BEFORE THE HEARING PANEL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER OF	on Proposed Plan Change 26 ("**PC26**") to the Operative Waipā District Plan ("**Proposed District Plan**")

FURTHER LEGAL SUBMISSIONS ON BEHALF OF KIWIRAIL HOLDINGS LIMITED IN RESPECT OF SCOPE

8 MAY 2023

Russell McVeagh

A A Arthur-Young | T F Power
P +64 9 367 8000
F +64 9 367 8163
PO Box 8
DX CX10085
Auckland

MAY IT PLEASE THE COMMISSIONERS:

1. These legal submissions respond to the questions raised by the Panel on 2 May 2023 in respect of the scope of KiwiRail's relief. Specifically, these questions arose from matters raised in the legal submissions by Kāinga Ora and Waipā District Council ("**Council**") that the relief sought by KiwiRail in respect of noise and vibration controls did not meet the tests in *Clearwater Resort v Christchurch City Council* High Court, Christchurch, 14/3/2003, AP34/02 and/or *Waikanae Land Company Ltd v Kāpiti Coast District Council* [2023] NZEnvC 056.

Setbacks

2. The issues raised by Kāinga Ora and the Council as set out in their legal submissions are confined to KiwiRail's relief for noise and vibration provisions, as opposed to KiwiRail's relief in respect of setbacks.[1] For completeness, setbacks clearly fall within scope of PC26 because:

   (a) PC26 clearly identifies the North Island Main Trunk railway line as a qualifying matter for the modification of the Medium Density Residential Standards ("**MDRS**").[2]

   (b) The MDRS include a standard 1m building setback from side and rear boundaries.[3]

   (c) KiwiRail's relief would amend the application of the MDRS setback on the basis of the identified qualifying matter by applying a building setback of 5m to the rail corridor. This aligns with how other qualifying matters have been applied to this standard, including application of a 7.5m setback from boundaries to state highways, a 5m setback to the Te Awa Cycleway and a 4m setback from arterial roads.[4]

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1 Waipā District Council Legal Submissions at 13.2 – 13.4 accept rail is a qualifying matter and assess the substantive value of KiwiRail's setback provisions. Kāinga Ora Legal Submissions at 3.8(b)(ii) refer to "*The relief sought by KiwiRail which involves the introduction of standards applying to all sensitive activities alongside a rail corridor*." This appears to reference the noise and vibration standards as they apply to sensitive activities, while the setback standards apply to all buildings, regardless of the activity they house.

2 See Amendment adding new Section 2A – MRDZ at 2A.1.9 (emphasis added):
"The Medium Density Residential Standards have been modified to accommodate qualifying matters in the Waipā District in the following circumstances: […]
Where sites are located proximate to nationally significant infrastructure, such as the National Grid transmission lines, state highways ***and the North Island Main Truck railway line****; and […]"*

3 RMA, Sch 3A, cl 13.

4 PC26 Section 32 Report at 2A.4.2.6.

3. We do not understand Council or Kāinga Ora to be raising any concerns with the scope of KiwiRail's setback relief.

Noise and vibration controls

4. The question raised by the Council and Kāinga Ora is whether KiwiRail's relief seeking to amend the noise controls within PC26 and further add vibration controls is out of scope.

Clearwater test

5. The Council alleges that KiwiRail's relief seeking acoustic insulation and vibration controls fail to meet the two limbs set out in *Clearwater* as to the scope of submissions on a plan change.[5]

First limb: Does KiwiRail's submission go beyond the change to the status quo?

6. The Council alleges KiwiRail's relief does not meet the first limb of the *Clearwater* test because "No changes to the acoustic insulation rules, and no vibration rules were proposed as part of PC26." [6]

7. With respect, in our submission the first limb of *Clearwater* clearly does not require the exact rules or standards raised in a submission to be subject to amendment in the notified version of a plan for the limb to be met. In determining whether a submission is "on" PC26, it is important to first understand the nature of the alteration to the Waipā District Plan that is introduced through PC26.

