

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

IN THE MATTER of the Resource Management Act 1991
AND of appeals under clause 14 of the First
Schedule of the Act
BETWEEN KIWI RAIL HOLDINGS LIMITED
(ENV-2020-AKL-000131)
Appellant
AND WHANGĀREI DISTRICT COUNCIL
Respondent

Court: Environment Judge J A Smith sitting alone under section 279 of the
Act

Date of Order: 01 APR 2021

Date of Issue: 01 APR 2021

CONSENT ORDER

A: Under section 279(1)(b) of the Resource Management Act 1991, the
Environment Court, by consent, orders that:

- (1) Plan Changes 88 and 109 to the Operative Whangārei District Plan are
amended in accordance with **Annexure 1**;
- (2) The Planning Maps be amended to show the new Strategic Railway
Line Protection Area in accordance with **Annexure 2**;



- (3) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Transport topic are resolved;
- (4) The District Wide – Transport topic remains extant;
- (5) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Noise topic remain extant.

B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

[1] This consent order relates to the appeal by KiwiRail Holdings Limited (**KiwiRail**) against the decision of the Whangārei District Council on Plan Changes 88A to 88I, 109 and 115 to the Operative Whangārei District Plan (**the Plan**), and specifically to that part of KiwiRail’s appeal dealing with setbacks from the railway corridor boundary allocated to the District Wide Transport topic.

[2] Under the Plan the only specific setbacks from railway corridor boundaries are within the Rural Village Residential Zone and Rural Village Centre Zone, where residential units are required to be setback 4.5m and 2m respectively from the railway line designation boundary.

[3] The notified plan changes did not introduce any additional railway corridor setbacks.

[4] KiwiRail made a submission on the Plan Changes (**the submission**) seeking the inclusion of a new rule within the district wide Transport (**TRA**) Chapter, applying to all zones, requiring consent as a restricted discretionary activity for buildings not set back at least 5 metres from a railway corridor boundary. As an alternative to the requested TRA rule, the submission sought the inclusion of the same setback rule

within 15 specified zone chapters. The submission also sought a district wide rule to require forestry replanting to be set back 10m from the railway corridor boundary.

[5] The Council's Decisions on the Plan Changes did not introduce the amendments requested in the submission.

[6] The appeal seeks relief consistent with the submission.

[7] The parties listed below have given notice of intention to become a party to KiwiRail's appeal with respect to building setbacks from the railway corridor under section 274 of the Act and have signed the joint memorandum in support of the consent order:

- (a) Foodstuffs North Island Limited
- (b) Heron Construction Holdings Limited
- (c) Kāinga Ora – Homes and Communities
- (d) Port Nikau Joint Venture
- (e) Southpark Corporation Limited
- (f) Udy Investments Limited
- (g) The University of Auckland

[8] There are no section 274 parties with respect to forestry setbacks from the railway corridor.

Agreement reached

[9] Following mediation and subsequent direct discussion, the parties have reached agreement on a proposal to resolve the aspects of the appeal within the District Wide – Transport topic.

[10] KiwiRail is no longer pursuing relief relating to forestry setbacks.

[11] The parties have agreed that the Planning Maps, interpretation rule HPW-R6 and policy TRA-P16 are to be amended, and a new TRA rule is to be inserted, to better protect the safe, efficient and effective operation of the rail corridor.

Section 32AA Analysis

[12] Section 32AA of the Act requires a further evaluation for any changes to a proposal since the initial section 32 evaluation report. In this instance the changes are the introduction of specific provisions for managing buildings in proximity to the railway corridor.

Mapping of Strategic Railway Line Protection Areas

[13] The appeal sought provisions requiring building setbacks from the “railway corridor boundary”. The two approaches identified in the appeal were either a blanket district wide rule in the TRA Chapter, or zone-specific rules in 15 specified zones.

[14] The agreed provisions take an alternative approach of creating a new mapped layer in the Planning Maps which identifies where the new setback rules apply. This approach is consistent with similar provisions in the TRA Chapter (strategic road protection areas and indicative roads).

