

BEFORE INDEPENDENT COMMISSIONERS

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

a submission by KiwiRail Holdings Ltd ("**KiwiRail**")
(submitter 408 and FS72) on Hearing Stream 5 -
Residential to the Wellington City Proposed District
Plan ("**Proposed District Plan**")

**LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED
IN RELATION TO HEARING STREAM 4 TO THE WELLINGTON CITY
PROPOSED DISTRICT PLAN**

28 JULY 2023

**Russell
McAugh**

A A Arthur-Young | K L Gunnell
P +64 9 367 8000
F +64 9 367 8163
PO Box 8
DX CX10085
Auckland

1. 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 is responsible for designations for railway purposes throughout New Zealand, including the North Island Main Trunk line ("**NIMT**") which passes through Wellington City.
- 1.3 KiwiRail supports urban development around transport nodes. However, such development must be planned and managed carefully 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 Proposed District Plan to ensure the safe and efficient operation of the rail network by ensuring that development near the rail corridor is appropriately managed to minimise adverse effects on health and amenity of adjoining landowners and reverse sensitivity effects on KiwiRail's operations.
- 1.1 KiwiRail supports the recommendations of the Council Officers to retain (with amendments) NOISE-O2, NOISE-P3 and NOISE P6 and the definition of "Noise Sensitive Activity".
- 1.2 KiwiRail seeks that changes are made to:
 - (a) introduce a new rule and standards relating specifically to transport network noise;
 - (b) appropriately reference ventilation requirements in NOISE-P6 and NOISE-S6;
 - (c) incorporate provisions relating to vibration; and
 - (d) other consequential amendments to plan provisions.

2. RAIL NOISE AND VIBRATION

- 2.1 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.¹
- 2.2 A key concern for KiwiRail in respect of the Proposed District Plan provisions 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.
- 2.3 Reverse sensitivity is a well-established concept and is an adverse effect for the purposes of the RMA.² 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.
- 2.1 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 where developments have the potential to give rise to such effects.³ 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.⁴ In considering the rail network, it is in our submission appropriate to consider the prospect of reverse sensitivity effects manifesting at the interface between the rail corridor and nearby land.

¹ Statement of Evidence of Stephen Chiles dated 18 July 2023 at [4.2].

² 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].

³ See, for example, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000.

⁴ *Foster v Rodney District Council* [2010] NZRMA 159 at [96].

KiwiRail's approach to noise and vibration controls

- 2.2 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.
- 2.3 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.⁵ 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.⁶
- 2.4 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.
- 2.5 The Proposed District Plan includes a noise rule (NOISE-R3) which applies noise standards to High Noise Areas including the area within 40 m of a railway corridor (NOISE-S4) and Moderate Noise Areas including the area between 40 m and 100 m of a railway corridor (NOISE-S5). NOISE-R3 also applies to the General Industrial Zone, the Airport inner air noise overlay and the Courtenay Place Noise Area.
- 2.6 As set out in Appendix A to the evidence of Ms Heppelthwaite, KiwiRail is seeking:
- (a) A separate rule, NOISE-R3(1A), for transport network noise instead of the railway corridor and state highway being included in the general noise rule. As explained by Dr Chiles, this is appropriate because the characteristics of transport noise differs from the characteristics of noise emitted by other sources.⁷ As a result different district plan provisions are needed for transport noise than that recommended by the S42A report, in particular

⁵ *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [245].

⁶ Statement of Evidence of Catherine Heppelthwaite dated 18 July 2023 at [8.9].

⁷ Statement of Evidence of Dr Chiles dated 18 July 2023 at [8.8].

the use of internal noise levels is recommended by Dr Chiles instead of uniform sound insulation requirements for all façades.⁸

- (b) Amendments to the rules and standards including:
- (i) Replacement of the noise standard relating to transport network noise with provisions based on indoor road and railway noise (new NOISE-S4A). Dr Chiles' evidence is that using internal rail noise levels allows account to be taken of the specific external noise exposure of each building, room and façade, and allows for the most efficient design option to be adopted.⁹
 - (ii) Minor amendments to the ventilation standard (NOISE-S6) to include additional assessment criteria and amend the air flow rate to six air changes per hour from three.
 - (iii) Removal of the distinction between High Noise and Moderate Noise Areas so that the transport network noise standard (NOISE-S4A) applies to the area within 100 m of a railway corridor.
 - (iv) Consequential amendments to policies (NOISE-P4, NOISE-P6) and the subdivision provisions (SUB-O1, SUB-P4 and SUB-R29A).

2.7 Ms Heppelthwaite concludes that the amended acoustic standards, are the most efficient outcome to provide for health and amenity along with consequentially reducing potential reverse sensitivity effects,¹⁰ and that amendments are necessary to appropriately mitigate the effects identified by Dr Chiles and to implement the Regional Policy Statement and District Plan policy framework.¹¹

Vibration

2.8 KiwiRail is seeking the inclusion of a new vibration standard (NOISE-S4B) that applies within 60 m of a railway corridor. Dr Chiles' evidence sets out

⁸ Statement of Evidence of Dr Chiles dated 18 July 2023 at [8.8].

⁹ Statement of Evidence of Dr Chiles dated 18 July 2023 at [7.4].

¹⁰ Statement of Evidence of Catherine Heppelthwaite dated 18 July 2023 at [8.3].

¹¹ Statement of Evidence of Catherine Heppelthwaite dated 18 July 2023 at [12].

the very real adverse health effects that can arise as a result of vibration.¹² Dr Chiles' evidence also sets out the need for vibration controls which he considers necessary to manage these adverse health effects.¹³

2.9 The Council Officer agrees in principle that there is value in incorporating a vibration standard related to rail in the plan provisions.¹⁴ The Council Officer rejects KiwiRail's submission in relation to a vibration control due to the lack of evidence,¹⁵ but invites the Panel to consider using its powers under s 41C of the RMA to direct further investigation into this matter. KiwiRail would support further reporting.¹⁶

2.10 However, in the absence of such additional reporting and assuming the Panel accepts the s42A report recommendation to reject KiwiRail's primary submission, KiwiRail would accept a vibration "alert layer" as an absolute minimum requirement.¹⁷ The vibration "alert layer" places properties adjacent to the rail corridor on notice of the potential vibration effects.

3. CONCLUSION

3.1 In our submission, the relief sought by KiwiRail will most appropriately achieve the sustainable management purpose of the RMA, protect the health and amenity of residents within proximity to the rail corridor, and ensure the ongoing safe and efficient use and operation of the railway corridor.

DATED: 28 July 2023

K L Gunnell

Counsel for KiwiRail Holdings Limited

¹² Statement of Evidence of Stephen Chiles dated 18 July 2023 at [4.5] and [4.6].

¹³ Statement of Evidence of Stephen Chiles dated 18 July 2023 at [5.1] – [5.4].

¹⁴ Section 42A report dated 3 July 2023 at [27].

¹⁵ Section 42A report dated 3 July 2023 at [27] and [28].

¹⁶ Statement of Evidence of Mike Brown dated 18 July 2023 at [4.6].

¹⁷ Statement of Evidence of Mike Brown dated 18 July 2023 at [4.7].