

**IN THE MATTER**

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

**AND**

**IN THE MATTER**

of the Proposed Waikato District Plan ("**Proposed Plan**")

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**LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED  
HEARING 7 – INDUSTRIAL ZONES**

**16 JANUARY 2020**

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## 1. INTRODUCTION

1.1 These legal submissions are presented on behalf of KiwiRail Holdings Limited ("**KiwiRail**") in relation to the notified Chapter 20 (Industrial Zone) and Chapter 21 (Heavy Industrial Zone) (together, "**Industrial Zones**") of the Proposed Waikato District Plan ("**Proposed Plan**").

1.2 KiwiRail agrees with a number of the Council Officer's recommendations in the section 42A report on the Industrial Zones. In particular, KiwiRail agrees with the Council Officer's recommendations to:

- (a) amend Rules 20.2.5.1 P1(a)(vii) and 21.2.5.1 P1(a)(vii) to enable areas exposed by earthworks to be finished with a hardstand surface as an alternative to revegetation;<sup>1</sup>
- (b) amend Rule 20.2.7.2 P1(a)(iii) to require that any sign must not obstruct sight lines at level crossings;<sup>2</sup> and
- (c) amend Rules 20.4.1 and 21.4.1 to require applications for subdivision in the Industrial Zones to consider impacts on the operation, maintenance, upgrade and development of existing infrastructure.<sup>3</sup> While this amendment differs from the relief sought by KiwiRail, the proposed change addresses the concerns raised in KiwiRail's submission regarding the need to ensure that any new subdivision is designed to provide ongoing access to rail infrastructure and avoid or minimise potential adverse effects on that infrastructure.

1.3 The key outstanding issues relate to the Council Officer's recommendations to:

- (a) reject the amendment to Rules 20.3.4 and 21.3.4 sought by KiwiRail<sup>4</sup> to introduce a permitted activity rule requiring a 5 metre setback from the railway corridor boundary for all new or altered buildings;<sup>5</sup>

<sup>1</sup> This amendment is based on the Council Officer's recommendation to accept in part KiwiRail's submissions (986.110 and 986.111) in relation to these rules.

<sup>2</sup> This amendment is based on the Council Officer's recommendation to accept KiwiRail's submission (986.119) in relation to this rule.

<sup>3</sup> Section 42A Report Part B – Industrial Zone Rules at [540]; Section 42A Report Part C – Heavy Industrial Zones at [950]-[951]. This recommendation is in response to the submissions of First Gas Limited (945.13) and Counties Power Limited (405.65).

<sup>4</sup> Submissions 986.59 and 986.60.

<sup>5</sup> Section 42A Report Part B – Industrial Zone Rules at [501]; Section 42A Report Part C – Heavy Industrial Zones at [917].

- (b) reject KiwiRail's proposed amendments to Rules 20.1 and 21.1<sup>6</sup> to add new matters of discretion for buildings adjacent to the rail corridor that do not comply with the 5 metre setback permitted activity rule;<sup>7</sup> and
- (c) reject the amendments to Rules 20.2.5.1 P1(a)(i) and 21.2.5.1(a)(i) sought by KiwiRail<sup>8</sup> to require all earthworks to be located at least 1.5m from any infrastructure.<sup>9</sup>

1.4 These outstanding issues are addressed further in the evidence of Pam Butler, Senior RMA Advisor on behalf of KiwiRail, and in these legal submissions.

## **2. SETBACKS FOR BUILDINGS ADJACENT TO RAILWAY CORRIDOR**

2.1 As set out in Ms Butler's evidence, a key concern for KiwiRail is to ensure the safe and efficient operation of the rail network, in particular where it may come into conflict with adjacent land uses.<sup>10</sup>

2.2 KiwiRail's submission on the Proposed Plan sought the inclusion of a new rule in all zones that are adjacent to the rail corridor (including the Industrial Zones) to require all new or altered buildings to be set back 5 metres from the rail corridor boundary.<sup>11</sup> Activities that comply with this control would be permitted, while activities that do not comply (ie that seek to establish or alter / add to a building within 5 metres of the rail corridor boundary) would require resource consent as a restricted discretionary activity.