[15] Mapping the locations where the setback rule applies avoids having to define the “railway corridor boundary”, and allows for an approach better tailored to specific instances in Whangārei where a setback is considered appropriate.

[16] For example, the “Kamo Shared Path” has recently been constructed throughout portions of Whangārei within the railway corridor designation, between the physical rail tracks and the adjoining property boundaries. There are also locations where the railway designation is significantly wider than the physical tracks, and any adjoining property boundaries are at least 100m from the tracks. The parties agree that requiring additional setbacks in either of these locations would not improve the safety or efficiency of rail operations, as a sufficient physical setback is already provided.

[17] The areas where a setback is considered appropriate traverse multiple zones and the parties agree that the most efficient method of targeting the setback is by introducing the new mapping.

[18] The appeal relief refers to setbacks in 15 specified Residential, Business and Open Space zones. The spatial analysis undertaken to generate the mapped setbacks refined this to only Residential and Business zones.

Amendments to policy TRA-P16

[19] The appeal did not specifically seek any amendments to the objectives or policies.

[20] The agreed provisions however consequentially introduce a new subclause to policy TRA-P16 to provide policy direction that providing sufficient building setbacks from identified strategic railway line protection areas is for the purpose of ensuring that buildings can be safely accessed and maintained.

[21] Introducing a policy framework provides more clarity and certainty for applicants, and for the Council when assessing resource consent applications.

New TRA Rule

[22] The agreed provisions introduce a new rule to the TRA Chapter which refers to the mapped strategic railway line protection areas. Locating the rule in the TRA Chapter is efficient as it avoids duplicating the rule in each relevant zone, and better relates the rule to the new policy which is also located in the TRA Chapter.

[23] The rule requires a 2m setback in the Residential Zones and a 2.5m setback in Business Zones.

[24] The setback distances have been reduced from the 5m setback sought in the appeal to respond to Whangārei's specific built environment and Plan-enabled development. This reduces the overall costs of the new provisions (compared to a 5m setback) while still ensuring that safe access to buildings adjacent to the railway corridor can be achieved.

[25] The larger setback in the Business Zones is based on the rationale that larger scale (smaller setbacks and greater height) buildings are enabled in the Business Zones and a larger setback provides for improved accessibility, such as use of scaffolding.

[26] The agreed rule exempts “minor buildings” (e.g. garden shed, water tanks, etc.) and “major structures” (e.g. fences, swimming pools, flag poles, etc.). Based on the Plan definitions the parties agree that these generally do not require setbacks for access or maintenance purposes, and that requiring setbacks could lead to inefficient use of space on smaller residential sites.

[27] The agreed matters of discretion have been refined from the relief sought in the appeal to focus on the location, size and design of the building as it relates to the ability to safely use, access and maintain buildings without requiring access on, above or over the rail corridor.

[28] The agreed rule includes a notification rule precluding public notification, and identifying KiwiRail as the only potentially affected person under the limited notification provisions of the Act.

Amendments to HPW-R6

[29] Interpretation rule HPW-R6 is a Plan-wide rule regarding the zoning of roads, railways and rivers:

All public roads (including state highways), railways and rivers are zoned, although they are not coloured on the planning maps to avoid confusion. Roads, railways and rivers are zoned the same as the zoning of adjoining sites. Where a different zone applies on either side of the road, railway or river then the zoning will apply to the centreline of the road, railway or river.

[30] The parties identified that some railway sites are specifically zoned on the Planning Maps. This results in internal conflict within the Plan as, in some instances, the mapped zoning would result in a different zoning outcome than if HPW-R6 were applied.

[31] To provide more clarity and to address this conflict the parties have agreed to consequentially amend HPW-R6 to record that some railway sites are zoned on the Planning Maps.

Assessment of reasonably practicable options

[32] The proposed amendment does not result in any changes to the zoning of the railway corridor but does resolve the current inconsistency in the Plan.