8. The overarching objective of PC26 is to incorporate the MDRS and give effect to Policies 3 and 4 of the NPS-UD. In implementing these requirements, a focus of PC26 is on intensifying development in urban areas, including in and around transport corridors. In circumstances where PC26 proposes changes that result in intensification near the rail corridor, there is a clear and obvious link between intensifying adjacent to the rail corridor and the need to manage the effects of that intensification on transport infrastructure through appropriate planning controls. In this regard, it cannot be said that KiwiRail's submission (which seeks to

5 See *Clearwater Resort v Christchurch City Council* High Court, Christchurch, 14/3/2003, AP34/02 at [69]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [54] - [55], as cited with approval in *Meridian Energy v McKenzie District Council* [2022] NZEnvC 105 at [19].

6 Waipā District Council Legal Submissions at 13.5(b).

introduce controls to manage the effects of that intensification on transport infrastructure) is out of "left field".[7]

9. When considering the scope of PC26, it is also relevant to consider the s 32 report and whether KiwiRail's submission raises matters that were or should have been addressed in that report.[8] The test is not whether the s 32 report did or did not address the issue raised in the submission. Rather, the inquiry is on what matters should have been addressed in the s 32 report and whether the submission addresses one of those matters.[9]

10. The Council prepared a s 32 report for PC26, which includes the summary of proposed changes and its s 32 evaluation. In this report and the notified plan change, the Council explicitly recognised the rail corridor as a qualifying matter.[10] This brought across the existing extent of the noise and vibration rules within the Waipā District Plan into the new Medium Density Residential Zone.[11] These amendments also explicitly acknowledge that these rules are incorporated into the Zone:[12]

> […] to reduce the potential for reverse sensitivity effects by requiring noise sensitive activities to be acoustically treated, where they are proposing to locate in close proximity to railways and strategic roads.

11. This addresses the resource management issue identified by the Council that:[13]

> there is the potential for reverse sensitivity effects when noise sensitive activities locate close to some existing activities such as the Te Awamutu Dairy Manufacturing site, roads with high traffic volumes, and **railway lines**.

12. The notified PC26 clearly engages with the issue that intensification can have effects on infrastructure (including reverse sensitivity effects) as a result of PC26 and there is therefore a need for controls to manage those effects. KiwiRail's relief, which seeks to manage the interface between intensification and infrastructure, is not "novel" or out of step with the purpose of PC26, and is clearly within the scope of PC26, as:

7 *Clearwater Resort* at [69].
8 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [81].
9 *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] 191 at [39].
10 See 2A.1.9, 2A.1.24.
11 See Policy 2A.3.4.9 and Rules 2A.4.2.40 and 2A.4.2.41.
12 2A.3.4.9.
13 2A.2.7 (emphasis added).

(a) the rail corridor has been recognised as a qualifying matter within the notified version of PC26;

(b) PC26 has explicitly recognised that noise controls are a mechanism to incorporate the intensification of PC26 while managing reverse sensitivity effects on infrastructure, including railways; and

(c) KiwiRail's relief seeks to amend the extent of those noise controls which are already incorporated within PC26 and incorporate associated vibration controls. Vibration is clearly an effect arising from the rail corridor in the same nature as that of noise, in that it affects sensitive activities and may give rise to reverse sensitivity effects.

<u>Second limb: Have adequate opportunities been provided for directly affected parties to participate?</u>

13. The Council also alleges KiwiRail does not meet the second limb of *Clearwater* because:[14]

> There is a real risk that landowners within 100m of the rail corridor would not have been aware that additional restrictions could be imposed on them as a result of PC26. These landowners have not had an opportunity to participate in the plan change process.

14. In our submission, there is no real risk that persons directly affected by KiwiRail's submissions would not have had the opportunity to participate in the process.

15. The Council was required to publicly notify PC26 and notify every person who was likely to be directly affected by PC26 (either directly or through a publication that is sent to all properties in the affected area). Landowners affected by PC26, including in those areas where intensification is proposed in and around the rail corridor, were on notice of the proposed changes.

16. To any affected party reviewing PC26, including the s 32 reports (discussed above), it would have been clear that:

(a) urban development was proposed to be intensified in areas adjacent to the rail corridor;

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14 Waipā District Council Legal Submissions at [13.5(c)].

(b) the rail corridor was identified as a qualifying matter; and

(c) provisions were incorporated applying noise controls surrounding the rail corridor to manage the interface between urban development and the rail corridor.