2.3 Providing a physical setback for buildings adjacent to the railway corridor boundary is primarily a safety control to manage the interface between operations within the railway corridor and activities on adjoining sites.<sup>12</sup> A building setback is appropriate to reduce the potential conflict between the safe enjoyment and maintenance of buildings on adjacent properties and the operational rail corridor.

<sup>6</sup> Submissions 986.65 and 986.66.

<sup>7</sup> Section 42A Report Part B – Industrial Zone Rules at [501]; Section 42A Report Part C – Heavy Industrial Zones at [917].

<sup>8</sup> Submissions 986.97 and 986.98.

<sup>9</sup> Section 42A Report Part B – Industrial Zone Rules at [366]; Section 42A Report Part C – Heavy Industrial Zones at [820].

<sup>10</sup> Statement of Evidence of Pam Butler for KiwiRail Holdings Limited (Hearing 7 – Industrial Zones) dated 10 December 2019 at 3.3.

<sup>11</sup> Submission 986.59 and 60. See also submissions 986.53-986.58 and 986.61 seeking equivalent amendments to the Residential, Village, Rural, Countryside Living, Business, Business Town Centre and Reserve Zones.

<sup>12</sup> Statement of Evidence of Pam Butler for KiwiRail Holdings Limited (Hearing 7 – Industrial Zones) dated 10 December 2019 at 3.3.

- 2.4 In KiwiRail's submission, 5 metres is an appropriate distance for buildings and structures to be set back from the boundary of the railway corridor. A setback of 5 metres ensures that there is sufficient space for land owners and occupiers to safely conduct their activities, and maintain and use their buildings, while minimising the potential for interference with the rail corridor. Such an approach strikes an appropriate balance between protecting people from the potential safety risks of developing near the railway corridor and the continued operation of regionally significant infrastructure.

**Section 42A report, submitter evidence and Council rebuttal evidence**

- 2.5 The Council Officer has recommended that KiwiRail's submissions in relation to the proposed new setback rule (as it relates to the Industrial Zones) be rejected. In the Council Officer's view, the proposed rule is not appropriate or necessary because potential encroachment into the rail corridor by adjacent land uses "is a private matter which does not require Council input" and is "no different to two private landowners negotiating an access agreement when no legal right of way exists".<sup>13</sup>
- 2.6 KiwiRail disagrees with the Council Officer's conclusion. As Ms Butler explains, KiwiRail has a "Permit to Enter" system which manages access to the rail corridor. However, direct access to the rail corridor is not the only issue KiwiRail seeks to address through the proposed setback rule.<sup>14</sup> There are many activities that may result in conflict with the railway corridor without third parties needing to physically access the corridor, such as objects and structures used in the maintenance of buildings that are close to the railway corridor. Locating buildings a safe distance from the railway corridor appropriately minimises the risk of inadvertent interference.
- 2.7 The Council Officer subsequently filed rebuttal evidence, which asserts that a 5 metre setback from the railway corridor boundary would "sterilise" that land and that "it would be more appropriate for KiwiRail to increase the width of their existing designation".<sup>15</sup> Ports of Auckland Limited ("**POAL**") has similarly asserted in evidence that the new rule is not the most appropriate way to address KiwiRail's concerns, and that it would be more appropriate to increase the width of KiwiRail's existing designations, where necessary.<sup>16</sup>

<sup>13</sup> Section 42A Report Part B – Industrial Zone Rules at [501]; Section 42A Report Part C – Heavy Industrial Zones at [917].

<sup>14</sup> Statement of Evidence of Pam Butler for KiwiRail Holdings Limited (Hearing 7 – Industrial Zones) dated 10 December 2019 at 3.10.

<sup>15</sup> Section 42A Report Rebuttal Evidence – Hearing 7: Industrial Zone & Heavy Industrial Zone at [70] to [77].

<sup>16</sup> Statement of Evidence of Mark Arbuthnot for Ports of Auckland Limited dated 9 December 2019 at 12.6.

