

BEFORE THE INDEPENDENT COMMISSIONERS

IN THE MATTER

of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER

on the Plan Change 14 ("**PC14**") to the Christchurch
District Plan ("**District Plan**")

**LEGAL SUBMISSIONS ON BEHALF OF
KIWIRAIL HOLDINGS LIMITED**

17 APRIL 2024

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1. BACKGROUND AND SUMMARY

- 1.1 KiwiRail is a State-Owned Enterprise responsible for the construction, maintenance and operation of New Zealand's rail network. KiwiRail is also a requiring authority under the RMA and holds railway purpose designations throughout New Zealand, including for the Main South Line, Hornby Industrial Line and Main North Line which passes through the Christchurch district. These are busy, active rail lines.
- 1.2 The rail network is an asset of national and regional significance. It is critical to the safe and efficient movement of freight and passengers throughout New Zealand and forms an essential part of the national transportation network and wider supply chain.
- 1.3 KiwiRail supports urban development around transport nodes and recognises the benefits of co-locating housing near transport corridors. However, such development must be planned with the safety and wellbeing of people and the success of the rail network in mind. PC14 provides an important opportunity to ensure these twin objectives are achieved.
- 1.4 In summary, KiwiRail seeks:
- (a) **Setbacks:** the recommendations of the Reporting Planner be accepted regarding a 4 metre setback in Medium Density Residential Zone, Town Centre Zone, Local Centre Zone, Mixed Use Zone, Commercial (outside city centre, Banks Peninsula), Commercial Office and Large Format Retail, and Town Centre Zone. KiwiRail also seeks a 4 metre setback control in the High Density Residential Zone.
 - (b) **Noise:** retention of the acoustic provisions set out in Rule 6.1.7.2.1, which were introduced by Plan Change 5E, with minor amendments.
 - (c) **Vibration:** the inclusion of a vibration "alert 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.
- 1.5 The relief sought by KiwiRail is the most appropriate way to 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 significant infrastructure in the Christchurch district.

2. SETBACKS

- 2.1 Setbacks are a common planning tool used to ensure the safe and efficient operation of activities such as the railway corridor, particularly when it may come into conflict with adjacent land uses. They are not a new tool.
- 2.2 In the case of rail, a setback provides a **safe physical distance** between a building and the railway corridor boundary. Without a sufficient setback, people painting their buildings, clearing gutters or doing works on their roof will need to go into the rail corridor. Heavy freight trains run on the railway lines through the Christchurch district. If a person or object encroaches onto the rail corridor, there is a substantial risk of injury or death for the person entering the rail corridor. 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.
- 2.3 A rail setback control has obvious safety benefits for the users of the land adjoining the rail corridor and 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.
- 2.4 Rail setbacks are not the same as yard buffers or setbacks from other properties, given there are significant and potentially severe consequences that can arise from encroachment into the rail corridor. There are obvious safety issues arising from people interfering with or entering a rail corridor.
- 2.5 Activities that comply with the setback control would be permitted, while activities that do not comply would require resource consent as a restricted discretionary activity. KiwiRail sought the inclusion of matters of discretion in the various zones to ensure Council planners give consideration to the impacts on safety and efficiency of the rail corridor where a setback control is not complied with. These matters of discretion have been accepted by the Reporting Planner in all zones except in the High Density Residential Zone.
- 2.6 The proposed setback controls do not create a "no build zone", but rather provide a reasonable and considered approach to development immediately adjacent to (eg within 4 metres of) the rail corridor.

2.7 KiwiRail's proposed setback control is the most efficient outcome from a planning perspective.¹

Setback distance

2.8 In its primary submission KiwiRail sought a 5 metre setback, consistent with relief it has sought in plans elsewhere. The Reporting Planner has recommended retention of the existing 4 metre setback controls in all zones apart from High Density Residential Zone. KiwiRail accepts that the existing plan provisions provide for a 4 metre setback, and on a pragmatic basis KiwiRail is willing to accept a 4 metre setback in the District Plan.

