

**BEFORE THE INDEPENDENT COMMISSIONERS**

**IN THE MATTER** of the Resource Management Act 1991 ("**RMA**")

**AND**

**IN THE MATTER** of a submission by KiwiRail Holdings Limited ("**KiwiRail**") (submitter 51 and further submitter 11) on the Proposed Waitomo District Plan ("**Proposed Plan**")

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**LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED  
IN RELATION TO TRANCHE 2 HEARING TOPICS**

**20 NOVEMBER 2024**

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## **1. BACKGROUND AND SUMMARY**

- 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 holds designations for railway purposes throughout New Zealand, including for the North Island Main Trunk line which passes through the Waitomo District and is a key part of the national rail network. Growth is expected in the use of rail. Rail also has a key role in assisting New Zealand's transition to a low-carbon economy through modal shift in freight.
- 1.3 KiwiRail supports urban development around transport nodes and recognises the benefits of co-locating development near transport corridors. However, such development must be planned and managed thoughtfully, with the safety and wellbeing of people and the success of the national rail network in mind. The Proposed Plan provides an important opportunity to ensure these twin objectives are achieved.
- 1.4 KiwiRail submitted on the Proposed Plan to ensure the safe and efficient operation of the district's rail network by ensuring that development near the rail corridor is appropriately managed to avoid, remedy or mitigate adverse effects on the health, safety and amenity of adjoining landowners, as well as reverse sensitivity effects on KiwiRail's operations.

### **What KiwiRail is seeking**

- 1.5 KiwiRail seeks:
- (a) a 5 metre building setback standard for sites adjoining the rail designation boundary in all zones adjacent to the rail corridor;
  - (b) matters of discretion directing consideration of impacts on the safety and efficiency of the rail corridor and consultation with KiwiRail in situations where the setback is not complied with;
  - (c) permitted activity standards requiring acoustic insulation and ventilation to be installed in new and altered activities sensitive to noise within 100 metres of the rail designation boundary;

- (d) a vibration "alert layer" to apply to new and altered activities sensitive to noise within 60 metres of the rail designation boundary;
  - (e) a new definition for "reverse sensitivity"; and
  - (f) an amendment to the definition for "noise sensitive activity".
- 1.6 KiwiRail's relief has been developed and refined over a number of years through multiple planning processes, and has been accepted by the Environment Court. The provisions are appropriate, pragmatic and reasonable, and consistent with the Council's obligations to prepare and change its plan in accordance with the provisions of Part 2 of the RMA, including enabling people and communities to provide for their social, economic, and cultural well-being and their health and safety.
- 1.7 KiwiRail's proposed provisions are set out in Attachment A to Ms Heppelthwaite's evidence.

## **2. SETBACKS**

- 2.1 Setbacks are a common planning tool used in district plans to address potential conflicts between adjacent land uses. In the case of rail, a setback provides a safe physical distance between a building and the property boundary with the railway corridor. A building setback is a safety control and acts to reduce the potential conflict between the safe enjoyment and maintenance of buildings on adjacent properties and the operational rail corridor. Without a sufficient setback, people painting their buildings, clearing gutters, or doing works on their roof are at risk of needing to enter the rail corridor.
- 2.2 Rail setbacks are not the same as yard buffers or setbacks for amenity, given there are significant and potentially severe consequences that can arise from encroachment onto the rail corridor. The risks associated with building next to the rail corridor as opposed to building next to other activities or residential properties are very different. Heavy trains run at speed. Any encroachment onto the rail corridor has the obvious and serious potential to result in injury or death for the person encroaching, not to mention stopping railway operations. There are not the same risks or consequences for other adjoining land.
- 2.3 There are also potential effects from such activities on railway operations and KiwiRail workers, ranging from the stopping of trains affecting service schedules to creating a health and safety hazard for train operators and KiwiRail workers operating within the rail corridor.