- 2.8 We respectfully disagree with the reasoning of both the Council Officer and POAL in this regard. In our submission, for the reasons outlined in Ms Butler's evidence and in our legal submissions below, the relief sought by KiwiRail is reasonable, appropriate and necessary to ensure that the risk of incidents occurring as a result of encroachment into the rail corridor is managed and avoided throughout the Waikato District.
- 2.9 Mr Arbuthnot, in his statement of evidence on behalf of POAL also asserted that KiwiRail has not undertaken an evaluation of the proposed provisions in accordance with section 32 of the RMA.<sup>17</sup> In response to POAL's evidence, an assessment of the proposed setback rule against the requirements of sections 32 and 32AA of the RMA is provided below.

### **Sections 32 and 32AA of the RMA**

- 2.10 Under sections 32 and 32AA of the RMA, KiwiRail is required to demonstrate that the proposed setback rule is the most appropriate way to achieve the objectives of the Proposed Plan, including by:
- (a) identifying other reasonably practicable alternatives for achieving the relevant objectives;
  - (b) assessing the efficiency and effectiveness of the setback rule in achieving those objectives; and
  - (c) identifying and assessing the benefits and costs of the setback rule, including the risk of acting or not acting.
- 2.11 The relief sought by KiwiRail gives effect to a range of objectives in the Proposed Plan, which provide for the ongoing safe and efficient operation of infrastructure in the Waikato District, including the following objectives in the Infrastructure and Energy Chapter:
- (a) Objective 6.1.1, which directs that infrastructure is to be developed, operated and maintained to benefit the social, economic, cultural and environmental wellbeing of the Waikato District.
  - (b) Objective 6.1.6, which requires that infrastructure is not compromised.
  - (c) Objective 6.4.1, which directs that infrastructure be provided for and integrated with subdivision, use and development.

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<sup>17</sup> Statement of Evidence of Mark Arbuthnot for Ports of Auckland Limited dated 9 December 2019 at 12.5 to 12.8.

(d) Objective 6.5.1, which requires that an integrated land transport network is provided, in which all transport modes are safe and efficient.

2.12 In light of the Council Officer's report and other evidence filed on behalf of submitters, the key aspect of the section 32 analysis in relation to the proposed setback rule is the assessment of the benefits and costs of implementing the rule in the Proposed Plan, including as compared to reasonably practicable alternatives. We address these below.

### **Reasonably practicable alternatives**

2.13 Possible alternatives to the relief sought by KiwiRail include maintaining the status quo (as recommended by the Council Officer) or increasing the width of KiwiRail's designations (as proposed by POAL and the Council Officer).<sup>18</sup> In our submission, these alternatives should not be preferred over KiwiRail's proposed setback rule.

#### *Maintaining status quo (no setback)*

2.14 Without the setback sought by KiwiRail, new buildings (or additions or alterations to existing buildings) will be able to be established right up to the boundary of the railway corridor without any consideration for the potential risks to human safety associated with such development locating in proximity to the rail corridor.

2.15 As explained in the evidence of Ms Butler, where buildings are not appropriately setback from the railway corridor boundary, building design (including the location of decks, awnings and / or signs) can lead to direct conflict between adjacent activities and the rail corridor. Everyday activities such as building maintenance, cleaning or vegetation removal, can also lead to inadvertent encroachment into the rail corridor by people, objects or structures.<sup>19</sup> While these activities cannot themselves be controlled, locating buildings a safe distance from the railway corridor boundary can be, and minimises the risk involved.

2.16 Unlike roads, the rail corridor is not a public place. Access is restricted because it is a hazardous environment. Interference with the railway corridor gives rise to the potential for collision with moving trains, which travel at speed

<sup>18</sup> When assessing the appropriateness of a proposed change to the provisions of a plan, the "other reasonably practicable options" against which that change must be compared include the status quo. See *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 at [63].

<sup>19</sup> Statement of Evidence of Pam Butler for KiwiRail Holdings Limited (Hearing 7 – Industrial Zones) dated 10 December 2019 at 3.10.

and are unable to stop quickly. Further, overhead lines and associated infrastructure within the railway corridor also pose a risk to safety and could have serious consequences, including the potential for loss of life, in the event of an interference with that infrastructure.

