

**BEFORE THE INDEPENDENT COMMISSIONERS**

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

**AND**

**IN THE MATTER** of the Proposed Waimakariri District Plan  
 ("**Proposed Plan**")

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**HEARING STREAM 9:  
MEMORANDUM OF COUNSEL ON BEHALF OF KIWIRAIL HOLDINGS LIMITED**

**31 JANUARY 2024**

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**MAY IT PLEASE THE PANEL:**

1. This memorandum responds to the questions set out below, raised by the Commissioners to KiwiRail on 24 January 2024.

**1. Setback in the MUZ, LCZ and NCZ**

*Address why it is appropriate now to include a setback in the MUZ, LCZ and NCZ where we understand, there is no Railway adjacent to these three zones.*

2. At present, the railway does not traverse these three zones. However, it can be reasonably and fairly anticipated that at some point in the future (and certainly within the life of this plan) the Council, a landowner or developer will seek to rezone land situated adjacent to the rail corridor to MUZ, LCZ or NCZ. In that case, inclusion of the setback standards in these zone provisions now will mean there is sufficient protection for both those landowners and the railway corridor at the time the land is rezoned to MUZ, LCZ or NCZ. The Proposed Plan should be reasonably forward-looking in this regard.

**2. Setback distance and difference with properties adjoining the railway line**

*Provide an explanation for the rationale and the provision of evidence for why 4m is more appropriate than 2.5m in respect of maintenance and access to buildings. In doing so, please explain why and how the maintenance and access to buildings and safety issues of people dropping things differs for the railway line compared to any other site boundary.*

3. As set out in Ms Grinlinton-Hancock's evidence<sup>1</sup>, the rail corridor has a very different risk profile compared to other sites or land uses. The rail corridor is a hazardous environment and entering the rail corridor can result in a material and significant safety issue to both the person accessing the corridor, and to the rail operations being undertaken within the rail corridor. Trains are large, travel at speed, and cannot quickly stop. Put frankly, people's lives can be at risk if there are not sufficient setback distances provided.
4. Buildings built right up on the boundary (or subject to a minimal setback from the boundary) also significantly increase the risk of inadvertent incursion into the rail corridor from objects falling from open windows or being dropped from scaffolding / platforms that are used for maintenance.
5. Any object within the rail corridor becomes a safety issue for rail employees who need to remove the obstruction, as well as train drivers and other people on trains if the obstruction is not removed in time.

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<sup>1</sup> Evidence of Michelle Grinlinton-Hancock - Hearing Stream 9 dated 15 January 2024 at [4.9].

6. To protect the railway corridor from unforeseen hazards, such as dropped objects, KiwiRail generally seeks a 5 metre setback for new buildings, or alterations to existing ones, adjacent to the network. This is illustrated in the diagram set out in **Appendix A**, which shows the horizontal distances required (including to accommodate a dropped object zone) for differing building heights and scaffolding configurations.
7. The figure shows, when considering building maintenance, any setback distance between the building and the boundary with the railway needs to be sufficient to keep effects within the adjacent site, and to avoid impacting the safety of people and the operating railway.
8. The diagrams illustrate a range of 3.7 to 4.6 metres for a person to construct scaffold, and 4.5 to 6.2 metres to enable access for scaffold for maintenance of wall cladding (not roof cladding) and allow for (some) falling objects. This assumes level, stable ground conditions.
9. While a 5 metre setback may not entirely protect the network from all such possibilities (with dropped objects potentially falling further), KiwiRail considers 5 metres to strike a good balance between protecting the rail network and preserving the property rights of landowners.
10. However, given the consistency of the proposed 4 metre setback across the Waimakariri District in the Council Officer reports, and KiwiRail's general approach to work with Council Officer supported plan provisions, KiwiRail is willing to accept a 4 metre setback for the Commercial and Mixed Use Zones.
11. KiwiRail does not consider a 2.5 metre setback allows sufficient space for this important safety issue. A 2.5 metre setback does not provide enough space around the base of scaffolding to accommodate the movement of people, materials, and other plant and equipment around the base of a building, nor to protect against the risk of objects being dropped from scaffolding into the rail corridor.

### **3. Railway line vs railway boundary**

*Address the appropriateness of a blanket set back from the railway boundary rather than the rail lines themselves, if the concern is interference with the operation of the railway line.*

12. The setback must be measured from the rail designation boundary, not the track. Track can be constructed anywhere within the designation, and so the appropriate "measuring point" for the setback control should be the designation line itself.
13. There are also a range of other rail-related activities that may be lawfully undertaken by KiwiRail anywhere within the designation boundary, and so a reference to the "line" or "track" is unclear, uncertain and ambiguous. A

setback from the rail boundary rather than the rail track ensures that there is a sufficiently safe distance from all of these rail activities. Setback standards measured from the designation boundary have been confirmed by the Environment Court in a number of plan processes.

