

**IN THE ENVIRONMENT COURT  
AUCKLAND**

**ENV-2024-**

**I MUA TE KOOTI TAIAO O AOTEAROA  
I TE TĀMAKI MAKĀURAU ROHE**

**UNDER**

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

**AND**

**IN THE MATTER**

of an appeal under Clause 14(1) of Schedule 1 of the  
RMA

**BETWEEN**

**KIWIRAIL HOLDINGS LIMITED**

**Appellant**

**AND**

**BAY OF PLENTY REGIONAL COUNCIL**

**Respondent**

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**NOTICE OF APPEAL ON BEHALF OF KIWIRAIL HOLDINGS LIMITED**

**25 MARCH 2024**

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**Russell  
McAugh**

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To: The Registrar  
The Environment Court at Auckland  
The Respondent

**KIWIRAIL HOLDINGS LIMITED ("KiwiRail")** appeals against parts of the decision of the Bay of Plenty Regional Council ("**Council**") on Proposed Change 6 (National Policy Statement for Urban Development) ("**PC6**") to the Bay of Plenty Regional Policy Statement ("**RPS**").

## **1. BACKGROUND AND DECISIONS APPEALED**

- 1.1 KiwiRail made a submission on PC6 on 6 September 2022.<sup>1</sup> KiwiRail presented evidence and legal submissions in support of its submission.<sup>2</sup>
- 1.2 KiwiRail received notice of the Council's decision on PC6 on 9 February 2024 ("**Decision**").
- 1.3 The parts of the Decision being appealed are the decisions to reject the matters raised in KiwiRail's submission, or to amend the RPS in a way that is inconsistent with the matters raised in KiwiRail's submission. KiwiRail appeals those parts of the Decision summarised in paragraph [2] below for the reasons set out in this Notice of Appeal.
- 1.4 KiwiRail is not a trade competitor for the purposes of Section 308D of the RMA.
- 1.5 KiwiRail is a State-Owned Enterprise responsible for the management and operation of the national railway network. This includes managing railway infrastructure and land, as well as freight and passenger services within New Zealand. KiwiRail is also a Requiring Authority under section 167 of the RMA for land designated for railway purposes throughout New Zealand.
- 1.6 KiwiRail's rail network in the Bay of Plenty region plays a critical role in the regional and national transport network. The East Coast Main Trunk, and the Mount Maunganui Branch lines are of regional and national importance as the main line to the Port of Tauranga, and through to Kawerau. The East Coast Main Trunk Line is part of the busiest freight linkage in New Zealand, connecting the key seaports of Auckland and Tauranga via Hamilton. KiwiRail

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<sup>1</sup> Submission Number 20.

<sup>2</sup> Statement of Evidence of Catherine Heppelthwaite (Planning) (dated 19 June 2023). Statement of Evidence of Michael Brown (Corporate) (dated 19 June 2023). Legal Submissions on Behalf of KiwiRail Holdings Limited (dated 19 June 2023)

has a strong interest in protecting its ability to operate, maintain and upgrade its lines, as well as seeking to ensure the safety and amenity of those locating near the rail corridor.

## **2. SCOPE OF APPEAL**

2.1 KiwiRail appeals the parts of the Decision that rejected the following relief by KiwiRail:

- (a) inclusion of references to the management of reverse sensitivity effects in the provisions of the RPS;<sup>3</sup>
- (b) inclusion of network utility providers growth plans as being something that the location and staging of urban subdivision, use and development needs to respond to;<sup>4</sup> and
- (c) removal of the reference to the efficient use of local authority and central government financial resources, including prudent local authority debt management from the list of matters to take into account for the rezoning or other provisions for the urban development of land.<sup>5</sup>

2.2 KiwiRail seeks the relief set out in this Notice of Appeal, or such alternative or consequential relief to address KiwiRail's concerns.

## **3. GENERAL REASONS FOR APPEAL**

3.1 The RPS, in its present form:

- (a) will not promote the sustainable management of the natural and physical resources in the Bay of Plenty Region, and is therefore contrary to or inconsistent with Part 2 and other provisions of the RMA;
- (b) is inconsistent with other relevant planning documents, including the National Policy Statement on Urban Development 2020;
- (c) will not meet the reasonably foreseeable needs of future generations;

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<sup>3</sup> Decision at [54] - [55].