- 2.17 Matters relating to human safety are relevant to the question of whether a particular option is the most appropriate way to give effect to the relevant objectives, and whether any potential alternatives to that option are "reasonably practicable".<sup>20</sup>

Where lives may be at stake, a practicable precaution should not lightly be considered unreasonable [...] a weighting exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight.

- 2.18 In our submission, the potentially fatal consequences of failing to appropriately manage conflicts between adjoining land uses and the railway corridor weighs in favour of including KiwiRail's proposed setback rule in the Proposed Plan. The setback rule is a practical and reasonable planning tool available to manage the risk to human safety. Maintaining the status quo is not, in our view, a reasonable alternative as, if adopted, the Proposed Plan will have no provisions that manage the potential for these risks nor to make applicants aware of the potential dangers of building close to the railway corridor.
- 2.19 Given the risks involved, it is KiwiRail's submission that in this case there is greater risk from not acting (ie not including the setback control) than there is from acting.<sup>21</sup> As such, we submit that the Panel should include the setback rule sought by KiwiRail.

*Increasing width of railway purposes designation*

- 2.20 The Environment Court has held that, where the relevant objectives can be achieved by a less restrictive regime, that regime should be adopted.<sup>22</sup> In our submission, if additional parts of the land adjoining the railway corridor were designated for railway purposes (as suggested by the Council Officer and POAL) the owners or occupiers of that land (including POAL) would be subject to a more restrictive regime than that provided under KiwiRail's proposed setback rule.

<sup>20</sup> *Royal Forest & Bird Protection Society of New Zealand Incorporated v Whakatāne District Council* [2017] NZEnvC 51 at [51].

<sup>21</sup> RMA, s 32(2)(c).

<sup>22</sup> *Royal Forest & Bird Protection Society of New Zealand Incorporated v Whakatāne District Council* [2017] NZEnvC 51 at [59], affirming *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* EnvC C153/2004, 21 October 2004 at [56].

- 2.21 While avoiding the establishment of buildings or structures on land adjacent to the railway corridor is preferable from a human safety and operational perspective, KiwiRail recognises that an integrated approach to planning requires a rule framework that allows development to occur near the rail corridor, in a way that appropriately manages the potential for conflict between adjoining land uses and the operation of the railway network. The setback rule sought by KiwiRail offers such an approach.
- 2.22 KiwiRail's proposed rule provides a practicable and efficient consenting pathway for applications that breach the 5 metre setback requirement, with consent able to be sought for a restricted discretionary activity. Any decision under the proposed restricted discretionary rule would be subject to specific criteria relating to the impacts on safety and the operation of the railway network.
- 2.23 In our submission, designating a setback along the length of the national rail corridor is a far less efficient use of land, and is not consistent with an integrated planning approach. If the land were designated, owners or occupiers would be required to seek written approval from KiwiRail under section 176 of the RMA prior to commencing any works on their land. Subject to section 179, the decision to grant or decline approval would be entirely at KiwiRail's discretion as requiring authority. This option would result in additional uncertainty and cost for applicants.
- 2.24 In our submission, a designation over land adjacent to the railway corridor boundary would result in a greater blight on that land than the proposed setback rule. We submit that KiwiRail's relief should be adopted as the less restrictive regime. KiwiRail is not seeking unreasonable or unnecessarily stringent controls on development of land adjoining the railway corridor boundary. The setback rule proposed by KiwiRail provides an efficient and pragmatic means of enabling development to occur near the railway corridor in a way that appropriately manages the risks to human safety associated with such development.

#### **Costs and benefits of proposed setback rule**

- 2.25 In his evidence for POAL, Mr Arbuthnot identifies what he considers to be the potential economic costs of KiwiRail's setback rule, in terms of potential economic growth and employment opportunities at POAL's site.<sup>23</sup> Mr Arbuthnot considers that KiwiRail's relief, if granted, would "place the costs of

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<sup>23</sup> Statement of Evidence of Mark Arbuthnot for Ports of Auckland Limited dated 9 December 2019 at 12.7.



the operation of the rail corridor directly on landowners".<sup>24</sup> We respectfully disagree.

