

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of proposed Plan Changes 82A-B, 88, 88A-J, 109, 147
and 148 to the Whangarei District Plan

LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED

22 NOVEMBER 2019

**Russell
McAugh**

A Arthur-Young | T W Atkins
P +64 9 367 8000
F +64 9 367 8163
PO Box 8
DX CX10085
Auckland

1. INTRODUCTION

1.1 These legal submissions are presented on behalf of KiwiRail Holdings Limited ("**KiwiRail**") in relation to proposed Plan Changes 82A-B, 88, 88A-J, 109, 147 and 148 ("**Plan Changes**") to the Whangarei District Plan ("**Plan**").

KiwiRail in the Whangarei District

1.2 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.

1.3 KiwiRail is a requiring authority pursuant to section 167 of the Resource Management Act 1991 ("**RMA**") and is responsible for designations for railway purposes throughout New Zealand, including the Main North Line ("**MNL**") within the Whangarei District.

Witnesses

1.4 Evidence has been filed on behalf of KiwiRail from the following witnesses:

- (a) **Pam Butler**, Senior RMA Advisor, KiwiRail. Ms Butler's evidence addresses KiwiRail's role in the Whangarei District, the relevant changes proposed through the Plan Changes, KiwiRail's submission points that have been accepted by the reporting officer in the section 42A report, and those submission points that remain outstanding.
- (b) **Dr Stephen Chiles**, Acoustic Engineer, Chiles Limited. Dr Chiles' evidence was submitted jointly by KiwiRail and the New Zealand Transport Agency ("**Transport Agency**"), and addresses matters relating to the effects of rail and road noise and vibration, including reverse sensitivity effects.

KiwiRail's approach to the Plan Changes

1.5 KiwiRail supports the overall intent of the Plan Changes. Many of the matters addressed in the Plan Changes are critical to KiwiRail's business, including the ongoing operation and development of the rail corridor through the Whangarei District. The reporting officer has recommended a number of amendments to

the Plan Changes in response to KiwiRail's submission. KiwiRail supports those recommendations, as identified in Ms Butler's evidence.¹

1.6 However, a number of the recommendations in the section 42A report are of concern to KiwiRail. These can be broadly grouped into the reporting officer's recommendations to:

- (a) reject the suite of new provisions requiring all new or altered sensitive activities proximate to the rail corridor to be acoustically treated, despite differing advice from the Council noise expert;²
- (b) exclude rail from the Transport Chapter and from the definition for "Transport Infrastructure";³ and
- (c) reject the new rules requiring setbacks from the railway corridor boundary for certain activities sought by KiwiRail.⁴

1.7 These legal submissions address the relief sought by KiwiRail in respect of the above matters, namely:

- (a) the insertion of new provisions into the Transport Chapter requiring new or altered sensitive activities in proximity to the rail corridor to be appropriately mitigated in relation to rail noise and vibration;⁵
- (b) that rail be provided for within the Transport Chapter and defined as Transport Infrastructure;⁶ and
- (c) rules requiring certain activities to be set back from the rail corridor, as follows:
 - (i) addition of new rules requiring all activities to be setback a minimum of 5m from the rail corridor boundary;⁷ and
 - (ii) insertion of a new rule requiring forestry activities to be setback at least 10m from the rail corridor boundary.⁸

¹ Evidence of Pam Butler (7 November 2019) at Table One and 3.2.

² Section 42A Report, Part 9 - Services at 345 to 361.

³ Section 42A Report, Part 9 - Services at 66.

⁴ Section 42A Report, Part 1 – Overview at paras 141 – 144; Section 42A Report, Part 2 – Strategic Direction and Subdivision at 222 – 224; Section 42A Report, Part 9 – Services at 340 – 341; 345 – 360.

⁵ Submission numbers 265.22-24.

⁶ Submission numbers 265.9-14, 265.19 and 265.42.

⁷ Submission number 265.30.

⁸ Submission number 265.32.

1.8 In our submission, these amendments are consistent with the purpose and principles of the RMA, and are the most appropriate means of achieving the objectives and policies of the Plan Changes and Plan as a whole.

2. RAIL NOISE AND VIBRATION

2.1 As set out in the evidence of Ms Butler,⁹ a key concern for KiwiRail in respect of the Plan Changes is to ensure that the development of sensitive activities near the rail corridor does not give rise to reverse sensitivity effects that may compromise the safe and efficient operation of the railway network.

