

IN THE MATTER

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

AND

IN THE MATTER

on the Proposed Waimakariri District Plan
("**Proposed Plan**")

**HEARING STREAM 5 - LEGAL SUBMISSIONS ON BEHALF OF
KIWIRAIL HOLDINGS LIMITED**

11 AUGUST 2023

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MAY IT PLEASE THE PANEL:

1. 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 that holds railway purpose designations in district plans throughout New Zealand, including the Main North Line ("**MNL**"), which passes through the Waimakariri District.
- 1.2 As an asset of national and regional significance, the rail network 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 submitted on the Proposed Plan to ensure good management of the interface between urban development and critical infrastructure such as the railway network. The changes sought by KiwiRail are necessary to ensure that reverse sensitivity effects on transport infrastructure are better recognised and provided for in the Proposed Plan, and the interface between urban development and the rail network is appropriately managed, now and into the future. The evidence of Mr Brown, Ms Heppelthwaite and Dr Chiles for KiwiRail provides evidence for the need for these controls, which include ensuring safe healthy homes for residents and protection of a vital national infrastructure asset.
- 1.4 Ms McGuire has tabled planning evidence on behalf of KiwiRail in relation to other matters raised in KiwiRail's submission relating to Session 5.
- 1.5 These legal submissions focus on KiwiRail's relief regarding noise and vibration.
- 1.6 Of the matters sought in KiwiRail's submission, both KiwiRail and the Council are in agreement that:
 - (a) NOISE-R16 should be amended to capture all noise-sensitive activities (not just residential);
 - (b) NOISE-P1 and NOISE-P3 should be retained as notified; and
 - (c) the matters of discretion under NOISE-MD1, NOISE-MD2 and NOISE-MD3 should be retained as notified.

- 1.7 The Council Officer and KiwiRail also agree that noise controls are appropriate to manage adverse noise effects on noise sensitive activities near the rail corridor. The only difference is the extent of those controls under NOISE-R16. KiwiRail maintains that 100m is appropriate (rather than 80m) (and Dr Chiles' evidence is that in reality these effects may be felt even further away than 100m from the rail corridor).¹
- 1.8 The Council Officer has recommended rejection of KiwiRail's submission that "marae and places of assembly" should be included in the definition of "Noise Sensitive Activity". KiwiRail disagrees. These are community spaces that clearly require the ability to host quiet gatherings, such as places of worship, or the need for marae to be able to provide accommodation. KiwiRail also maintains that vibration controls need to be included in the Proposed Plan, which the Council has not accepted. In our submission, the proposed controls provide a practical and flexible tool for managing vibration effects based on the needs of a particular site.
- 1.9 KiwiRail also seeks an amendment to the definition of "Noise Sensitive Activities" to remove the exclusion for residential units in rural zones. All residential activities are sensitive to noise, irrespective of their zoning, including when in a rural zone. Mr Lindenburg and Mr Styles for Kāinga Ora also support this amendment.
- 1.10 Ms Heppelthwaite's evidence addresses the amendments sought by KiwiRail in further detail.

2. RAIL NOISE AND VIBRATION

Why KiwiRail seeks noise and vibration controls

- 2.1 A key concern for KiwiRail in respect of the Proposed Plan provisions is to ensure that the development of sensitive activities (such as dwellings) near the rail corridor does not cause ongoing disturbance and adverse health effects to communities surrounding the rail corridor or constrain the use and development of the corridor.
- 2.2 Reverse sensitivity is a well-established legal concept. It is an adverse effect under the RMA.² It refers to the susceptibility of lawfully established activities

¹ Statement of Evidence of Dr Chiles dated 4 August 2023 at [8.6].

² 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].

(which cannot internalise all of their effects)³ to complaint arising from the 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.

- 2.3 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.⁴ The vulnerability of an activity to reverse sensitivity effects is enough to warrant the implementation of protections for the activity in question.⁵ Most recently in relation to noise controls in areas near the rail corridor in Drury, the Court said:⁶

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 Waihoehoe Road) are not unduly constrained...

- 2.4 The Council Officer acknowledges the critical need to manage reverse sensitivity effects on the rail network, noting that NOISE-O2 of the Proposed Plan provides clear direction against adverse reverse sensitivity effects on regionally significant infrastructure from noise sensitive activities.⁷
- 2.5 KiwiRail is a responsible infrastructure operator that endeavours to avoid, remedy or mitigate the adverse rail noise and vibration effects it generates, through its ongoing programme of upgrades, repairs and maintenance work to improve track conditions. However, the nature of rail operations means that KiwiRail is unable to fully internalise all noise and vibration effects within the rail corridor boundaries. In any case, KiwiRail is not required to internalise all of its effects, as the RMA is not a "no effects" statute.⁸

Noise controls

Extent of NOISE-R16

- 2.6 The Council agrees with KiwiRail that NOISE-R16 supports healthy and liveable communities while also mitigating reverse sensitivity effects on the

³ 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] 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.

⁴ See, for example, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000.

⁵ *Foster v Rodney District Council* [2010] NZRMA 159 at [96].

⁶ *Kāinga Ora – Homes and Communities v Auckland Council* [2022] NZEnvC 218, at [74].

⁷ Hearing Report dated 21 July 2023 at [299].