- 2.26 Mr Arbuthnot has not acknowledged the fact that, under the regime proposed by KiwiRail, resource consent could still be sought for new or altered activities (the proposed rule does not impact existing activities) that do not comply with the setback requirement as restricted discretionary activities. In this regard, the proposed rule does not impose a disproportionate or unreasonable cost on landowners and occupiers.
- 2.27 Economic considerations, while relevant are also not determinative of the appropriateness of a proposed rule in terms of sections 32 and 32AA of the RMA. Although detailed economic evidence can be useful, it is not required for the purposes of an assessment of benefits and costs under section 32.<sup>25</sup> A broader exercise of judgment is required, taking into account all relevant matters.<sup>26</sup> In the context of KiwiRail's proposed setback rule, this includes matters relating to human safety.<sup>27</sup>
- 2.28 As explained in Ms Butler's evidence in relation to the Industrial Zones as well as Hearing 6, the most efficient and effective means of minimising the potential for adverse effects in terms of human safety is by requiring buildings and structures to be setback from the boundary of the rail corridor.<sup>28</sup> There are many activities that may not otherwise be seen as creating safety risks, such as water blasting and using equipment to maintain buildings, as well as aspects of building design including (for example) the location of awnings or decks near the rail corridor. However, without an appropriate setback from the railway corridor boundary, such activities can (and, in KiwiRail's experience, do) bring people into contact with infrastructure and/or trains within the rail corridor. This clearly poses a significant risk to them from a health and safety perspective.
- 2.29 A permitted activity rule requiring a physical setback would reduce the likelihood of adjoining landowners innocently coming into conflict with the rail corridor, and appropriately mitigate against future behaviour or activities that

<sup>24</sup> Statement of Evidence of Mark Arbuthnot for Ports of Auckland Limited dated 9 December 2019 at 12.9.

<sup>25</sup> *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [51] and [92], affirming the Environment Court's decision in *Geotherm Group Ltd v Waikato Regional Council* EnvC A151/2006, 19 November 2006.

<sup>26</sup> *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC).

<sup>27</sup> *Royal Forest & Bird Protection Society of New Zealand Incorporated v Whakatāne District Council* [2017] NZEnvC 51 at [51].

<sup>28</sup> Statement of Evidence of Pam Butler for KiwiRail Holdings Limited (Hearing 7 – Industrial Zones) dated 10 December 2019 at 3.5; and Statement of Evidence of Pam Butler for KiwiRail Holdings Limited (Hearing 6 – Village Zone) dated 25 November 2019 at 4.6.

may lead to inadvertent conflict into the corridor. This would be achieved without placing undue constraints on adjoining landowners.

- 2.30 KiwiRail's proposed setback would also reduce the extent to which adjoining landowners are required to follow the "Permit to Enter" process.<sup>29</sup> A requirement to follow this process can be onerous for adjacent landowners if they wish to access the rail corridor for the purpose of (for example) painting a building, where poles, ladders or abseil ropes may (depending on the height of the building) encroach into the rail corridor.
- 2.31 In our submission, reliance on the Permit to Enter system is a less efficient means of giving effect to the relevant objectives of the Proposed Plan than the setback rule sought by KiwiRail, from the perspective of both KiwiRail's operational requirements and the ability of adjoining landowners to use their land.

#### **Other setbacks in the Proposed Plan**

- 2.32 A setback rule to manage the interface between activities is not novel. The Proposed Plan includes a range of other rules and standards requiring activities to be set back from certain boundaries. In relation to the Industrial Zones, the Council Officer has recommended that these include requirements that all buildings be set back at least 5 metres from any road boundary and 5 metres from any other boundary where the relevant site adjoins a zone other than the Industrial Zones.<sup>30</sup>
- 2.33 In our submission, it is unreasonable and inconsistent for the Council Officer to accept the necessity and appropriateness of these setback rules while rejecting those sought by KiwiRail, particularly where little justification has been provided for the difference in approach.
- 2.34 The Proposed Plan anticipates that boundary issues will arise in the Industrial Zones, such that setback provisions to manage these issues are justified. The nature of the railway corridor and train movements means that significant adverse effects in terms of health and safety may arise if the potential conflict between the railway corridor and adjoining activities is not appropriately

