

IN THE MATTER

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

AND

IN THE MATTER

of the Proposed Waikato District Plan – Variation 3
("**Variation 3**")

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

21 JULY 2023

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MAY IT PLEASE THE PANEL:**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 Waikato region.
- 1.3 KiwiRail supports urban development around transport nodes and recognises the benefits of co-locating housing near transport corridors which provide passenger connections. However, such development must be planned with the safety and wellbeing of people, and the ongoing efficient operation of the rail network in mind.
- 1.4 KiwiRail has submitted on Variation 3 to ensure good management of the interface between the increased urban development proposed under the Variation and lawfully established, critical infrastructure such as the railway network. An integrated and proactive approach to planning is critical to support the overall integrated vision of our developing urban environments, and to ensure that our transport network can support the increasing growth and housing intensification.
- 1.5 Many of KiwiRail's submission points on Variation 3 align with its appeals on the Proposed Waikato District Plan. In order to ensure efficiency across the two processes, any overlapping matters have been deferred to October / November to enable the current discussions between parties to resolve the Proposed District Plan appeals to conclude.¹ All of KiwiRail's relief relating to setbacks, noise and vibration controls will be heard in November 2023.
- 1.6 These legal submissions are therefore limited to the two elements of KiwiRail's relief addressed in the s 42A report for this hearing, being:
- (a) the recognition of the rail corridor as a qualifying matter pursuant to s77I(e) and s77O(e) of the RMA; and

¹ Hearing Panel Direction 12 June 2023.

(b) amendments to Objective MRZ2-O6, and Policies MRZ2-P6 and MRZ2-P11.

1.7 The evidence of Ms Pam Butler, resource management planner for KiwiRail, sets out KiwiRail's position in respect of this relief, and responds to the comments made by the Council Officer in the s 42A Report. We address each of these topics in turn below.

2. QUALIFYING MATTERS

2.1 The RMA includes a list of qualifying matters that allow Councils to adjust the Medium Density Residential Standards ("**MDRS**") and the relevant building height and density requirements under Policy 3 of the National Policy Statement on Urban Development 2020 ("**NPS-UD**") (which apply to residential and non-residential activities in centre zones and walkable catchments).²

2.2 Under Sections 771(e) and s770(e) of the RMA, a qualifying matter includes "a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure".³

2.3 The New Zealand rail network is defined as nationally significant infrastructure within the NPS-UD.⁴ The rail networks which pass through the Waikato region are of particular national and regional importance, with the North Island Main Trunk ("**NIMT**") and East Coast Main Trunk ("**ECMT**") are considered among the busiest stretches of rail network in New Zealand. Both are critical to the transport of freight from various ports to the rest of the nation. In addition, Waikato is a key focus area for a growing investment into passenger rail on KiwiRail's network, which is currently provided for via the Te Huia passenger service which runs from Hamilton to Auckland.⁵

2.4 In recognition of this legislative direction and the Waikato context, Variation 3 has recognised the rail corridor as a qualifying matter.⁶ This recognition has been supported by both the Council Officer and Ms Butler in their reporting / evidence.⁷

² RMA, s771. Section 770 of the RMA provides that qualifying matters may modify the requirements of Policy 3 of the NPS-UD in an urban non-residential zone.

³ Section 771(e) and s770(e).

⁴ NPS-UD, Definitions "nationally significant infrastructure means all of the following: [...] (f) the New Zealand rail network (including light rail)".

⁵ Statement of Evidence of Pam Butler dated 4 June 2023 at [3.1] – [3.5].

⁶ Variation 3 to the Proposed Waikato District Plan - Part 1: Introduction and general provisions / Interpretation, page 6.

⁷ Section 42A Report dated 15 June 2023 at [252].

2.5 In KiwiRail's submission, the question for the Panel is therefore confirming what controls are appropriate to give effect to the qualifying matter. Those controls will be the subject of the deferred November hearing, and will be addressed in detail at that time.

3. POLICY MRZ2-P6

3.1 As currently drafted, Policy MRZ2-P6, which provides a policy framework for the application of qualifying matters is limited to restrictions on residential developments. KiwiRail's submissions seek that all development is managed to appropriate levels where a qualifying matter exists.

3.2 Specifically, KiwiRail sought to amend Policy MRZ2-P6 as follows (amendment in red):

Restrict residential development to an appropriate level to provide for and protect any relevant qualifying matters.

3.3 In the s 42A report, the Council Officer rejected KiwiRail's submission on the basis that Policy MRZ2-P6 is drafted with the intention of applying only to residential development. The Council Officer states that Policy MRZ2-P10 appropriately provides for non-residential development.⁸

3.4 The overarching objective of Variation 3 is to incorporate the MDRS and give effect to Policies 3 and 4 of the NPS-UD.⁹ In implementing these requirements, a focus of Variation 3 is on intensifying both residential and non-residential development in urban areas, including in and around transport corridors like the rail network. The implementation of qualifying matters is the core mechanism to address proposed development where necessary in order to avoid adverse effects on existing significant infrastructure activities such as the rail network.

3.5 Policy MRZ2-P10 does not refer to the application of qualifying matters in its management of non-residential development.¹⁰ KiwiRail considers that without

⁸ Section 42A Report dated 15 June 2023 at [201].

⁹ RMA, s 80E(1)(a).

¹⁰ MRZ2-P10 specifically provides:
Non-residential activities.

(1) Maintain the zone primarily for residential activities while also:

(a) Ensuring community facilities: (i) Are suitably located; (ii) Are of a limited scale and intensity that is compatible with the zone; (iii) Contribute to the amenity of the

its suggested amendment, there is a clear gap in the policy framework provided. In the absence of any policy direction on how to apply qualifying matters to non-residential development as well as residential development, Variation 3 does not appropriately reflect Policy 3 of the NPS-UD which seeks to enable intensification across the urban areas of New Zealand, not limiting development to just residential.