<sup>4</sup> Decision at p. 53.

<sup>5</sup> Decision at p. 53.

- (d) will not enable the social, economic, and cultural wellbeing of the people of the Bay of Plenty Region;
- (e) does not avoid, remedy, or mitigate actual and potential adverse effects on the environment; and
- (f) will not promote or enable efficient use and development of railway infrastructure and the operation of the railway corridor;
- (g) will not adequately protect and provide for KiwiRail's current and future operations in the Bay of Plenty;
- (h) will not provide positive health and amenity outcomes for people locating in proximity to the railway corridor; and
- (i) is not the most appropriate way to achieve the objectives of the RPS in terms of section 32 of the RMA.

3.2 In addition to the general reasons outlined above, KiwiRail appeals the decision for the specific reasons set out below.

#### **4. SPECIFIC REASONS**

##### **Reverse sensitivity**

- 4.1 Reverse sensitivity is a well-established planning principle, and an adverse effect that is recognised in some of the policies in the RPS.
- 4.2 KiwiRail recognises the increasing pressures for urban intensification and is not opposed to development alongside the railway network. However, the nature of railway operations means KiwiRail cannot fully internalise all its effects within the railway corridor boundaries. Increasing development around railway corridors consequentially means the introduction of more sensitive receivers to adverse effects of existing and lawful railway activities. With more sensitive activities establishing near the rail corridor, there is an increased risk of reverse sensitivity effects.
- 4.3 While KiwiRail acknowledges that there are clear benefits in co-locating people and businesses near transport corridors, several of KiwiRail's submissions sought that specific reference to reverse sensitivity effects being included in the RPS, to ensure that development is managed in a way that ensures the safe and efficient operation of the rail network and to minimise adverse health effects on communities.

- 4.4 The specific provisions and policies in the RPS in which KiwiRail sought to include reference to reverse sensitivity effects are set out below.

*Issue 2.8.1. Regionally significant urban and rural growth management issues*

- 4.5 KiwiRail's submission sought to amend issues 2 and 9 of Issue 2.8.1:
- (a) In respect of Issue 2.8.1 (2)<sup>6</sup> (land supply and inefficient patterns of use) - Remove the reference to "low density" patterns of land use, specifically include that there is a shortage of "appropriate" developable land, and to add that unplanned growth and inefficient land use also have the potential "to create land use conflicts and reverse sensitivity effects".
- (b) In respect of Issue 2.8.1(9)<sup>7</sup> (intensive urban development) – to include that more intensive urban development also has the potential to compromise the "safe" and efficient operation of the transport network, "where the interface between conflicting uses is not appropriately managed".
- 4.6 The Decision rejected the relief sought by KiwiRail, in respect of both Issues 2 and 9.<sup>8</sup>
- 4.7 These amendments are required to recognise that urban development and land use changes can result in reverse sensitivity effects, and that the interfaces between conflicting land uses must be appropriately managed. The reference to low density patterns of land use as being inefficient should be removed as there may be circumstances where lower density is more efficient.

Relief Sought

- 4.8 KiwiRail seeks amendments to Issue 2.8.1(2) and (9) as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

*Policy UG 7A*

- 4.9 KiwiRail's submission sought an additional clause in Policy UG 7A to include the criterion that "the development avoids the potential for reverse sensitivity

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<sup>6</sup> Submission 20.2.

<sup>7</sup> Submission 20.3.

<sup>8</sup> Decision at p. 53, and at [54] - [55].

effects on the safe and efficient operation of transport corridors".<sup>9</sup> The Decision rejected this submission and did not include the criterion sought by KiwiRail.<sup>10</sup>

- 4.10 Policy UG 7A is framed such that it is not an exhaustive list of criteria that must be complied with, but rather a list of factors that should be considered by the decision maker. It is entirely appropriate that the extent to which development avoids reverse sensitivity effects on the safe and efficient operation of transport corridors be a relevant consideration in the context of a policy that is addressing unanticipated or out-of-sequence development.