17. Parties were on notice that amendments to the controls around the rail corridor may be sought through submissions. As with any plan change process, affected parties can then make their own inquiry about whether to become involved in the process by reviewing the summary of submissions and lodging further submissions. Submitters did take up this option and either identified the possibility of controls on properties surrounding the rail corridor in their original submissions or further submitted on KiwiRail's submission.[15]

18. The Council also says that:[16]

> Neither the Council nor other parties have had an opportunity to engage their own technical noise and vibration experts to review the technical information provided by KiwiRail.

19. The Council had opportunity at several stages to engage with KiwiRail's submissions and, if they considered necessary, engage their own technical acoustic experts, including in preparation of their s 42A report, original evidence and rebuttal evidence. Other councils around the country, including Waikato District Council, have engaged acoustic experts to engage with KiwiRail on these same matters. Submitters similarly had the ability to engage experts to review the matters raised in KiwiRail's original submission, and respond in further submissions, or in their evidence on the plan changes.

20. In any case, we say that the fact the Council did not prepare evidence in response to issues raised by KiwiRail in its submission does not go to the question of scope as raised in *Clearwater*.

Waikanae Land Company Ltd v Kāpiti Coast District Council

21. Both the Council and Kāinga Ora have referred the Panel to the recent Environment Court decision *Waikanae Land Company Ltd v Kāpiti Coast District Council*, and claim KiwiRail's relief in respect of noise and vibration is *ultra vires* because:

15 See Cogswell Surveys Ltd Original Submission; Kāinga Ora Further Submission.
16 Waipā District Council Legal Submissions at [13.5(c)].

(a) Council says the noise and vibration amendments do not fall within one of the mandatory or discretionary elements of s 80E, saying that:[17]

> In particular, the provisions are not modifications of the density standards forming part of the MDRS, but instead impose additional restrictions on landowners within the vicinity of the rail corridor.

(b) Kāinga Ora says any reduction of existing development opportunities through imposing additional obligations on residential activities that are currently permitted is *ultra vires* per *Waikanae*.[18]

22. With respect, we submit that the Council and Kāinga Ora have applied the Court's dicta incorrectly. KiwiRail's relief can be factually distinguished from *Waikanae*, and does fall within scope of s 80E:

(a) The Court's assessment of Kāpiti District Council's plan change approach in *Waikanae* was whether the provisions were lawfully included within the scope of ss 77I or 80E.[19]

(b) The key discussion in its assessment for KiwiRail's relief relates to s 80E, as this is the framework under which KiwiRail proposes the noise and vibration controls are introduced.[20] As discussed by the Court in *Waikanae*, s 80E enables IPIs to "amend or include" related provisions (emphasis added):[21]

> (1) In this Act, intensification planning instrument or IPI means a change to a district plan or a variation to a proposed district plan
>
> […]
>
> (b) that may also amend or include the following provisions:
>
> […]
>
> (iii) related provisions, including objectives, policies, **rules, standards** and zones, **that support or are consequential on**–
>
> (A) the MDRS; or
>
> (B) policies 3, 4, and 5 of the NPS-UD as applicable.
>
> (2) In subsection (1)(b)(iii), related provisions also includes provisions that relate to any of the following, without limitation:

17 Waipā District Council Legal Submissions at [13.5(a)].
18 Kāinga Ora Legal Submissions at 3.11.
19 *Waikanae* at [23] – [32].
20 This is because the noise and vibration controls do not amend the MDRS, the mechanism provided for under s 77I.
21 RMA, s 80E.

(a) district-wide matters:

[…]

(d) infrastructure:

(e) qualifying matters identified in accordance with section 77I or 77O.

[…]

(c) The Court considered whether the particular factual scenario in *Waikanae* included provisions which "supported" or were "consequential on" the MDRS:

(i) **Support**: The Court said the amendments in *Waikanae* (to add an existing site to the Plan's Schedule 9 of wāhi tapu areas) did not support the MDRS because those amendments "actively precluded the operation of the MDRS on the Site".[22] That is, the inclusion of the site as a new wāhi tapu site within Schedule 9 meant residential activities changed from being those which could occur as of right (as a permitted activity) to activities requiring restricted discretionary or non-complying consents. This meant the MDRS could not apply as intended as permitted activity standards.