- 2.4 The Council Officer (Ms Wratt) agrees building setbacks are appropriate to manage potential health and safety effects arising from buildings close to the rail corridor.<sup>1</sup> The Proposed Plan currently includes a restricted discretionary activity standard in Rule TRAN-R9 where "the structure is located within 5 m of the edge of a railway corridor" which applies to all zones and precincts.
- 2.5 A setback of 5 metres ensures 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.<sup>2</sup> KiwiRail supports the Council and Ms Wratt for proposing a sensible safe distance for structures adjoining the railway corridor. KiwiRail is proposing some mechanical amendments to ensure the standard is included in each zone chapter to align with the National Planning Standards, as set out in Ms Heppelthwaite's evidence.<sup>3</sup>
- 2.6 KiwiRail also seeks the inclusion of associated matters of discretion in each setback standard to ensure the Council (and KiwiRail as a potentially affected party) has an opportunity to consider impacts on the safety and efficiency of the rail network where the setback control is not complied with.
- 2.7 KiwiRail's proposed setback provisions are set out in Attachment A to Ms Heppelthwaite's evidence.

### **3. RAIL NOISE AND VIBRATION**

#### **Why KiwiRail seeks noise and vibration controls**

- 3.1 Trains are large, travel at speed, and generate noise and vibration as part of their operation. As set out in Dr Chiles' evidence, sound and vibration from rail networks have the potential to cause high levels of annoyance and adverse health effects on people living nearby.<sup>4</sup> These effects have been documented by bodies such as the World Health Organisation and are underpinned by robust scientific research.<sup>5</sup>

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<sup>1</sup> Section 42A Report – Topic: Transport prepared by Carolyn Wratt dated 21 October 2024 at [108].

<sup>2</sup> Evidence of Pam Butler dated 4 November 2024 at [4.13]. This distance accommodates scaffolding, other mechanical access equipment required for maintenance and space for movement around the scaffolding and equipment, and allows for a dropped object zone.

<sup>3</sup> Evidence of Cath Heppelthwaite dated 4 November 2024 at [7.3].

<sup>4</sup> Evidence of Dr Stephen Chiles dated 4 November 2024, Appendix A.

<sup>5</sup> Evidence of Dr Stephen Chiles dated 4 November 2024, Appendix A.

- 3.2 KiwiRail is a responsible infrastructure operator that endeavours to avoid, remedy or mitigate the adverse rail noise and vibration it produces, through its ongoing programme of upgrade, repair and maintenance work to improve track conditions. Not only is this important to KiwiRail as a good neighbour, but it is also under a statutory obligation to use the best practicable option to avoid unreasonable noise and to avoid, remedy or mitigate adverse effects on the environment.
- 3.3 However, the nature of rail operations means that KiwiRail cannot fully internalise all noise and vibration effects within the rail corridor boundaries. In any case, KiwiRail is not required to internalise all its effects, as the RMA is not a "no effects" statute.
- 3.4 A key concern for KiwiRail in respect of the Proposed Plan is to ensure the development of sensitive activities near the rail corridor does not give rise to health and amenity effects on adjoining residents, nor reverse sensitivity effects that may compromise the safe and efficient operation of the rail network.
- 3.5 Reverse sensitivity is a well-established concept and is an adverse effect for the purposes of the RMA.<sup>6</sup> It refers to the susceptibility of lawfully established effects-generating activities (which cannot internalise all 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.
- 3.6 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.<sup>7</sup> The High Court recently confirmed the vulnerability of infrastructure operators to reverse sensitivity effects.<sup>8</sup>

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<sup>6</sup> 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].

<sup>7</sup> See, for example, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000.

<sup>8</sup> *Auckland International Airport Limited v Auckland Council & Anor* [2024] NZHC 2058.