[33] The railway corridor is identified as Regionally Significant Infrastructure under the Decisions and the Regional Policy Statement for Northland 2016.¹ As such it is important to ensure that rail infrastructure can continue to operate in a safe, efficient and effective manner. In considering the most appropriate method of achieving this, the parties identified three options:

- (a) Option 1 (status quo) – No specified building setbacks from railway corridor boundaries. Any setbacks would be dependent on the underlying zone setback rules.
- (b) Option 2 (KiwiRail appeal relief sought) – A district wide “blanket” 5m building setback from the railway corridor boundary.
- (c) Option 3 (the agreed provisions) – A 2m – 2.5m building setback from specifically mapped parts of the railway corridor.

[34] The parties agree that the most *efficient and effective* option in the context of Whangārei’s specific built environment and Plan-enabled development is Option 3 because:

- (a) Providing for a railway corridor setback better protects the safe, efficient and effective operation of rail infrastructure than the status quo.
- (b) Reducing the setback distance from 5m to 2m – 2.5m reduces the costs on landowners while still providing for safe access and maintenance (including space for ladders and scaffolding).
- (c) Identifying specific areas where the railway corridor setback applies (and conversely does not apply) tailors the provisions to areas within Whangārei where an additional setback is appropriate.

[35] The agreed new rule and mapping together with the amendments to TRA-P16 and HPW-R6 provide a clear and consistent framework for protecting the safe, efficient and effective operation of rail infrastructure in Whangārei. Option 3 will

¹ Appendix 3 of the Regional Policy Statement for Northland 2016.

effectively limit instances where private property owners may need to access the railway corridor in order to maintain or access their buildings. The agreed provisions are efficient in that they are less onerous than KiwiRail's relief sought, and there are notification exemptions where property owners apply for resource consent if they wish to infringe the setbacks.

[36] The parties agree that this is not a situation where there is uncertain or insufficient information such that the risk of acting or not acting needs to be evaluated, as the location of and safety requirements for the railway corridor are well understood.

Consideration

[37] In making this order the Court has read and considered the appeals and the joint memoranda of the parties dated 26 March 2021.

[38] The Court is making this order under section 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for present purposes that:

- (a) all parties to the proceedings have executed the memorandum requesting this order;
- (b) all parties agree that the agreed amendments to the Plan Change resolve the KiwiRail appeal in relation to the District Wide – Transport topic in full; and
- (c) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

[39] I am satisfied that an appropriate outcome has resulted. Overall, I consider the sustainable management purpose and the other relevant requirements of the Act are broadly met.

Order

[40] Therefore the Court orders, by consent, that:

- (a) Plan Changes 88 and 109 to the Operative Whangārei District Plan are amended in accordance with **Annexure 1** (insertions marked as underlined, deletions as ~~striketrough~~);
- (b) The Planning Maps are amended to show the new Strategic Railway Line Protection Area in accordance with **Annexure 2**;
- (c) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Transport topic are resolved;
- (d) The District Wide -- Transport topic remains extant;
- (e) Those aspects of the appeal by KiwiRail Holdings Limited with respect to the District Wide – Noise topic remain extant; and
- (f) There is no order as to costs.