3.6 KiwiRail therefore continues to seek the amendment to Policy MRZ2-P6.

4. OBJECTIVE MRZ2-O6 AND POLICY MRZ2-P11

4.1 KiwiRail's submission supports Objective MRZ2-O6 to the extent it recognises the need to avoid and minimise the potential for reverse sensitivity effects by managing the location and design of sensitive activities. From KiwiRail's experience, building design and location is a fundamental method of addressing the effects of development on or near the rail corridor.¹¹

4.2 However, KiwiRail considers Objective MRZ2-O6 would benefit from further amendments to allow it to comprehensively provide for policy direction on:

- (a) the benefits to public health and safety which extend from the management mechanisms it directs;
- (b) clarification that these reverse sensitivity effects can also arise from non-sensitive activities; and
- (c) inclusion of the additional management methods sought by KiwiRail and Waka Kotahi in their submissions and appeals, being acoustic insulation, ventilation and vibration measures.

4.3 The specific amendments KiwiRail seeks for MRZ2-O6 are as follows (amendments in red):

(1) Avoid or minimise the potential for reverse sensitivity **and risks to public health and safety** by managing the location and design of **sensitive** activities through:

neighbourhood; and (iv) Support the social and economic well-being of the residential community.

(b) Avoiding the establishment of new non-residential activities (except home occupations) on rear sites, or sites located on cul-de-sacs; and

(c) Ensuring that the design and scale of non-residential activities and associated buildings mitigates adverse effects related to traffic generation, access, noise, vibration, outdoor storage of materials and light spill.

¹¹ Statement of Evidence of Pam Butler dated 4 June 2023 at [5.5].

(a) The use of building setbacks: ~~and~~

(b) The design of subdivisions and development: ~~;~~ and

(c) The design of buildings, including use of acoustic insulation, ventilation and vibration measures.

4.4 Similarly, KiwiRail sought the following amendment to Policy MRZ2-P11:

Maintain appropriate setback distances between new ~~sensitive (and altered)~~ land uses and existing lawfully established activities ~~and require buildings to be designed with acoustic insulation and vibration measures to minimise the potential that may result in for~~ reverse sensitivity effects ~~and risks to public health and safety.~~

4.5 We address the three elements of this relief as set out below.

Public health and safety

4.6 In the s 42A report, the Council Officer has rejected KiwiRail's amendments for the reason that this would change the intent of the objective which is intended to relate to reverse sensitivity and not risks to public health and safety.¹²

4.7 As set out in Ms Butler's evidence, reverse sensitivity issues and health and safety are intertwined. Reverse sensitivity is a well-established concept and is an adverse effect for the purposes of the RMA.¹³ 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. For KiwiRail, those complaints or restrictions typically arise from adverse effects like noise or concerns as to safety from rail activities.

4.8 KiwiRail's key focus in respect of Variation 3 is therefore 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.

4.9 KiwiRail considers this is in keeping with the intent behind the Housing Supply Amendment Act and NPS-UD in that the first and overarching objective of the NPS-UD provides:

¹² Section 42A Report dated 15 June 2023 at [190] and [209].

¹³ 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].

New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, **and for their health and safety**, now and into the future.

- 4.10 This is a fundamental concept to the application of the NPS-UD. It indicates that the NPS-UD does not intend housing that is enabled under NPS-UD to be incorporated into plans in a blunt and/or blanket manner. Instead, regard must still be had as to the appropriate type, scale and location of housing depending on the particular context and environment. KiwiRail's amendment seeks to emphasise the interrelation of these two issues, and incorporate this policy background from the NPS-UD.

Non-sensitive activities

- 4.11 As outlined above in section 3, it is important that the policy direction in the Plan in respect of qualifying matters applies not just to residential activities (like sensitive activities) but also to non-residential or non-sensitive activities. Non-sensitive buildings, like offices or warehouses, still require setbacks from the rail corridor. This amendment is therefore required to provide policies which will enable the controls sought by KiwiRail.

Management tool for reverse sensitivity – noise and vibration controls

- 4.12 The reference to a physical setback in Objective MRZ2-O6 helps to manage the adverse effects on safety of the adjacent occupiers and operation of the railway corridor, while also providing a level of amenity in terms of safe enjoyment of land use activities adjacent to the corridor. However, KiwiRail and Waka Kotahi's relief (as will be outlined in full at the November hearings) also seeks the use of acoustic insulation and ventilation and vibration measures as a necessary tool to ensure the ongoing health and wellbeing of people and to manage reverse sensitivity effects arising from rail noise and vibration.
- 4.13 As set out in KiwiRail's evidence, these tools apply minimal restrictions on development occurring adjacent to transport networks while appropriately managing noise and vibration, and associated reverse sensitivity effects. By comparison, adequate management of noise and vibration solely through setbacks could result in significant sterilisation of land, as properties may be required to be set back 50m or more along with the installation of barriers to achieve appropriate noise levels and avoid reverse sensitivity effects.

- 4.14 As outlined in Ms Butler's evidence, the addition of (c) provides appropriate policy direction for the necessary tools sought by KiwiRail and Waka Kotahi to manage reverse sensitivity through these plan changes and will also help in clarifying the range of building management measures available to developers when assessing the effects of development on the railway.
- 4.15 KiwiRail considers the Panel must also read these provisions alongside the controls to be addressed at the November hearings, given these will provide the necessary policy framework to enable those controls. For this reason, KiwiRail reserves the position to make further comments on this policy framework at the November hearings if necessary.

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