2.9 Adopting the Reporting Planner's recommendations for a 4 metre setback will also enable the Council to comply with its obligations under section 74(1)(b) of the RMA to enable people and communities to provide for their social, economic, and cultural well-being and their health and safety.

2.10 However, unusually, the Reporting Planner has recommended only a 1 metre setback for the High Density Residential Zone. KiwiRail does not support this recommendation.

2.11 A 1 metre setback between a building and the edge of the rail corridor boundary is not sufficient in terms of space for an occupant of that building to maintain or access their own building safely. This is particularly given the High Density Residential Zone clearly anticipates much taller buildings near the rail corridor which will require more significant infrastructure such as scaffolding to carry out maintenance activities. Ms Grinlinton-Hancock's evidence sets out why there needs to be sufficient space in this Zone for maintenance activities such as scaffolding, particularly for taller buildings.² An updated figure is **attached** as Appendix A to these legal submissions.

2.12 If not enough space is provided, the only option is for people to encroach onto the rail corridor which poses potentially significant adverse consequences. The risks associated with the rail corridor are very different from property used for residential or other uses – if a person or object encroaches on the rail corridor there is a risk of injury or worse from rail activities.³ It is uncommon in KiwiRail's experience for adjoining landowners to request permission to enter the rail corridor to undertake such maintenance activities and it is a health and

¹ Statement of Evidence of Ms Heppelthwaite dated 20 September 2023, Attachment B.

² Statement of Evidence of Ms Grinlinton-Hancock dated 20 September 2023 at [4.15] – [4.19].

³ Statement of Evidence of Ms Grinlinton-Hancock dated 20 September 2023 at [4.8] and [4.9].

safety risk for such access to occur without approval, and ultimately for KiwiRail to have to rely on prosecution after the fact.

- 2.13 In any event, requiring landowners to seek permission to enter an operational rail corridor (or if they fail to obtain permission, and trespass) in order to undertake necessary building maintenance, is a poor, and potentially unsafe, planning outcome. A much better planning outcome is to accommodate building maintenance activities within the property itself.
- 2.14 A setback of 4 metres across all zones 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.

3. RAIL NOISE AND VIBRATION MANAGEMENT

- 3.1 KiwiRail endeavours to avoid, remedy or mitigate the rail noise and vibration effects its activities generate, through its ongoing programme of upgrades, repairs and maintenance work to improve track conditions. However, the nature of rail operations means KiwiRail is unable to fully internalise all noise and vibration effects within the rail corridor boundaries.⁴
- 3.2 Accordingly, a balance needs to be struck between the existing lawful operator managing its effects, and the planning framework providing appropriate controls for the development of new sensitive activities in proximity to the rail corridor. Prudent, forward-thinking planning plays a key role in setting community expectations around effects from the rail corridor by ensuring reasonable standards of mitigation in new builds.
- 3.3 If land is able to be developed without the appropriate mitigation, it has the potential to put both sensitive activities and the lawful operation of the rail corridor at risk. Reverse sensitivity effects can manifest in a number of ways, including through restrictions on operations of the rail network (such as night-time movements or train volumes).
- 3.4 Reverse sensitivity is a well-established legal concept. It is an adverse effect under the RMA.⁵ It refers to the susceptibility of lawfully established activities (which cannot internalise all of their effects)⁶ to complaint arising from the

⁴ Statement of Evidence of Stephen Chiles dated 20 September 2023 at [3.2] and Appendix A.

⁵ 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].

⁶ 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]

location of new sensitive activities near those lawfully established activities. The location of sensitive activities can place significant constraints on the operation of established activities, as well as their potential for growth and development in the future.

3.5 The Courts have recognised the importance of protecting regionally significant infrastructure from reverse sensitivity effects and have declined applications for developments which have the potential to give rise to such effects.⁷ The vulnerability of an activity to reverse sensitivity effects is enough to warrant the implementation of protections for the activity in question.⁸

3.6 Most recently in relation to noise controls in areas near the rail corridor in Auckland, the Environment Court said:⁹

The setbacks for activities sensitive to noise sensibly ensure that consideration is given both to the receiving activities and also ensure the noise generating activities (such as the rail corridor and [road]) are not unduly constrained...