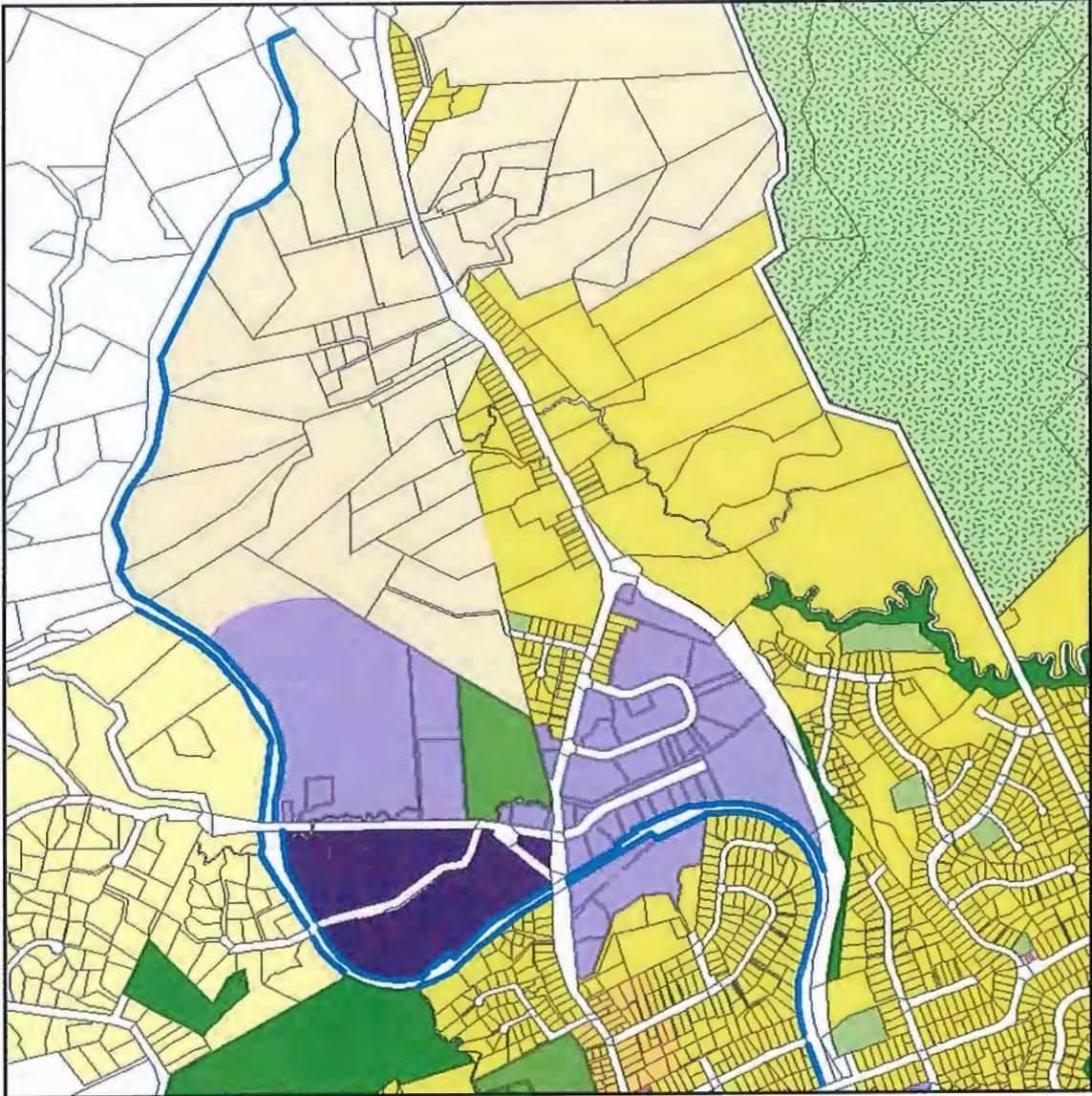
Annexure 1

(insertions marked as underlined, deletions as ~~striketrough~~)