## Controls addressing rail noise and vibration effects

### *Acoustic insulation and ventilation provisions*

- 3.7 KiwiRail seeks provisions that require new and altered sensitive activities to comply with acoustic insulation and ventilation measures within 100 metres of the rail designation boundary, to manage adverse health effects.
- 3.8 Ms Wratt agrees with KiwiRail these provisions are appropriate to reduce the internal noise of buildings where sensitive activities occur and manage reverse sensitivity.<sup>9</sup> Ms Wratt relies on the acoustic insulation provisions agreed in relation to the Waikato District Plan.<sup>10</sup> KiwiRail supports the provisions agreed in the Waikato context, however, it is important to clarify that the Waikato provisions applied to a distance of **100 metres, not 40 metres** as proposed by Ms Wratt.<sup>11</sup>
- 3.9 For the reasons set out in the evidence of Dr Chiles, acoustic insulation provisions only applying 40 metres from the railway corridor are not sufficient to protect new and altered noise sensitive activities from adverse health effects.<sup>12</sup> Dr Chiles' evidence is the 100 metre distance reflects a reasonable compromise to capture the most affected sites without requiring assessment where building treatment is less likely to be required.<sup>13</sup> On the basis of Dr Chiles' evidence, KiwiRail seeks the acoustic insulation provisions proposed by Ms Wratt are amended to apply 100 metres from the railway corridor. This aligns with the provisions agreed in the Waikato Proposed District Plan.
- 3.10 KiwiRail's proposed noise provisions are set out in Attachment A to Ms Heppelthwaite's evidence.

### *Vibration alert layer*

- 3.11 In its submission, KiwiRail sought the inclusion of controls requiring vibration attenuation measures to be installed in new and altered activities sensitive to noise within 60 metres of the rail designation boundary. Dr Chiles' evidence demonstrates that rail vibration has a very real effect on the occupants of properties adjacent to the rail corridor that requires mitigation.<sup>14</sup>

<sup>9</sup> Section 42A Report – Topic: Transport prepared by Carolyn Wratt dated 21 October 2024 at [151] and [153].

<sup>10</sup> *HD Land Ltd v Waikato District Council* [2024] NZEnvC 054.

<sup>11</sup> Evidence of Pam Butler dated 4 November 2024 at [5.8] – [5.9].

<sup>12</sup> Evidence of Dr Stephen Chiles dated 4 November 2024 at [7.3].

<sup>13</sup> Evidence of Dr Stephen Chiles dated 4 November 2024 at [6.1].

<sup>14</sup> Evidence of Dr Stephen Chiles dated 4 November 2024 at [4.1] and [5.2].

- 3.12 KiwiRail now proposes the inclusion of a vibration "alert layer",<sup>15</sup> acknowledging that research into transportation vibration effects is still in its infancy in New Zealand, and the costs of managing vibration effects can vary significantly. This alert layer would apply to all properties within 60 metres on either side of the rail designation boundary, consistent with KiwiRail's approach in other parts of New Zealand.
- 3.13 A vibration alert layer is an information layer to signal to property owners that higher levels of vibration may be experienced in the area due to its proximity to the rail corridor. There are no rules or other provisions associated with the vibration alert layer. Alert layers still provide some management of effects, as landowners will be prompted when building new dwellings to consider incorporating vibration attenuation measures of their own accord, or to consider locating new buildings outside the alert layer. New purchasers will also be alerted when purchasing a property that they may experience such effects.
- 3.14 Alert layers are commonly used to provide information to plan readers. A rail vibration alert layer has been accepted in a number of district plans throughout the country including in the Whangārei and Waikato district plans. KiwiRail's proposed wording is set out in Attachment A to Ms Heppelthwaite's evidence.

#### **4. CONCLUSION**

- 4.1 KiwiRail's relief, as set out in Attachment A to Ms Heppelthwaite's evidence, will most appropriately achieve the sustainable management purpose of the RMA, protect the health and safety of residents within proximity to the rail corridor, and ensure the ongoing safe and efficient use of nationally and regionally significant infrastructure in the Waitomo District.

**DATED:** 20 November 2024

**K L Gunnell**

Counsel for KiwiRail Holdings Limited

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<sup>15</sup> Evidence of Pam Butler dated 4 November 2024 at [5.12].