.6 Through its submission, KiwiRail sought to introduce the following rules and standards in the Noise Chapter (or in all relevant zones adjoining the rail corridor):

- (a) a permitted activity standard requiring acoustic insulation and ventilation apply to all new (and altered) activities sensitive to noise within 100m of the rail corridor;
- (b) a permitted activity vibration standard be inserted for all new (and altered) activities sensitive to noise within 60m of the rail corridor to ensure that vibration effects are appropriately addressed; and
- (c) a restricted discretionary activity status where the above noise and vibration standards are not complied with and corresponding matters of discretion.

KiwiRail's approach to noise and vibration controls

4.7 KiwiRail is a responsible infrastructure operator that endeavours to avoid, remedy or mitigate the adverse rail noise and vibration effects it generates, through its ongoing programme of upgrade, repairs and maintenance work to improve track conditions.

4.8 However, the nature of rail operations means that KiwiRail is unable to fully internalise all noise and vibration effects within the rail corridor boundaries. In any case, KiwiRail is not required to internalise all of its effects, as the RMA is not a "no effects" statute.¹⁸ As set out in the evidence of Ms Heppelthwaite, the Greater Wellington Regional Policy Statement accepts there will be effects from infrastructure (beyond its boundaries) and provides a policy framework in which to manage these.¹⁹

4.9 Accordingly, a balance needs to be struck between the onus on the existing lawful emitter (here, KiwiRail) to manage its effects, and district plans providing appropriate controls on the development of new sensitive activities in proximity to the rail corridor.

¹⁶ See, for example, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000.

¹⁷ *Foster v Rodney District Council* [2010] NZRMA 159 at [96].

¹⁸ *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [245].

¹⁹ Statement of Evidence of Catherine Heppelthwaite dated 19 April 2023 at [9.0].

- 4.10 Dr Chiles' evidence is that application of the rule to all areas within 100 metres of the rail corridor will cover most areas likely to be exposed above 55 dB $L_{Aeq(1h)}$ and this is necessary to manage potential adverse health effects on people in new and altered buildings.²⁰
- 4.11 Dr Chiles' evidence also sets out the basis for the need for vibration controls which he considers necessary to manage adverse health effects on sensitive activities.²¹
- 4.12 Ms Heppelthwaite concludes that the introduction of the acoustic standard and the new vibration control provides for health and amenity along with consequentially reducing potential reverse sensitivity effects.²²
- 4.13 The Council evidence report rejected KiwiRail's submission on noise and vibration controls on the basis that no technical evidence was provided.²³ KiwiRail has now provided this through the evidence of Dr Chiles and Ms Heppelthwaite.
- 4.14 The relevant qualifying matter is required to ensure the safe or efficient operation of the rail network. In our submission, the noise and vibration controls proposed by KiwiRail are necessary to ensure this. At the very least, they are clearly related provisions that support or are consequential to the MDRS.²⁴
- 4.15 Overall, the noise and vibration controls sought by KiwiRail are clearly within scope of the IPI and based on the expert evidence before the commissioners, should be included to manage the interface between intensified development and the operations of the rail corridor.

5. CONCLUSION

- 5.1 The relief sought by KiwiRail is the most appropriate way to provide for the safe and efficient operation of nationally significant infrastructure as intended by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

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J W Burton

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²⁰ Statement of Evidence of Stephen Chiles dated 19 April 2023 at [6.4].
²¹ Statement of Evidence of Stephen Chiles dated 19 April 2023 at [4.5 - 4.6].
²² Statement of Evidence of Catherine Heppelthwaite dated 19 April 2023 at [8.4].
²³ Council's Evidence Report dated 6 April 2023 at [1109].
²⁴ RMA, s80E(1)(b)(iii), (2).