

BEFORE INDEPENDENT COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER on Proposed Change 6 (National Policy Statement for Urban Development) ("**PC 6**") to the Bay of Plenty Regional Policy Statement ("**RPS**")

LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED

19 JUNE 2023

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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 responsible for designations for railway purposes throughout New Zealand, including the East Coast Main Trunk and Mount Maunganui Branch lines that pass through the Bay of Plenty region. These lines support the vital movement of freight and people throughout the country.
- 1.3 KiwiRail supports the RPS and urban development around the rail corridor. However, such development must be planned and managed well, with the safety of people and the success of the national rail network in mind.
- 1.4 The changes to the RPS through PC 6 are important precursors to the more specific policy and rule framework to be followed through the intensification plan changes for Tier One districts in the Bay of Plenty region. In particular, PC 6 provides an opportunity to ensure the RPS is updated to accord with the RMA as amended by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("**Housing Supply Amendment Act**") and National Policy Statement for Urban Development 2020 ("**NPS-UD**").
- 1.5 Both KiwiRail and Bay of Plenty Regional Council ("**Council**") agree that reverse sensitivity effects must be recognised and provided for in the RPS. However, the reporting officer considers reverse sensitivity effects are already appropriately recognised by the RPS provisions, such that KiwiRail's relief is unnecessary.¹
- 1.6 In its submission KiwiRail sought amendments to better manage this interface.² Ms Heppelthwaite's evidence is that the RPS as currently drafted provides for reverse sensitivity, but in an incomplete way. In particular, it is only limited to rural areas.³ Critically, PC 6 as notified also does not address reverse sensitivity effects relative to rail (or other

¹ Section 42A report dated 5 June 2023 at page 3.

² See Provision 2.8.1, Policy UG 7A, Policy UG 7Ax, Policy UG 13B, Policy UG 14B.

³ Statement of Evidence of Catherine Heppelthwaite dated 19 June 2023 at [7.1] and [7.2].

transport) infrastructure.⁴ For transport infrastructure, intensification drives the need for even more careful management of reverse sensitivity effects in urban areas, with more sensitive activities looking to establish around transport corridors. This is also in the context where the role of rail is expected to grow (which means a greater frequency of trains). The Council needs to future proof for that growth in the same way that it is planning for residential growth.

- 1.7 The changes sought by KiwiRail are critical to ensure that reverse sensitivity effects on transport infrastructure are better recognised and provided for in the RPS, and the interface between urban development and the rail network is appropriately managed, now and into the future.

2. LEGAL FRAMEWORK

Statutory framework

- 2.1 The RMA provides that the purpose of a regional policy statement is to:⁵

...achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

- 2.2 Regional policy statements are a key element in the hierarchy of planning documents, providing a nexus between the RMA and the more specific objectives, policies and methods set out in the regional and district plan provisions. In addition to achieving the purpose of the Act itself, regional policy statements must accord with relevant national policy statements and regulations that set national directions in the planning hierarchy.⁶

- 2.3 They establish at a high-level a region's policy framework for sustainable management. Regional and district plans must give effect to any regional policy statement⁷ and, when considering resource consent applications, a consent authority must have regard to any applicable operative or proposed regional policy statement. For all of these reasons, regional

⁴ Statement of Evidence of Catherine Heppelthwaite dated 19 June 2023 at [7.3] and [7.8].

⁵ RMA, s 59.

⁶ RMA, s 61(da).

⁷ RMA, ss 65(6) and 73(4).

policy statements have been referred to as "the heart of resource management" within a region.⁸

Drivers for PC 6

- 2.4 The introduction of the NPS-UD, and the amendments to the RMA made by the Housing Supply Amendment Act, change the legislative and policy framework for the RPS. They introduce a range of new planning concepts and processes into the language of the RMA itself, as well as the policy direction beneath it. These include the standardisation of urban form through the Medium Density Residential Standards ("**MDRS**"), the introduction of overall objectives for well-functioning urban environments and the utilisation of the concept of "qualifying matters".
- 2.5 These changes are the core drivers of PC 6, in that the current RPS no longer accords (per s 61) with the RMA as amended, or the current NPS-UD and the planning concepts directed by these higher-order legislation and policy documents.

Reverse sensitivity

- 2.6 Reverse sensitivity is a well-established concept and is an adverse effect under the RMA.⁹ It refers to the susceptibility of lawfully established effects-generating activities (which cannot internalise all of their effects)¹⁰ and complaints or objections arising from the location of new sensitive activities near those lawfully established activities. The location of sensitive activities in these areas can place significant constraints on the operation of established activities, as well as their potential for growth and development in the future.
- 2.7 The Courts have recognised the importance of protecting regionally significant infrastructure from reverse sensitivity effects, and has declined applications for resource consent where developments have the potential to give rise to such effects, demonstrating the importance in appropriately

⁸ *North Shore City Council v Auckland Regional Council* [1994] NZRMA 521 at 526 (PT).

⁹ 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].

¹⁰ 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.

providing for it in planning documents.¹¹ The vulnerability of an activity to reverse sensitivity effects is enough to warrant the implementation of protections for the activity in question.¹²

Well-functioning urban environments

2.8 The description of PC 6 provides:

The National Policy Statement-Urban Development (2020) (NPS-UD) introduced requirements for regional councils to amend their Regional Policy Statement to be more responsive to urban development proposals and provide support to intensification of urban areas. Their purpose is to enable additional development capacity, regardless of whether it is planned in existing planning documents, and to contribute to well-functioning urban environments...