⁸ *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [245].

transport network.⁹ The only difference between the Council Officer's position and KiwiRail's on NOISE-R16 is the extent to which those controls should apply.

- 2.7 Dr Chiles' evidence is that 80m will not capture the appropriate areas subject to adverse effects, given that rail noise extends well beyond this distance. While Dr Chiles considers effects extend even beyond 100m, KiwiRail seeks a 100m as it would ensure the most affected areas are covered.¹⁰
- 2.8 Such noise controls are regularly sought by KiwiRail and have been included in district plans around the country (including recently through Environment Court processes in Whangārei).
- 2.9 Kāinga Ora has taken the position that these controls should be removed entirely. With respect, that position is unsupported by the evidence before the Commissioners. There is a clear basis for these controls to manage effects, based on the evidence of Ms Heppelthwaite, Dr Chiles, and the recommendations of Mr Camp and the Council Officer.
- 2.10 Prudent, forward-thinking planning plays a key part in setting community expectations around effects from the rail corridor by setting reasonable standards of treatment. If land is able to be developed with substandard mitigation, this has the potential to put both the sensitive activities and the lawful operation of the rail corridor at risk. Reverse sensitivity effects can manifest in a number of ways, including complaints or other restrictions on operations of the rail network (such as on night time movements or train volumes). It is appropriate and responsible planning to ensure developers build with adequate acoustic mitigation in place where they choose to establish near the rail corridor.

Definition of noise sensitive activities

- 2.11 The Council Officer and KiwiRail agree that it is appropriate for NOISE-R16 to capture all noise sensitive activities, not just residential units.¹¹ As outlined in the evidence of Ms Heppelthwaite, KiwiRail considers the definition of noise sensitive activities does not currently capture all relevant activities that are sensitive to noise. Ms Heppelthwaite recommends the definition also include marae and places of assembly, residential activities in rural areas.

⁹ Hearing Report dated 21 July 2023 at [300].

¹⁰ Statement of Evidence of Dr Chiles dated 4 August 2023 at [7.5].

¹¹ Hearing Report dated 21 July 2023 at [6].

2.12 Places of assembly are defined in the Proposed Plan as:

land or buildings used for principally for public or private assembly of people for recreation, cultural, spiritual or entertainment activities and includes halls and community centres.

[sic]

2.13 It is inherent in the nature of a range of cultural and/or spiritual activities that they need quiet spaces, for example for prayer.

2.14 In relation to marae, a key function of marae is the provision of accommodation, similar to residential activities. As a place where people sleep, marae are clearly noise sensitive activities. That approach is also consistent with a range of other plans, including under the Auckland Unitary Plan and Wellington District Plan. As with places of assembly, marae also provide spaces for quiet gatherings and so should to have mitigation in place manage noise effects where near the rail corridor.

2.15 In relation to residential activities in rural zones, Ms Heppelthwaite recommends a further amendment to the definition of noise sensitive activities to ensure that all residential activities are captured across all zones. A large portion of the rail corridor in the Waimakariri District adjoins rural zones. The "zone" of the residential activity is irrelevant – a house built next to the rail corridor is equally sensitive to noise as one located in a "residential" zone. Ms Heppelthwaite's approach is also be consistent with what was intended by the notified version of NOISE-R16, which captured all residential and minor units across all zones.¹² Both Kainga Ora's planning and acoustics experts agree with Ms Heppelthwaite that this further amendment to the noise sensitive activities definition should be included.

Vibration controls

2.16 For the reasons set out in Dr Chiles' evidence,¹³ KiwiRail seeks the introduction of vibration controls for new and altered sensitive activities within 60m of the rail corridor to manage the adverse health and amenity effects on those near the rail corridor, while also protecting the rail corridor against reverse sensitivity effects.

¹² Statement of Evidence of Ms Heppelthwaite dated 4 August 2023 at [10.6].

¹³ Statement of Evidence of Dr Chiles dated 4 August 2023 at [7.17] and [7.18].

2.17 The Council Officer is not opposed to vibration controls as a means of managing effects, but expresses concern around how vibration controls can be implemented from a practical perspective.¹⁴

2.18 There are a range of practical ways in which vibration effects can be managed through the district plan. Dr Chiles' evidence is that the vibration controls proposed by KiwiRail provides a clear framework that will ensure vibration is considered by developers as part of their building design. This provides flexibility for developers to take into account site-specific factors,¹⁵ and the responsibility will be on developers to demonstrate compliance with the vibration criterion and satisfy Council.¹⁶ This is similar to what developers would be expected to demonstrate with other building controls.¹⁷ In our submission, this provides a clear, practical way to manage vibration effects and will appropriately address Council's concerns.

3. CONCLUSION

3.1 KiwiRail's relief should be granted for the reasons set out in KiwiRail's evidence, and as set out in **Attachment A** of Ms Heppelthwaite's evidence.

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¹⁴ Hearing Report dated 21 July 2023 at [281].

¹⁵ Statement of Evidence of Ms Heppelthwaite dated 4 August 2023 at [8.5].

¹⁶ Statement of Evidence of Dr Chiles dated 4 August 2023 at [8.1].

¹⁷ Statement of Evidence of Dr Chiles dated 4 August 2023 at [8.1].