2.2 The relief sought in KiwiRail's submission seeks to manage the potential for such effects by requiring new or altered¹⁰ (not existing) sensitive activities in proximity to the rail corridor to appropriately mitigate against rail noise and vibration.¹¹

Reverse sensitivity and the rail corridor

2.3 Reverse sensitivity is a well-established planning principle, and is an adverse effect for the purposes of the RMA.¹² It refers to the susceptibility of established, effects-generating activities (which often cannot internalise all of their effects) to complaints or objections arising from the location of new sensitive activities nearby. Such complaints can place significant constraints on the operation of established activities, as well as their potential for growth and development in the future.

2.4 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.¹³

⁹ Evidence of Pam Butler (7 November 2019) at section 4.

¹⁰ As noted in the Evidence of Pam Butler (7 November 2019) at paragraph 4.18, the proposed provisions will only apply to habitable spaces. It will not apply to alterations to non-habitable spaces and other spaces not used for noise sensitive activities.

¹¹ Submission number 265.25.

¹² 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].

¹³ See, for example, in the context of airport noise, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000, where the Environment Court declined an application for subdivision consent within the 50 dB Ldn contour for Christchurch International Airport on the basis that there was potential for serious reverse sensitivity effects.

- 2.5 In the context of rail, reverse sensitivity effects arise where sensitive activities (such as dwellings) locate in close proximity to the rail corridor. As explained in Ms Butler's evidence, the potential for reverse sensitivity effects is most apparent in the context of rail noise and vibration.¹⁴ Trains are large, travel at speed, and are powered by diesel locomotives. All of these factors create noise and vibration effects in and around the rail corridor, which cannot be internalised. The evidence of Ms Butler and Dr Chiles provide examples of reverse sensitivity issues arising in the context of rail noise and vibration throughout New Zealand.¹⁵
- 2.6 KiwiRail has duties under the RMA to use the best practicable option to ensure that noise and vibration effects do not exceed a reasonable level,¹⁶ and to avoid, remedy or mitigate adverse effects on the environment.¹⁷ However, a balance must 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.¹⁸ Good planning controls to appropriately manage reverse sensitivity effects are critical to ensuring that the safe and efficient operation of the railway network is not unduly constrained as a result of complaints from sensitive uses, as well as ensuring that the effects of rail noise and vibration are appropriately mitigated.

Land use controls to manage reverse sensitivity

- 2.7 As reverse sensitivity is an adverse effect under the RMA,¹⁹ in preparing and promulgating the Plan Changes, the Council has a duty under Part 2 and section 74 to avoid, remedy or mitigate such effects. In KiwiRail's submission, the land use controls sought by KiwiRail are an appropriate way to mitigate the effects of rail noise and vibration on nearby land uses, as well as to manage the potential for reverse sensitivity effects on KiwiRail's operations.

¹⁴ Evidence of Pam Butler (7 November 2019) at paragraphs 4.1 to 4.7.

¹⁵ Evidence of Pam Butler (7 November 2019) at paragraph 4.6; Evidence of Stephen Chiles (7 November 2019) at paragraph 4.5.

¹⁶ RMA, s 16.

¹⁷ RMA, s 17.

¹⁸ *Ngatarawa Development Trust v Hastings District Council* EnvC Wellington W17/08, 14 April 2008 at [23]. See also *Gargiulo v Christchurch City Council* EnvC Christchurch C137/200, 17 August 2000; and *Foster v Selwyn District Council* EnvC Christchurch C138/2007, 1 November 2007.

¹⁹ *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC W17/04, 14 April 2008 at [22].

- 2.8 The Environment Court has provided guidance as to when controls on surrounding land are an appropriate way to resolve the tension between the need to enable the ongoing operation of established, effects-generating activities, on the one hand, and to mitigate effects on surrounding land uses, on the other. In order to justify imposing land use controls on adjoining activities, the effect-emitting activity "must be of some considerable economic or social significance, locally, regionally or nationally."²⁰
- 2.9 While the appropriate outcome will depend on the circumstances and relevant planning regime in each case, the Court has noted that the RMA does not require that total internalisation of effects is achieved.²¹ There is a greater expectation of internalisation for newly established activities than older activities, and the main concern is to ensure that adverse effects beyond the boundary are not unreasonable.²²
- 2.10 The MNL is a long-established lawful activity in the Whangarei District and Northland Region more broadly, and it is of local, regional and national importance. Full internalisation of the effects of the MNL's use cannot reasonably be achieved due to the nature of rail activities. While KiwiRail constantly seeks to ensure it operates its corridor in a way to internalise effects as far as is reasonably practicable, it has limited ability to change the levels of noise or vibration from the use of its tracks.
- 2.11 Therefore, in order to ensure that the adverse effects of rail noise and vibration beyond the rail corridor are appropriately managed, KiwiRail submits that land use controls should be included in the District Plan for new or altered sensitive activities proposed to locate adjacent to, or near, the rail corridor.