2.9 KiwiRail's submission supports the inclusion of references to "well-functioning urban environments" in the RPS as notified. This concept comes from the first and overarching objective of the NPS-UD, that:

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.

2.10 The first policy of the NPS-UD explains what such "well-functioning urban environments" are:

Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:

- (a) have or enable a variety of homes that:
 - (i) meet the needs, in terms of type, price, and location, of different households; and
 - (ii) enable Māori to express their cultural traditions and norms; and
- (b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and
- (c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and

¹¹ See, for example, *Gargiulo v Christchurch City Council* NZEnvC Christchurch 137/2000, 17 August 2000.

¹² *Foster v Rodney District Council* [2010] NZRMA 159 at [96].

- (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and
 - (e) support reductions in greenhouse gas emissions; and
 - (f) are resilient to the likely current and future effects of climate change.
- 2.11 The NPS-UD does not intend housing enabled under NPS-UD to be incorporated into plans in a blunt and/or blanket manner. Instead, regard must be had as to the appropriate type, scale and location of housing depending on the particular context and environment.
- 2.12 The kind of effects management required for infrastructure like the rail network provides a useful example of the importance of a nuanced objective like "well-functioning urban environments" guiding these plan changes. Clearly, PC 6 encourages intensification around transport corridors and nodes – an approach which KiwiRail supports.
- 2.13 An objective like that of "well-functioning urban environments" encourages users of the RPS to navigate through this context and ensure the housing intensification which is planned for those nodes is developed in light of the likely effects and operational requirements of the rail corridor. This prompts consideration of design changes which may be required to manage these effects, like the noise, vibration or setback controls KiwiRail seeks throughout the country.

3. CHANGES REQUIRED

- 3.1 Trains are large, travel at speed, and generate noise and vibration effects. 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.
- 3.2 However, KiwiRail cannot internalise all of its effects within the rail corridor. Lawful noise and vibration effects extend beyond the boundary of the designation, even when KiwiRail is taking reasonable steps to manage those effects. Exposure to activities that create noise and vibration can give rise to annoyance and adverse health effects for people living near noisy sources.

- 3.3 The Overview Report recognises reverse sensitivity effects on existing lawfully established activities through numerous policies.¹³ The reporting officer has recommended rejection of KiwiRail's relief on the basis that sensitivity effects are appropriately recognised in the RPS provisions as notified.¹⁴
- 3.4 In our submission, PC 6 has significant gaps in recognising and providing for management of reverse sensitivity effects on transport infrastructure, including in urban areas. It is fundamental to a well-functioning urban environment that housing intensification occurs in a way that is well integrated with transport infrastructure.
- 3.5 Unusually, PC 6 as notified only recognises and provides for management of reverse sensitivity effects in rural areas and does not address transport infrastructure. Regarding these effects, PC 6 provides the following explanation (in the context of Policy UG 20B):
- Unplanned rural lifestyle living and fragmentation of rural land through subdivision has occurred in some areas with reverse sensitivity concerns from these new dwellers resulting in associated adverse effects on the productive capacity of the land and its versatility, as well as on the efficient operation and growth of rural production activities.
- 3.6 Similar reasoning can clearly be applied in the context of intensification of urban areas located near transport infrastructure, which risk compromise of the safe and efficient operation of that infrastructure. Ms Heppelthwaite's evidence explains the amendments to the RPS sought by KiwiRail in further detail which address these gaps.
- 3.7 As outlined in Mr Brown's evidence, people who locate near the rail corridor experience noise and vibration effects as a result of rail movements. Unless appropriately managed, this leads to complaints and the potential to adversely impact the wellbeing of those residents. It can also manifest in other parties seeking to restrict night time operations within the rail corridor.¹⁵ It is important that PC 6 provides for reverse sensitivity effects to avoid these impacts and to ensure development is well-integrated with transport infrastructure.

¹³ Policy UG 20B: Managing reverse sensitivity effects on rural production activities and infrastructure in rural areas; Policy EI 7B: Managing the effects of infrastructure development and use; Policy AQ 1A: Discouraging reverse sensitivity effects associated with odours, chemicals and particulates; Policy EI 3B: Protecting nationally and regionally significant infrastructure.

¹⁴ Section 42A report at page 3 and 50.

¹⁵ Statement of Evidence of Mike Brown dated 19 June 2023.

- 3.8 As New Zealand's population continues to grow, demand for rail, as a mean for freight and passenger transport will increase. Mr Brown's evidence outlines the significant investment in rail infrastructure occurring in the Bay of Plenty Region and across New Zealand, and the critical role that rail is playing in reducing transport emissions. If urban development near the rail corridor is not managed well, it will exacerbate reverse sensitivity effects on the rail network and may impact the health and amenity of residents. Planning documents should prudently plan for the interface between sensitive activities and the rail network so that urban development occurs in a way that does not constrain future operation of the rail network, ensures the wellbeing of communities, and supports the development of well-functioning urban environments.
- 3.9 In our submission, KiwiRail's relief should be granted for the reasons set out in the evidence of Ms Heppelthwaite and Mr Brown. The relief sought by KiwiRail, summarised at **Attachment A** of Ms Heppelthwaite's evidence, will ensure the safe and efficient operation of nationally significant infrastructure as intended by NPS-UD and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

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