Relief Sought

- 4.11 KiwiRail seeks amendments to Policy UG 7A as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

*Policy UG 7Ax*

- 4.12 KiwiRail's submission sought an additional clause to this policy to provide that urban development in urban environments should also minimise land use conflicts as far as practicable, and avoid the potential for reverse sensitivity effects.<sup>11</sup> The Decision rejected this relief and did not include this additional clause.<sup>12</sup>
- 4.13 Policy UG 7Ax, provides a list of particular circumstances that are to be achieved in order to provide for, and enable, increased-density urban development in urban environments. Given the adverse effects associated with reverse sensitivity, it is appropriate to include in this list that land use conflicts are minimised as far as practicable, as well as avoiding the potential for reverse sensitivity effects.

Relief Sought

- 4.14 KiwiRail seeks amendments to Policy UG 7Ax as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

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<sup>9</sup> Submission 20.6.

<sup>10</sup> Decision at p. 53, and at [54] - [55].

<sup>11</sup> Submission 20.7.

<sup>12</sup> Decision at p. 53 and at [106] - [108].

*Policy UG 13B*

- 4.15 KiwiRail's submission sought to include two additional items to be given regard to in promoting the integration of land-use and transport activities, being, the interface between land use and transport activities, including potential reverse sensitivity effects on transport corridors, and any appropriate reductions in building height and/or density of urban form to provide for qualifying matters.<sup>13</sup>
- 4.16 KiwiRail's submission also sought to include that regard should be had to the "safe and efficient operation" of existing and future transport corridors.
- 4.17 The Decision did not include either of these additional clauses, and did not include the reference to the safe and efficient operation of existing and future transport corridors.<sup>14</sup>
- 4.18 It is entirely appropriate that the extent to which development avoids reverse sensitivity effects on the safe and efficient operation of transport corridors is a relevant consideration in the context of a policy that is addressing unanticipated or out-of-sequence development.
- 4.19 Policy UG 13B is framed as a list of items to have regard to in promoting the integration of land-use and transport activities. The amendments sought by KiwiRail are appropriate in this context. Where urban development is enabled in new areas and at a higher density near lawfully established activities like transport corridors, there is a need to ensure reverse sensitivity effects do not constrain the safe and efficient operation of transport networks. The amendments sought by KiwiRail are also necessary to recognise qualifying matters at the RPS level to ensure the district planning framework appropriately gives effect to the higher order planning documents.

Relief Sought

- 4.20 KiwiRail seeks amendments to Policy 13B as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

*Policy UG 14B*

- 4.21 KiwiRail's submission sought provisions that provide urban growth is also restricted where it cannot be demonstrated that avoidance of reverse sensitivity effects is achieved.<sup>15</sup>

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<sup>13</sup> Submission 20.9.

<sup>14</sup> Decision at p. 53 and at [54] - [55], and [116] - [117].

<sup>15</sup> Submission 20.10.

4.22 The Decision rejected KiwiRail's submission and did not include the reference to reverse sensitivity effects.<sup>16</sup>

4.23 The relief sought by KiwiRail to expressly recognise and provide for the avoidance of reverse sensitivity effects as one of the principles for restriction of urban growth is appropriate as reverse sensitivity is a critical resource management issue that must be managed when providing for growth of urban activities near lawfully established transport corridors.

#### Relief Sought

4.24 KiwiRail seeks amendments to Policy UG 14B as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

#### **Objective 25 – network utility providers and operators' growth plans**

4.25 KiwiRail's submission sought that the location and staging of urban subdivision, use and development, should expressly respond to network utility providers and operators' growth plans (in addition to responding to the growth plans of industry sector groups and other development entities).<sup>17</sup>

4.26 The Decision rejected the relief sought by KiwiRail and did not include the reference to the growth plans of network utility providers and operators.<sup>18</sup>

4.27 This amendment is necessary to ensure that urban subdivision, use and development is located and staged in a way that is expressly responsive to network utility operator growth plans in addition to the growth plans of industry sector groups and other development entities.