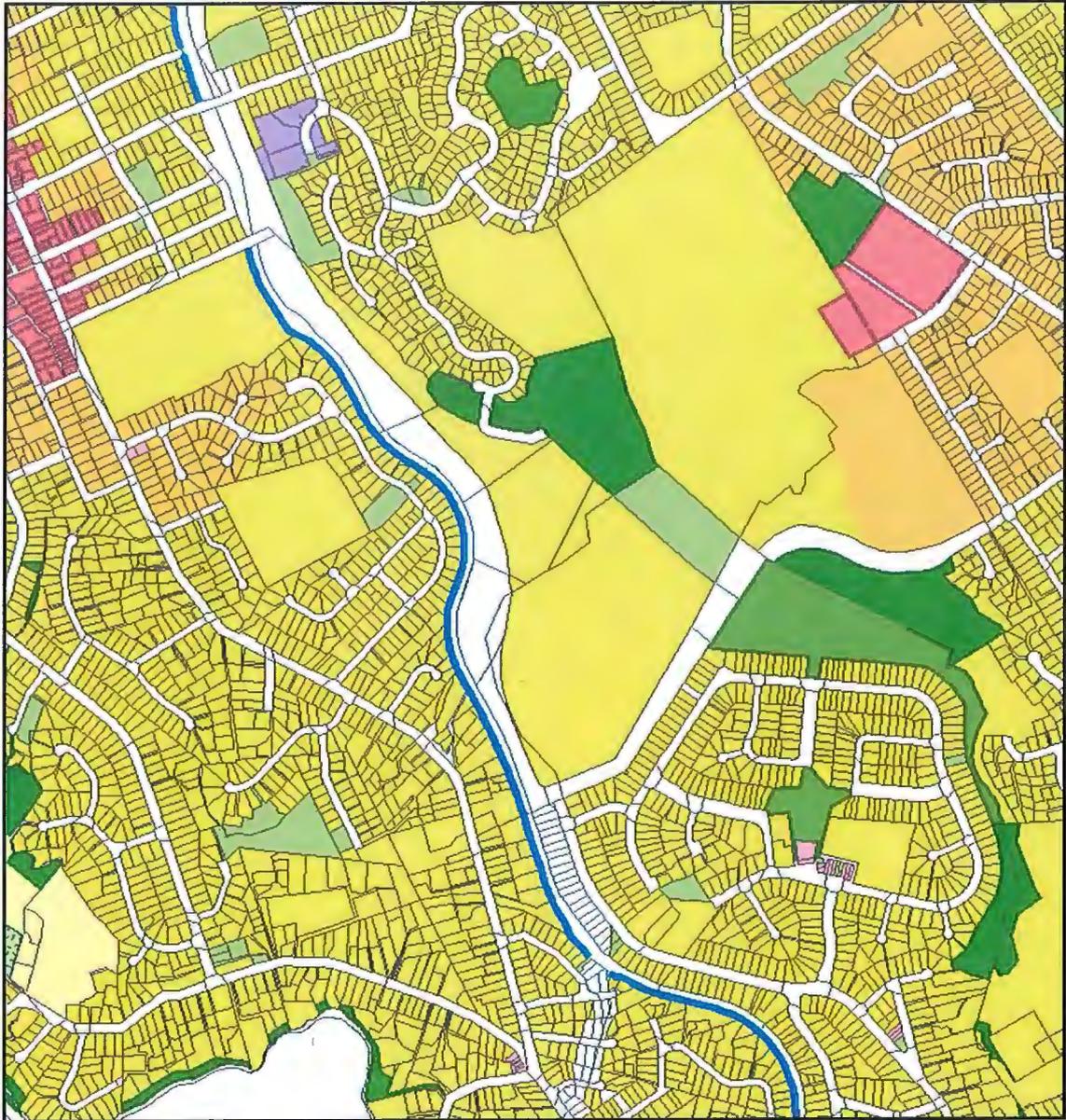
Annexure 2

Location of new Strategic Railway Line Protection Areas

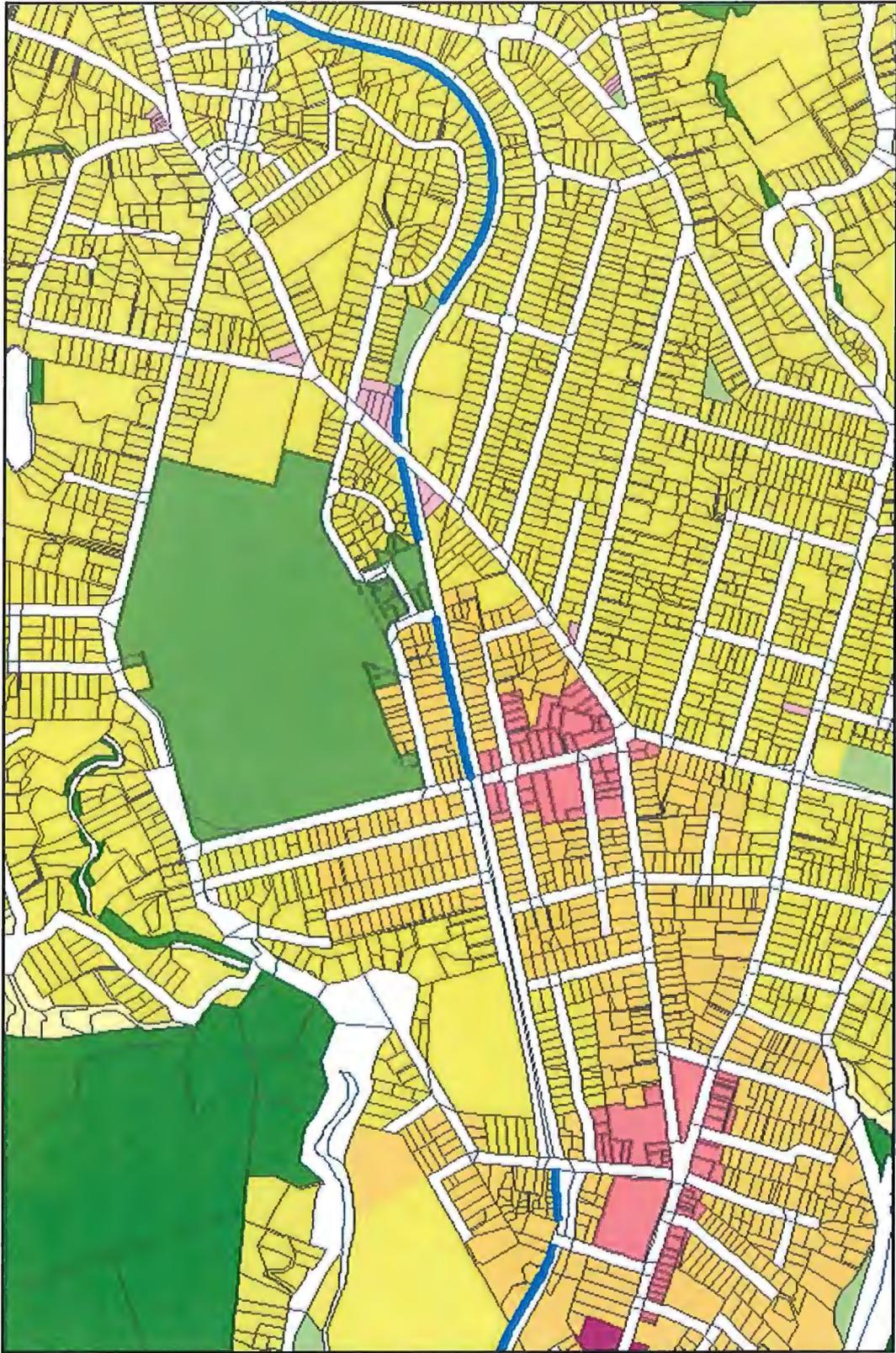
| Legend | |
|---|--|
|  | Strategic Railway Line Protection Areas |
|  | Rural (Urban Expansion) Zone |
|  | Rural Living |
|  | Rural Production Zone |
|  | Rural Village Centre Sub-Zone |
|  | Rural Village Industry Sub-Zone |
|  | Rural Village Residential Sub-Zone |
|  | Strategic Rural Industries Zone |
|  | Fonterra Kauri Milk Processing SRIE – Ancillary Irrigation Farms |
|  | Marsden Primary Centre |
|  | Ruakaka Equine Zone |
|  | Large Lot Residential Zone |
|  | Low Density Residential Zone |
|  | General Residential Zone |
|  | Medium Density Residential Zone |
|  | Neighbourhood Centre Zone |
|  | Local Centre Zone |
|  | Commercial Zone |
|  | Shopping Centre Zone |
|  | Mixed Use Zone |
|  | Waterfront Zone |
|  | City Centre Zone |
|  | Light Industrial Zone |
|  | Heavy Industrial Zone |
|  | Airport Zone |
|  | Hospital Zone |
|  | Port Zone |
|  | Development Area |
|  | Open Space Zone |
|  | Sport and Active Recreation Zone |
|  | Natural Open Space Zone |



