

BEFORE INDEPENDENT COMMISSIONERS

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

on Proposed Plan Change 56 (“**PC56**”) to the
Operative Hutt City District Plan

LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED

21 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 Hutt City 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 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 PC56 to ensure the safe and efficient operation of the rail network by ensuring that development near the rail corridor is being appropriately managed to minimise adverse effects on health and amenity of adjoining landowners and reverse sensitivity effects on KiwiRail's operations.
- 1.1 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;
 - (c) amendment to the acoustic standards so they apply to noise sensitive activities within 60m (vibration) and 100m (noise) of the rail corridor boundary; and
 - (d) amendment to the definition of Noise Sensitive Activity to ensure that all relevant sensitive land uses are covered by the definition.

¹

Statement of Evidence of Michael Brown dated 29 March 2023 at [3.3].

2. QUALIFYING MATTERS

- 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**") less enabling of development in relation to an area in a relevant residential zone.²
- 2.2 PC56 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 770(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 Matters to ensure the safe or efficient operation of KiwiRail's rail network in Hutt City is clearly a qualifying matter.
- 2.4 The Reporting Planners have questioned whether the relief sought by KiwiRail is within the scope of the plan change.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. 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 PC56 sought the following:⁶
- (a) an increase in the minimum setback from the rail corridor in the General Residential Zone to 5 metres; and

² RMA, s771. Section 770 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 Section 42A Report at [765] and [803].

⁶ KiwiRail's Submission on Proposed Plan Change 56 to the Hutt City Operative District Plan dated 20 September 2022.

- (b) the introduction of a new rule in the 5 metre setback in the Medium Residential Zone, General Business Zone, High Density Residential Zone, Suburban Mixed Zone.
- 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. 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 The Reporting Planners state that "[n]oise effects are managed by the noise standards and sound insulation provisions of this plan and an additional 5m setback will not noticeably contribute to reducing noise effects".⁷ However, this is not the intention of the setback. The purpose of the 5 metre setback is not to provide noise and vibration benefits but rather protect health and safety. 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.
- 3.5 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.
- 3.6 The Reporting Planners think KiwiRail's request is "disproportionate to the issue".⁸ They also consider KiwiRail's concerns can be addressed by neighbouring landowners arranging access "with the neighbour" and the law of trespass.⁹ This is not good planning in our submission.
- 3.7 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.¹⁰ It is uncommon in KiwiRail's experience for landowners to request permission to enter the rail corridor to undertake such activities¹¹ and it is a health and safety risk to have to rely on prosecution after the fact.

⁷ Section 42A Report at [469].

⁸ Section 42A Report at [804].

⁹ Section 42A Report at [767] and [804].

¹⁰ Statement of Evidence of Michael Brown dated 29 March 2023 at [5.4].

¹¹ Statement of Evidence of Michael Brown dated 29 March 2023 at [5.7].

- 3.8 Fencing and designations are also not appropriate planning outcomes to address this issue. As described by Mr Brown, fencing the rail corridor (to stop people having to illegally access the corridor because district plans have not provided a sensible setback buffer) is not practical, reasonable or a good use of taxpayer money.¹² The Fencing Act 1978 also expressly excludes land held for railway purposes.¹³
- 3.9 The Reporting Planners consider that if KiwiRail needs additional protection for its infrastructure beyond the existing designation, the appropriate method is to alter the designation.¹⁴ In my submission it is not an efficient use of land for KiwiRail to designate adjoining properties, as it would impose potentially a greater blight on private land. Designating land would result in additional cost and uncertainty for developers as they must seek section 176 approval from KiwiRail when they wish to undertake activities on that land.
- 3.10 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.¹⁵
- 3.11 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.¹⁶
- 3.12 Ms Heppelthwaite also considers that the setback is the most efficient outcome from a planning perspective.¹⁷ 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

¹² Statement of Evidence of Michael Brown dated 29 March 2023 at [5.10].

¹³ Fencing Act 1978 s3(c).

¹⁴ Section 42A Report at [768] and [804].

¹⁵ Statement of Evidence of Michael Brown dated 29 March 2023 at [5.12].

¹⁶ Statement of Evidence of Michael Brown dated 29 March 2023 at [5.14].

¹⁷ Statement of Evidence of Catherine Heppelthwaite dated 29 March 2023 at [8.3].

health effects on people living nearby.¹⁸ These effects have been documented by bodies such as the World Health Organisation and are underpinned by robust scientific research.¹⁹

- 4.2 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.
- 4.3 Reverse sensitivity is a well-established concept and is an adverse effect for the purposes of the RMA.²⁰ It refers to the susceptibility of lawfully established effects-generating activities (which cannot internalise all of their effects)²¹ 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.
- 4.4 Reverse sensitivity is 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 where developments have the potential to give rise to such effects.²²

KiwiRail's approach to noise and vibration controls

- 4.5 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.
- 4.6 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.²³ As set out in the evidence of Ms Hoppelthwaite, the Greater Wellington Regional Policy Statement accepts

¹⁸ Statement of Evidence of Stephen Chiles dated 29 March 2023 at [4.1].