#### Relief Sought

4.28 KiwiRail seeks amendments to Objective 25 as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

#### **Policy UG 10B – local and central government financial resources**

4.29 KiwiRail's submission sought the deletion of the reference to the efficient use of local authority and central government financial resources, including prudent local authority debt management from the list of matters to take into account for the rezoning or other provisions for the urban development of land.<sup>19</sup>

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<sup>16</sup> Decision at p. 53, and at [54] - [55], [126].

<sup>17</sup> Submission 20.4.

<sup>18</sup> Decision at p. 53, and at [54] - [56].

<sup>19</sup> Submission 20.5.



- 4.30 The Decision rejected this relief and kept the subclause in the policy.<sup>20</sup>
- 4.31 The specific inclusion of "efficient use of local authority and central government financial resources" in the list of matters to take into account may mean that consideration of local and central government financial resources in decision making is unduly narrow. It is also not a relevant planning matter in the context of the RPS. There is a range of other cost considerations to be considered when providing for urban development of land, including costs associated with protecting the safe and efficient operation of transport corridors.

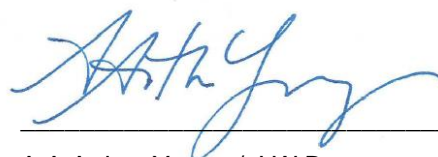
#### Relief Sought

- 4.32 KiwiRail seeks amendments to Policy UG 10B as set out in **Attachment A** or any other consequential amendments necessary to address KiwiRail's concerns.

#### **ATTACHMENTS**

- 4.33 The following documents are attached to this notice:
- (a) **Attachment A:** a copy of KiwiRail's proposed amendments to the issues, objectives and policies of the RPS.
  - (b) **Attachment B:** a copy of the decision.
  - (c) **Attachment C:** a copy of KiwiRail's submission.
  - (d) **Attachment D:** a list of the relevant names and addresses of persons who lodged submissions who are to be served with a copy of this notice.

**KIWIRAIL HOLDINGS LIMITED** by its solicitors  
and authorised agents Russell McVeagh:



**Signature:**

A A Arthur-Young / J W Burton

**Date:**

25 March 2024

**Address for Service:**

C/- Sian Kilgour  
Russell McVeagh  
Barristers and Solicitors  
48 Shortland Street

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<sup>20</sup> Decision at p. 53.

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**Telephone:** (09) 367 8000

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**TO:** The Registrar of the Environment Court at  
Auckland.

**AND TO:** The Bay of Plenty Regional Council.

**AND TO:** The relevant submitters on the provisions  
appealed.

### **Advice to recipients of copy of notice of appeal**

#### *How to become a party to proceedings*

1. You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.
2. To become a party to the appeal, you must:
  - (a) within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
  - (b) within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.
3. Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.
4. You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