Relief sought

- 2.12 KiwiRail seeks that new provisions be inserted into the proposed Transport Chapter requiring all new or altered sensitive activities in all zones to appropriately mitigate to the effects of rail noise and vibration.²³ The Transport Agency also seeks the inclusion of these provisions.²⁴

²⁰ *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC W17/04, 14 April 2008 at [24].

²¹ *Waikato Environmental Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431 (EnvC) at [184].

²² *Waikato Environmental Protection Soc Inc v Waikato Regional Council* [2008] NZRMA 431 (EnvC) at [185]-[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.

²³ Submission number 265.25.

²⁴ Submission numbers 240.30-32.

- 2.13 In his evidence, Dr Chiles explains that, from an acoustic perspective, the preference would be for sensitive land uses to simply be prohibited from establishing near the rail corridor (so as to avoid the potential for reverse sensitivity effects and adverse health or amenity effects altogether).²⁵ However, KiwiRail (like Dr Chiles) recognises that an integrated approach to planning requires a rule framework that allows this type of development to occur in a way that appropriately manages the relevant effects of, and on, the rail corridor.
- 2.14 As explained by Dr Chiles, the implementation of building design and acoustic standards as sought by KiwiRail and the Transport Agency is a pragmatic means of achieving this outcome.²⁶ KiwiRail is not seeking to impose unreasonable or unnecessarily stringent design requirements on persons seeking to develop near the railway corridor. Rather, KiwiRail is seeking to ensure that, if sensitive development is to occur in proximity to the railway corridor, it occurs in a way that protects people from the effects of rail noise and vibration. This will, in turn, manage the potential for reverse sensitivity effects on KiwiRail's operations.
- 2.15 Many other district councils across New Zealand have accepted that such an approach is necessary and appropriate in managing the effects of rail noise and vibration, with various district plans adopting similar provisions to those sought by KiwiRail and the Transport Agency. These include (most recently) Christchurch, Hurunui, Palmerston North and the Proposed New Plymouth District Plan.

Northland Regional Policy Statement

- 2.16 The provisions proposed by KiwiRail and the Transport Agency are also necessary to give effect to the Northland Regional Policy Statement ("**Northland RPS**"). For example:
- (a) Objective 3.6 of the Northland RPS provides support for measures that work to protect existing and planned regionally significant infrastructure (which includes railways) from the adverse effects of new subdivision, use and development, and enable its ongoing operation.
 - (b) Objective 3.7 recognises and promotes the benefits of regionally significant infrastructure in enhancing Northland's economic, cultural

²⁵ Evidence of Stephen Chiles (7 November 2019) at paragraph 6.2.

²⁶ Evidence of Stephen Chiles (7 November 2019) at paragraph 6.2.

and social wellbeing. This objective recognises the need to promote these benefits alongside managing adverse effects. The explanatory note specifically acknowledges that, due to the constraints of some infrastructure, adverse effects cannot always be practically avoided or internalised.

3. RAIL AS TRANSPORT INFRASTRUCTURE

- 3.1 As notified, the Plan Changes did not include rail as Transport Infrastructure and did not provide for rail activities within the proposed Transport Chapter. The notified version of the Transport Chapter is focused primarily on roads and activities relating to roading infrastructure. KiwiRail lodged a number of submissions seeking amendments to the Plan Changes to ensure that rail was similarly recognised and provided for as an integral part of Whangarei's transport network.²⁷
- 3.2 The Council, in its section 42A report, has recommended the rejection of KiwiRail's submission points that seek to have rail recognised as Transport Infrastructure and included within the Transport Chapter of the Plan. The reporting officer does not provide any justification for the exclusion of the railway from the Transport Chapter, other than to note his view that "the transport network is not considered to include the railway corridor in the context of the Transport Chapter".²⁸
- 3.3 KiwiRail strongly disagrees with the conclusion of the reporting officer. Rail is very clearly transport infrastructure. KiwiRail's submissions, and Ms Butler's evidence, outline the various reasons why the Plan should appropriately recognise and provide for rail and issues associated with the operation and maintenance of the railway corridor as Transport Infrastructure, including:
- (a) the integral role of KiwiRail's operations to Whangarei's freight transport network;
 - (b) the lack of any real distinction between road and rail networks in terms of their ownership and designation status; and
 - (c) the efficiency and efficacy of managing the use, maintenance, and development of the rail corridor (as a regionally and nationally

²⁷ Submission numbers 265.11-16, 265.21, 265.25, 265.31-33, 265.36, 265.43.