<sup>29</sup> KiwiRail has a dedicated "Permit to Enter" system for all access to the rail corridor, which must be followed prior to access being granted. This can include the requirement for on-site safety personnel, or the temporary closure of the track (known as a block of line) for a set period to manage safety while activities occur. A block of line requires around six months to plan, as freight and passenger demands are required to be factored in and alternatives found. This process applies equally when KiwiRail needs to undertake work on its assets, as it does for third parties.

<sup>30</sup> Section 42A Report Rebuttal Evidence – Hearing 7: Industrial Zone & Heavy Industrial Zone, Attachments 4 and 4 at page 15, Rules 20.3.4.1 P1(a)(ii) and 21.3.4.1 P1(a)(ii).

managed. KiwiRail's proposed setback also imposes no greater restriction on the use of adjoining land than that already required in relation to road boundaries and boundaries joining other zones.

### **3. EARTHWORKS NEAR THE RAILWAY CORRIDOR**

- 3.1 KiwiRail is concerned to ensure that the potential adverse effects of earthworks on rail infrastructure is appropriately avoided or managed in the Proposed Plan. Where this is not achieved, the integrity of the railway network can be undermined by earthworks undertaken on adjacent sites, including (for example) as a result of inadequate sediment control.
- 3.2 KiwiRail's submission sought amendments to Rules 20.2.5.1 and 21.2.5.1 to provide that all earthworks must be located at least 1.5 metres from any infrastructure.<sup>31</sup> The Council Officer has recommended that KiwiRail's relief be rejected on the basis that the proposed amendment is "problematic" and it is unclear how it would assist in maintaining track integrity as "presumably" the width of KiwiRail's designation already accounts for such effects.<sup>32</sup>
- 3.3 A change in the contour of land as a result of earthworks or inadequate sediment control measures on adjacent sites can impact on the rail corridor if it is not appropriately managed. In our submission, the relief sought by KiwiRail is both necessary and appropriate to avoid or manage the potential adverse effects of earthworks on rail infrastructure, in the event that, for example, a train inadvertently travels along tracks that have been damaged or undermined by earthworks that are being undertaken on adjacent sites.
- 3.4 The proposed amendments to Rules 20.2.5.1 and 21.2.5.1 also give effect to Objectives 6.16, 6.4.1 and 6.5.1, which together direct that infrastructure is not to be compromised and is to be integrated with subdivision, use and development within the Waikato District.

### **4. CONCLUSION**

- 4.1 KiwiRail is generally supportive of the resource management outcomes sought by the Council in respect of the Industrial Zones. In particular, KiwiRail supports the Council Officer's recommendations discussed in paragraphs 1.2

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<sup>31</sup> Submissions 986.97 and 986.98. This submission is supported in principle by Watercare Services Limited - Further Submission 1176.310.

<sup>32</sup> Section 42A Report Part B – Industrial Zone Rules at [366]; Section 42A Report Part C – Heavy Industrial Zones at [820].

and 1.3 of these legal submissions, and seeks that the Panel adopts these recommendations.

4.2 However, KiwiRail disagrees with the remainder of the Council Officer's recommendations in relation to KiwiRail's submission. KiwiRail seeks that the Panel amend the provisions of the Industrial Zones to:

- (a) provide a permitted activity control requiring a 5 metre setback from the railway corridor boundary for all new or altered buildings and add new matters of discretion for buildings that do not comply with that requirement; and
- (b) require that all earthworks be located at least 1.5 metres from any infrastructure.

4.3 In our submission, the relief sought by KiwiRail is the most appropriate way to achieve the purpose of the RMA and is the most efficient and effective means of achieving the relevant objectives of the Proposed Plan.

**DATED** 16 January 2020

**A A Arthur-Young / L J Eaton**  
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