#### *Advice*

*If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.*



## Appendix A – Relief Sought

Provision	Relief Sought
Issue 2.8.1.	<p><b>2. Land supply and inefficient patterns of land use</b></p> <p>An imbalance of land supply, demand, and uptake can have adverse economic and social effects, yet it is very difficult to plan and predict. Inefficient <del>and low density</del> patterns of land use and ad hoc development are difficult and costly to service and maintain, and contribute to increasing greenhouse gas emissions. A shortage of <u>appropriate</u> developable land and housing supply reduces housing choices and leads to increases in prices. Unplanned growth and inefficient land use also have the potential to <u>create land use conflicts and reverse sensitivity effects</u>, adversely affect rural production activities and to reduce the ability of versatile land to be used for a range of productive purposes.</p>
Issue 2.8.1.	<p><b>9. Intensive urban development</b></p> <p>More intensive urban development is necessary to accommodate growth but has the potential to:</p> <ul style="list-style-type: none"> <li>• Overload network infrastructure including water supply, wastewater and stormwater, as well as creating an unanticipated demand on social infrastructure such as schools and healthcare facilities if not integrated with infrastructure planning and funding decisions.</li> <li>• Create unforeseen social, economic and cultural effects.</li> <li>• Increase road congestion leading to restricted movement of goods and services to, from, and within the region, and</li> <li>• compromising the <u>safe and</u> efficient operation of the transport network, <u>where the interface between conflicting uses is not appropriately managed if not undertaken in conjunction with well-planned transport improvements.</u></li> </ul>
Objective 25	<p>Urban subdivision, use and development is located and staged in a way that integrates with the long term planning and funding mechanisms of local authorities, central government agencies and network utility providers and operators whilst also being responsive to the growth plans of relevant industry sector groups, <u>network utility providers and operators</u>, and other development entities.</p>
Policy UG 7A	<p>Private plan changes, submissions on plan changes, or submissions on plan reviews providing for development of urban environments and urban growth that forms part of an urban environment, that is unanticipated or out-of-sequence, will add significantly to development capacity based on the extent to which the proposed development satisfies the following criteria:</p> <p>(a) The development is of large enough scale to contribute to meeting demand for additional urban land identified through the HBA for the area, including meeting housing bottom lines or meeting needs for specific housing typologies or price points, or business types. Where there is no HBA, there is evidence that there is a need for additional urban land, and</p> <p>(b) For Tauranga City and Western Bay of Plenty District urban environments, the development is large scale (5 hectares or more), and sufficient able to support multi modal transport options, and</p> <p>(c) For all other urban environments, the development is at a scale commensurate with the size of the urban environment and includes a structure plan for the land use change that meets the requirements of Method 18, and</p>

	<p>(d) The development is located with good accessibility between housing, employment, community and other services and open space, and</p> <p>(e) The development is likely to be completed earlier than the anticipated urban development and/or land release sequence, and</p> <p>(f) Required development infrastructure can be provided efficiently, including the delivery, funding and financing of infrastructure without materially reducing the benefits of other existing or planned development infrastructure, or undermining committed development infrastructure investment.</p> <p><u>(g) The development avoids the potential for reverse sensitivity effects on the safe and efficient operation of transport corridors.</u></p>
Policy UG 7AX	<p>Provide for and enable increased-density urban development in urban environments that:</p> <p>(a) Contributes to a well-functioning urban environment,</p> <p>(b) Encourages increased density in areas of identified demand,</p> <p>(c) Is adequately served by existing or planned development infrastructure and public transport.</p> <p><u>(d) Minimises land use conflicts as far as practicable, including avoiding the potential for reverse sensitivity effects.</u></p>
Policy UG 10B	<p>Require the rezoning or other provisions for the urban development of land to take into account:</p> <p>(a) Sustainable rates of land uptake,</p> <p>(b) Existing or committed public and private sector investments in urban land development and infrastructure,</p> <p>(c) Sustainable provision and funding of existing and future infrastructure, <del>and</del></p> <p><u>(d) Efficient use of local authority and central government financial resources, including prudent local authority debt management.</u></p>
Policy UG 13B	<p>In promoting the integration of land-use and transport activities, regard should be given to:</p> <p>(a) Land use and transport planning being closely linked,</p> <p>(b) The land transport system providing opportunities and integrated links for both public and private transportation modes,</p> <p>(c) Proximity to commercial centres, places of employment, community services and areas of high amenity are considered in transport planning to support higher density development,</p> <p>(d) Demand management is considered in planning, design and transport investment decisions,</p> <p>(e) The benefits of increased-density urban intensification,</p> <p>(f) Existing and future transport corridors <u>are</u> defined and protected <u>to ensure their safe and efficient operation, and</u></p> <p>(g) Integrated transport packages for funding are developed. <u>and</u></p> <p><u>(h) The interface between land use and transport activities, including potential reverse sensitivity effects on transport corridors, and</u></p> <p><u>(i) Any appropriate reductions in building height and/or density of urban form to provide for qualifying matters.</u></p>
Policy UG 14B	<p>Restrict the growth of urban activities located outside urban environments unless it can be demonstrated that sound resource management principles are achieved, including:</p> <p>(a) The efficient development and use of the finite land resource, <del>and</del></p> <p>(b) Providing for the efficient, planned and co-ordinated use and development of infrastructure. <u>and</u></p> <p><u>(c) The avoidance of reverse sensitivity effects.</u></p>