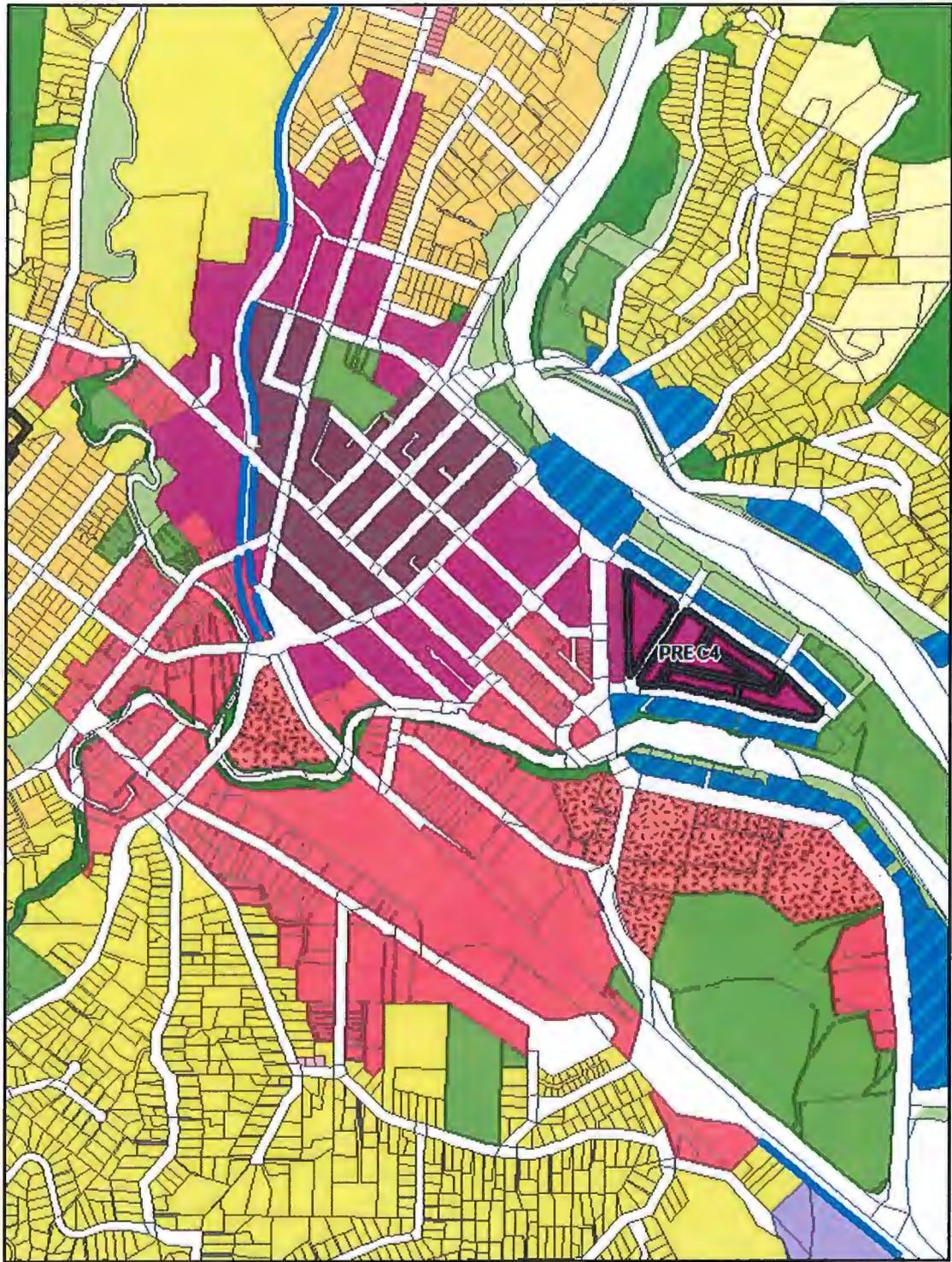
Springs Flat and Northern Kamo



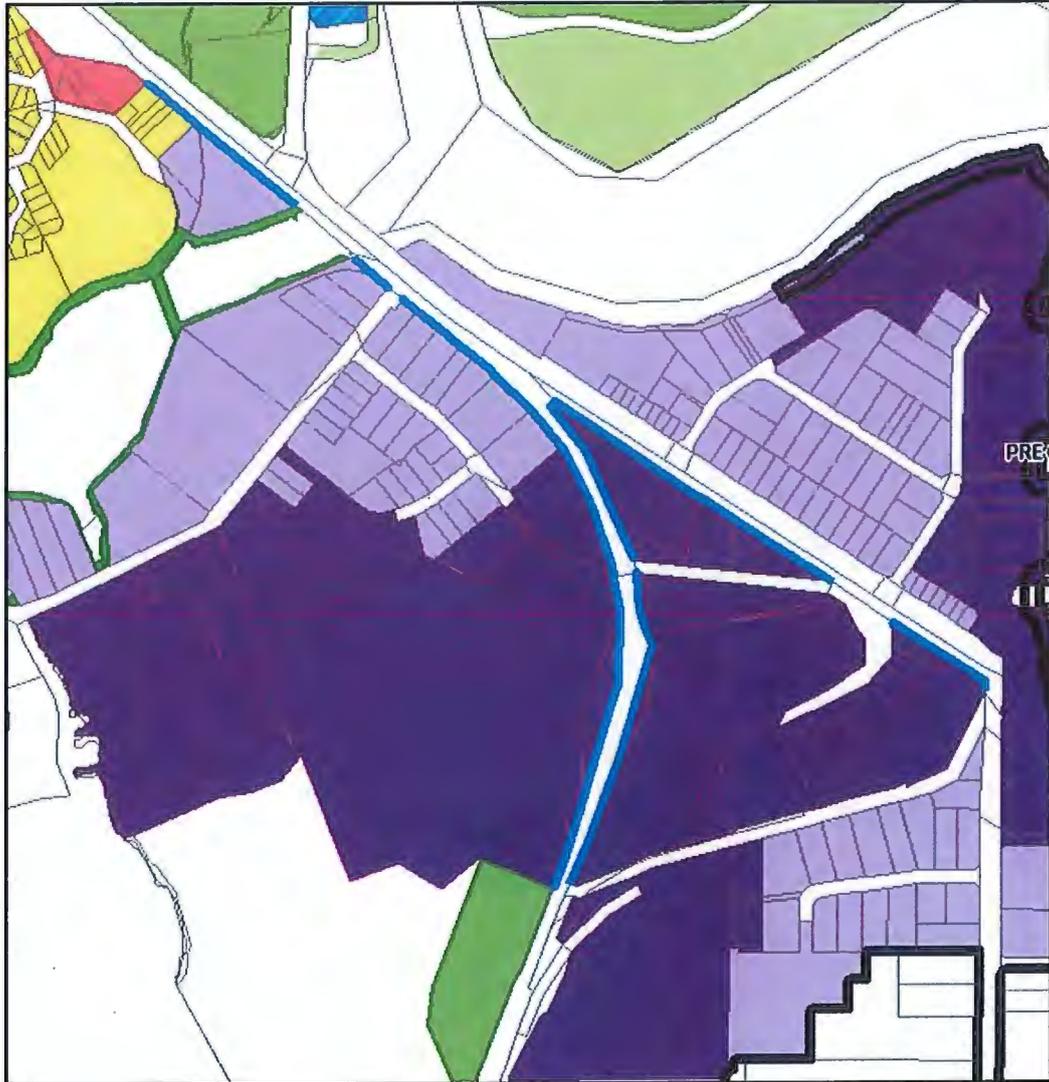
Kamo and Otangarei



Kensington and Regent



Central City



Port Whangarei



Ruakaka