Noise controls

3.7 In its submission, KiwiRail sought the retention of the acoustic provisions set out in Rule 6.1.7.2.1, which were introduced by Plan Change 5E. The Reporting Planner has not proposed any changes to this rule, however, Kāinga Ora seek amendments to the ventilation provisions contained in Rule 6.1.7.2.1.

3.8 KiwiRail agrees with the amendments sought by Kāinga Ora to the ventilation provisions, with the exception that KiwiRail seeks Rule 6.1.7.2.1(d)(i) and (ii) be amended to ensure habitable spaces are provided with mechanical ventilation of up to 1 air change per hour irrespective of whether the space has a compliant natural ventilation device or not.¹⁰

3.9 Mr Macdonald's evidence is that without this amendment the ventilation provisions will be insufficient and undermine the effectiveness of the acoustic provisions. If there is insufficient ventilation, people are forced to open their windows and are then exposed to rail noise.¹¹

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.

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

⁸ *Foster v Rodney District Council* [2010] NZRMA 159 at [96].

⁹ *Kāinga Ora – Homes and Communities v Auckland Council* [2022] NZEnvC 218, at [74].

¹⁰ Rebuttal Statement of Evidence of Angus Macdonald on behalf of KiwiRail Holdings Limited dated 8 October 2023, Appendix 1.

¹¹ Rebuttal Statement of Evidence of Angus Macdonald on behalf of KiwiRail Holdings Limited dated 8 October 2023, at [2.1] and [2.2].

Vibration controls

- 3.10 In its submission, KiwiRail sought the introduction of vibration controls for new sensitive activities within 60m of the rail corridor.
- 3.11 Dr Chiles' evidence sets out the technical basis for these controls, including why the adverse health effects of rail vibration should be addressed in the PC14 provisions.
- 3.12 While Dr Chiles and Ms Heppelthwaite continue to support the inclusion of vibration controls in district plans, KiwiRail would accept the inclusion of a rail vibration "alert layer",¹² 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. An alert layer has been accepted by Reporting Planner.¹³
- 3.13 A vibration alert layer is an information layer that signals to property owners and occupiers 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 the effects, as landowners may be prompted when building new dwellings to consider incorporating vibration attenuation measures of their own accord or to locate new buildings outside the alert layer. New purchasers and occupiers will also be alerted when purchasing a property that they may experience such effects.
- 3.14 On the basis of Dr Chiles' evidence on the extent of the effects of vibration, this alert layer should apply to all properties within 100 metres on either side of the centre of the railway track. This distance would align with the noise control included in Rule 6.1.7.2.1 through Plan Change 5E. KiwiRail considers this would provide greater coherency and efficiency for a layperson reading the District Plan to see one overlay for both noise and vibration.
- 3.15 It is important that the overlay is included in the District Plan maps, and in response to the Reporting Planner's question, there would be no administrative cost to Council incurred by its inclusion. KiwiRail disagrees with the Reporting Planner's suggested alternative that alert layer be incorporated into Land Information Memorandum and on property files. Obtaining a LIM or a property file incurs a fee and is less easily accessible than the planning maps. It is also

¹² Statement of Evidence of Ms Grinlinton-Hancock dated 20 September 2023 at [5.8].

¹³ Statement of Rebuttal Evidence of Ms Oliver on behalf of Christchurch City Council dated 9 October 2023 at [33] – [35].

something that is unlikely to be undertaken by existing landowners who may be thinking of renovating or potential occupiers. This reduces the effectiveness of the overlay.

3.16 **Attached at Appendix A** to Ms Heppelthwaite's evidence is the wording sought by KiwiRail for the vibration alert layer to be included in the District Plan through PC14. This is based on similar wording approved by the Environment Court.¹⁴ This approach has also been agreed with Kāinga Ora in the Whangārei District Plan and the Precinct provisions relating to the Drury area in the Auckland Unitary Plan.

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¹⁴ *KiwiRail Holdings Limited v Whangārei District Council* [2023] NZEnvC 004.

APPENDIX A