¹⁹ Statement of Evidence of Stephen Chiles dated 29 March 2023 at [4.2].

²⁰ 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].

²¹ The RMA does not require total internalisation of effects, although effort must be taken to ensure adverse effects beyond boundaries are not unreasonable. See *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.

²² See, for example, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000.

²³ *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [245].

there will be effects from infrastructure (beyond its boundaries) and provides a policy framework in which to manage these.²⁴

- 4.7 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.
- 4.8 The Operative Hutt City District Plan currently contains a standard – Rule 14A 5 Standard 6, which applies an acoustic performance standard within the Railway Corridor Buffer Overlay which is 40 metres of the boundary of a designation from rail corridor purposes. KiwiRail's submission seeks to extend the application of this standard to 100 metres from the rail corridor for noise and 60 metres for vibration.
- 4.9 Dr Chiles' evidence is that the current 40 metres in Standard 6 misses substantial areas where the threshold of 55 dB $L_{Aeq(1h)}$ is exceeded.²⁵ 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.²⁶
- 4.10 Dr Chiles' evidence is also that the current distance of 40 metres is inadequate to protect new and altered noise sensitive activities from adverse health effects from vibration, and 60 metres is a more appropriate distance.²⁷
- 4.11 Finally, KiwiRail's submission seeks to extend Standard 6 so that it applies to all activities that are generally considered to be sensitive to noise and vibration. Dr Chiles' evidence confirms that all activities proposed to be included in the KiwiRail submission are sensitive to noise and vibration, and should therefore be defined as noise sensitive activities.²⁸ This amendment will ensure the vulnerable uses that have been omitted from the current definition are afforded the same benefits of the noise and vibration provisions.²⁹
- 4.12 Ms Heppelthwaite concludes that the noise and vibration package proposed by KiwiRail is the most efficient outcome to provide for health and amenity along with consequentially reducing potential reverse sensitivity effects.³⁰

²⁴ Statement of Evidence of Catherine Heppelthwaite dated 29 March 2023 at [9.1].

²⁵ Statement of Evidence of Stephen Chiles dated 10 March 2023 at [6.5].

²⁶ Statement of Evidence of Stephen Chiles dated 10 March 2023 at [6.5].

²⁷ Statement of Evidence of Stephen Chiles dated 29 March 2023 at [6.6].

²⁸ Statement of Evidence of Stephen Chiles dated 29 March 2023 at [6.11].

²⁹ Statement of Evidence of Catherine Heppelthwaite dated 29 March 2023 at [9.6].

³⁰ Statement of Evidence of Catherine Heppelthwaite dated 29 March 2023 at [9.8].

- 4.13 The relevant qualifying matter is required to ensure the safe or efficient operation of the rail network. In our submission, the extension of the noise and vibration controls proposed by KiwiRail, and the amendment to the definition of noise sensitive activities are necessary to ensure this. At the very least, they are clearly related provisions that support or are consequential to the MDRS.³¹
- 4.14 Section 80E gives the Council discretion to amend or include "related provisions".³² This discretion is broad. By reference to the express use of the terms "amend or include", there is scope to introduce new, or alter existing, provisions in a district plan through an intensification planning instrument ("IPI"). Other than requiring that such provisions must "support" or be "consequential" on the mandatory requirements, Parliament did not limit the scope of this power.
- 4.15 While neither "support" nor "consequential" are defined in the RMA, these terms invoke the need for a connection between the related provisions and the mandatory requirements. In our submission, this can (and must) include provisions to manage the interface between intensification and infrastructure. Quite clearly, the implementation of the MDRS and policies 3 and 4 of the NPS-UD will result in more people living near the rail corridor in Auckland. As a consequence, provisions to mitigate the effects of intensification (such as the setback and noise and vibration controls sought by KiwiRail) are necessary and appropriate to support the implementation of the MDRS and NPS-UD, as well as being consequential to the implementation of greater intensification.
- 4.16 Further, the MDRS include both setbacks and design controls, like glazing for street facing facades.³³ The inclusion of these standards in the MDRS shows Parliament has already recognised these types of controls as being necessary to mitigate the effects of intensification and support the implementation of the MDRS.
- 4.17 When intensifying our urban environments, it is critical that development is integrated in a way that ensures the ongoing operation and future development of our transport infrastructure. The power to include provisions in the IPI (both as qualifying matters and related provisions) that protect the safe and efficient operation of nationally significant infrastructure is important and integral to ensuring the IPI is effective in bringing forward intensification in a cohesive way. Such an approach is consistent with the broader policy direction in the NPS-UD which seeks to ensure that local authority decisions on urban development are integrated with infrastructure planning.³⁴

³¹ RMA, s80E(1)(b)(iii), (2).

³² RMA, section 80E also provides discretion to include provisions relating to financial contributions and to enable papakainga housing.

³³ RMA, schedule 3A, part 2 at clauses 13 and 17.

³⁴ NPS-UD, Objective 6.

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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