²⁸ Section 42A Report, Part 9 - Services at 341.

significant physical resource) through both designation and other land use controls.

- 3.4 The omission of rail from the Transport Chapter assumes that all rail related activities and operations are designated and undertaken by KiwiRail. That is not the case. As explained in the evidence of Ms Butler, KiwiRail does not, and cannot, rely on its designations alone to protect its activities from potential reverse sensitivity issues.²⁹
- 3.5 KiwiRail's designations only control land use activities *within* the designated corridor that are for railway purposes. They cannot be relied upon to ensure that the development of sensitive activities in proximity to the railway corridor is appropriately managed. This means that clear direction and appropriate land use controls must also be included in the Plan's objectives, policies and rules.

Policy recognition of rail as Transport Infrastructure

- 3.6 In our submission, the recognition of, and provision for, rail as Transport Infrastructure is also the most appropriate way to achieve the objectives of the Transport Chapter for the purposes of section 32 of the RMA. The objectives (and supporting policies) of the Transport Chapter are broadly framed, seeking to ensure the ongoing efficient functioning of Whangarei's transport network. In our submission, rail clearly forms part of the transport network in Whangarei as described in the Issues section of the Transport Chapter. Among other things, the railway network "provides for the movement of people and goods throughout the District", and assists in promoting "alternative modes of transportation and reduced dependency on private motor vehicles".³⁰
- 3.7 The Council also has an obligation under section 75 of the RMA to ensure that the Plan Changes give effect to the Northland RPS.³¹ By failing to recognise rail as Transport Infrastructure, the Plan Changes do not give effect to the RPS, which specifically identifies railway lines and associated railway facilities as regionally significant transport infrastructure.³²
- 3.8 In our submission, unless the definition of Transport Infrastructure and relevant parts of the Transport Chapter are amended as sought in KiwiRail's submission, any decision on the Plan Changes would fail to give effect to the

²⁹ Evidence of Pam Butler (7 November 2019) at paragraph 5.5.

³⁰ Proposed Transport Chapter, Overview.

³¹ RMA, s 75(3)(c).

³² Northland RPS, Appendix 3 – Regionally significant infrastructure at page 167.

Northland RPS and, therefore, would be inconsistent with section 75 of the RMA.

4. SAFE AND EFFICIENT OPERATION OF RAIL NETWORK

4.1 KiwiRail's submission also sought the inclusion of provisions to ensure the safe and efficient operation of the rail network where it comes in conflict with neighbouring activities such as built environments and forestry.³³ In particular, KiwiRail seeks the addition of rules requiring such activities to be set back from the railway corridor.

Adjacent buildings setback

4.2 KiwiRail seeks the addition of a new rule to the Transport Chapter (or, alternatively, to each zone chapter in the Plan) to require a 5m setback for new or altered buildings adjacent to the boundary of the railway corridor (excluding private railway sidings).³⁴ Activities outside of this setback would be permitted, with activities seeking to establish within 5m of the railway corridor boundary requiring resource consent for a restricted discretionary activity. In our submission, the addition of this rule to the Transport Chapter is the most efficient and effective means of giving effect to relief sought by KiwiRail.

4.3 As noted in Ms Butler's evidence, KiwiRail needs to protect the ability for trains to be operated safely along the railway corridor.³⁵ Unless buildings are set back from the railway corridor boundary, the safe and efficient operation of the railway can be compromised by everyday activities on neighbouring properties (such as vegetation clearance, painting or cleaning). If the potential for conflict with the use of the railway corridor is not appropriately managed, these activities can bring people or their equipment into the path of trains, which brings with it the risk of a collision occurring. The consequences of a collision on the railway are significant.

4.4 In our submission, for the reasons set out in Ms Butler's evidence, the amendments sought by KiwiRail are reasonable, appropriate and necessary to ensure that the risk of incidents occurring as a result of encroachment into the railway corridor is appropriately managed and avoided throughout the Whangarei District. The proposed setback rule is also not unduly onerous on owners of land adjacent to the railway corridor, as it does not prevent the

³³ Submission number 265.31.

³⁴ Submission number 265.31.

³⁵ Evidence of Pam Butler (7 November 2019) at paragraphs 6.5 and 6.6.

establishment of new buildings or activities within 5m of the railway boundary altogether.

- 4.5 As explained above, resource consent can still be sought for such activities as a restricted discretionary activity, with impacts on the safety and efficiency of the railway corridor listed as a matter of discretion.