#### 4. Setback distance

*Provide evidence that there is an issue in Waimakariri District that warrants a 4 or 5m setback, noting our question below. Explain why the Hearings Panel would impose a 4 or 5m setback when this is inconsistent with smaller-sized setbacks in recently approved or decided District Plans (including plan changes). Ms Dale for Kainga Ora, has referenced the Whangarei, New Plymouth and Marlborough District Plans. We would also like the Selwyn and Porirua District Plans to be addressed, noting the North Island Main Trunk Line goes through Porirua.*

14. Please refer to the response to the second question for the need for a 4 metre setback at a minimum.
15. The below table sets out other District Plan provisions that provide for setbacks from the rail corridor. As can be seen, there have been a range of setback distances imposed, agreed or notified. These arise in different contexts, for example, the residential intensity of the zone adjoining the rail corridor, how busy the railway line is through the particular district and the likelihood of any future upgrades to the rail corridor.
16. The Selwyn District Plan included a 5 metre setback in the Town Centre, Low Density Residential and Settlement zones. The recent Porirua decision (currently the subject of appeals) included a 1.5 metre setback.

Plan	Distance
Auckland Unitary Plan – Drury Centre (I450.6.15) and Waihoehoe (I452.6.11) Precincts	5 metres
Christchurch District Plan – Rule 14.4.2.7	4 metres
Proposed Second Generation Dunedin City District Plan – Rule 6.7.4	4 metres
Marlborough Environment Plan – Rule 5.2.1.20	3 metres
Porirua	1.5 metres <i>Appeal period now open</i>
Proposed New Plymouth District Plan – TRAN R7	2 metres (subject to appeal from KR seeking 5m)

Plan	Distance
Selwyn	5 metres
Whangārei District Plan Operative in Part – TRA R10	2 metres – 2.5 metres

## 5. Access rights

*In respect of Ms Grinlinton-Hancock's paragraph 4.12, please explain the relationship between a District Plan and the Property Law Act in respect to the rights of a person to access another property and please set out why this is an RMA matter. Is it appropriate that the District Plan includes rules based on the premise that someone might trespass on KiwiRail land?*

17. Fundamentally, the Resource Management Act 1991 ("**RMA**") based setback provision is sought to appropriately manage health and safety of communities and protect the ongoing operation of the national railway.
18. Health and safety issues are clearly required to be addressed in plan-making under the RMA. Territorial authorities must prepare and change district plans in accordance with the provisions of Part 2 of the RMA.<sup>2</sup> This includes changing district plans in accordance with the purpose of the RMA which provides for sustainable management of resources "in a way...which enables people and communities to provide for their social, economic, and cultural well-being, and for their health and safety...".<sup>3</sup>
19. A District Plan framework which enables developments as permitted activities that cannot be built or maintained safely and lawfully adjacent to the rail corridor is not in accordance with the purpose of the RMA (to enable people and communities to provide for their social, economic, and cultural well-being and their health and safety). Such an approach breaches Council's obligations under s 74(1)(b) of the RMA.
20. The reference to KiwiRail's experience with the process to request permission to enter railway land in paragraph 4.12 of Ms Grinlinton-Hancock's evidence provides some real-world context to the health and safety effect that the setback standard seeks to address. In our submission, it would be a poor planning outcome if the options for landowners, who need to access their buildings for maintenance, is either to seek permission to encroach onto the rail corridor or trespass on the rail corridor.
21. The better planning outcome is to provide an adequate plan-based setback adjacent to the corridor to enable landowners to safely access their properties (and avoid significant safety risks).

<sup>2</sup> RMA, s74(1)(b).

<sup>3</sup> RMA, s5(1).

22. There are many other examples of development being managed in an RMA context to ensure that safety effects can be addressed. One example is the Transpower national grid corridor overlay included in a range of district plans, which restricts activities within a specified spatial extent of its network. Airports and ports are also another common infrastructure type which seek to restrict activities on surrounding private land through RMA tools. We do not consider this novel and it is entirely consistent with the RMA framework. The High Court has affirmed the RMA and Property Law Act 2007 are different jurisdictions and have their own statutory objectives<sup>4</sup>, with the RMA's objective being to promote the concept of sustainable management (including health and safety) in Part 2 (rather than to have regard to private property rights).

### **Conclusion**

23. KiwiRail continues to maintain its support of the Council Officer's recommendation of the inclusion of a 4 metre setback control as appropriate and necessary for the safe and efficient operation of the rail network in Waimakariri District.
24. The KiwiRail team is happy to appear to speak to this memo, or any other queries, if that would assist the Panel.

**DATED: 31 January 2024**



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**A A Arthur-Young / K L Gunnell**  
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<sup>4</sup> *New Zealand Suncorn Construction Limited v Auckland City Council* (1997) 3 ELRNZ 230.

**APPENDIX A – Illustration of Dropped Object Paths from Different Height Buildings/Scaffolding**