Forestry setback

- 4.6 KiwiRail has also sought the inclusion of a setback of 10m from the railway corridor for any replanting that occurs within 5 years of harvesting plantation forestry.³⁶ As noted in Ms Butler's evidence, trees pose safety risks to the railway corridor due to the potential for intrusion on sight lines, dropping of branches (and corresponding increased risk of derailment), and the risk of "mud spots" resulting from the growth of tree roots beneath the rail corridor (which can damage the track and potentially cause derailment).³⁷

- 4.7 The need for afforestation activities to be set back from adjoining properties (including the railway corridor) is recognised and provided for in Regulation 14 of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 ("**NES Forestry**").³⁸ However, replanting which occurs within five years of harvesting of plantation forestry is not captured. In our submission, KiwiRail's proposed amendments to the Transport Chapter are necessary to ensure that all forestry activities with the potential to cause adverse effects on the safe and efficient operation of the railway corridor are appropriately managed.

Consistency with strategic objectives

- 4.8 KiwiRail's submissions seeking setbacks from the railway corridor are also the most appropriate way to give effect to Objectives TRA-O1 and TRA-2, which seek to provide and maintain a safe and efficient transport network, including through the control of land use and development. Objective 3.8 of the Northland RPS specifically acknowledges that the functionality and resilience of regionally significant infrastructure (including railways) should be supported so that it can meet future needs, be efficient and adaptable.

³⁶ Submission number 265.31.

³⁷ Evidence of Pam Butler (7 November 2019) at paragraph 6.18.

³⁸ Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017, regulation 14(1)(a).

5. SECTION 32 EVALUATION

- 5.1 The rules and standards proposed through the Plan Changes must be the most appropriate way to achieve the objectives of the Plan (and Plan Changes),³⁹ and must also implement its policies.⁴⁰
- 5.2 As set out in Ms Butler's evidence, the Plan and Plan Changes contain various objectives and policies that specifically recognise the potential for reverse sensitivity and other adverse effects (eg safety) on regionally significant infrastructure such as railways, and direct that these effects are avoided, remedied or mitigated where appropriate. These include:
- (a) Objective 23.3.3, which seeks to protect network utility operators (which are defined to include railways) from the adverse effects of adjacent land use and development;
 - (b) Objective 6.3.8, which promotes the integration of land use and transport planning, and Objective 6.3.12, which seeks to avoid conflict between incompatible land use activities as a result of subdivision and urban development; and
 - (c) Policy 6.4.8, which provides for the design and location of activities, subdivision and development so as to avoid or mitigate conflicts between incompatible land uses.
- 5.3 In our submission, the relief sought by KiwiRail is consistent with the above provisions, as the relief provides land use controls that will mitigate the effects of rail noise and vibration on sensitive activities in proximity to the rail corridor while at the same time ensuring the ongoing safe and efficient operation of the railway network. The recommendations in the section 42A report are inconsistent with these objectives and policies.

6. CONCLUSION

- 6.1 KiwiRail supports the resource management outcomes sought by the Council through the Plan Changes.
- 6.2 However, KiwiRail seeks that the Commissioners amend the Plan Changes in the manner sought by KiwiRail in its original submission and subsequently

³⁹ RMA, s 32.

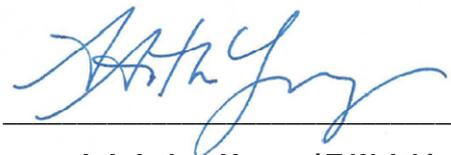
⁴⁰ RMA, s 75.

developed in the evidence of Ms Butler, Dr Chiles and these legal submissions, as follows:

- (a) insert new provisions into the Transport Chapter requiring new or altered sensitive activities in proximity to the rail corridor to be appropriately mitigated in relation to rail noise and vibration;⁴¹
- (b) provide for rail within the Transport Chapter and amend the definition of Transport Infrastructure to include rail;⁴² and
- (c) include rules requiring setbacks from the rail corridor, as follows:
 - (i) new rules requiring all activities to be setback a minimum of 5m from the rail corridor boundary;⁴³ and
 - (ii) a new rule requiring forestry activities to be setback at least 10m from the rail corridor boundary.⁴⁴

6.3 In our submission, the relief sought by KiwiRail will most appropriately achieve the sustainable management purpose of the RMA, the ongoing safe and efficient use and operation of the railway corridor, and is the most appropriate means of achieving and implementing the objectives of the Plan.

DATED 22 November 2019



A A Arthur-Young / T W Atkins
Counsel for KiwiRail Holdings Limited

⁴¹ Submission number 265.25.

⁴² Submission numbers 265.9 to 14, 265.19 and 265.42.

⁴³ Submission number 265.30.

⁴⁴ Submission number 265.32.