(ii) **Consequential on:** The Court further considered the inclusion of the site as a new wāhi tapu site within the Plan's Schedule 9 was not consequential on the MDRS and the nine standards identified.[23]

(d) By comparison, the KiwiRail relief is distinguished and does meet the s 80E test because:

(i) **Support:** KiwiRail's relief does not preclude the operation of the MDRS as the amendments to the wāhi tapu Schedule 9 were found to have done in *Waikanae*. The framework set up by the Enabling Housing provisions in the RMA enables the MDRS to be applied subject to permitted activity standards, with residential activities avoiding a requirement for consent. KiwiRail's relief would also apply as permitted activity standards, which avoid consenting requirements if met (supporting intensification under the MDRS) while at the same time

22 *Waikanae* at [30].
23 *Waikanae* at [30].

managing effects on the rail corridor as a qualifying matter (which is a relevant basis for the application of the related provisions under s 80E(2)(d) and (e)). The outright "preclusion" identified in *Waikanae* does not occur.

(ii) **Consequential on**: KiwiRail's relief is clearly consequential on the intensification enabled adjacent to parts of the rail corridor by the application of the MDRS standards, compared to that under the existing District Plan. This intensification significantly increases the number of sensitive activities which may be undertaken compared to the existing District Plan. KiwiRail's relief proposes a way to manage the reverse sensitivity effects of that increased intensification on the rail corridor, while still allowing the MDRS to apply.

23. Using s 80E to enable "consequential changes" to the Plan to properly address new or consequential effects which may arise from the intensification enabled under the MDRS was explicitly considered by the Ministry for the Environment and the Ministry for Housing and Urban Development in their report on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill ("**Departmental Report**"). This discussed the need for the IPI to enable councils to include related provisions (per s 80E) to support the implementation of the MDRS and NPS-UD:[24]

> Councils should be able to use the IPI to amend or develop provisions (including objectives, policies, standards, rules and zones) that are consequential or complementary to the MDRS and NPS-UD. This includes provisions relating to district wide matters (i.e. subdivision, fences, earthworks, infrastructure, and hydraulic neutrality/stormwater management). Such provisions can have their own chapters in plans, others are covered in 'district wide' chapters, and therefore amendments to relevant content in district wide chapters should also be able to be included in the IPI.
>
> Councils often manage district wide matters relating to technical infrastructure matters through chapters in their plans that have district wide effect. The ability to adjust these measures through the ISPP will both allow councils to manage infrastructure issues and support MDRS and NPS-UD implementation.

[24] Ministry for the Environment and the Ministry for Housing and Urban Development *Departmental Report on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill* at [25].

This approach was supported by the Select Committee report,[25] as then reflected in the final wording of s 80E of the RMA.

24. The Departmental Report and Select Committee clearly anticipated section 80E being used to adjust the application of IPI to ensure the increased intensification under the MDRS did not impact negatively on infrastructure or other values.[26] Within PC26, the Council has included a range of additional requirements above and beyond those in the operative District Plan to manage the effects of the intensification, including the provisions set out in Appendix 3 to the s 32 Report.[27] The noise and vibration provisions occur in the same manner: while they do not directly amend the MDRS, they manage the intensification which flows from the MDRS in a way which enables councils to "manage infrastructure issues and support MDRS and NPS-UD implementation" as anticipated by the Departmental Report and Select Committee.

25. The Environment Court's comments in *Waikanae* about the amendments in that case "disenabling" or "removing rights" for activities are clearly in respect of the change which was proposed in that case to the activity status of residential activities (emphasis added):[28]

> By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by **changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non-complying.**

26. KiwiRail's relief does not change the activity status of residential activities in the Plan, but seeks to amend the permitted activity standards which apply. In our submission the Environment Court's comments in *Waikanae* regarding "disenabled" activities do not extend to such requirements, given those standards still enable the MDRS and residential activities to proceed. If they did, no additional permitted activity standards or district wide matters

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25 Report of the Environment Committee *Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill*, December 2021, Section 2, recommendation 1.

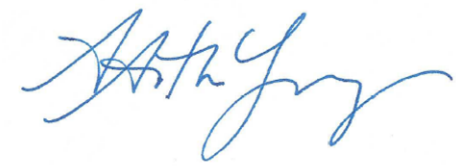
26 By comparison to one of the examples given in the Departmental Report, while the MDRS does not include standards for fencing, the above comments acknowledge that impacts of the intensification may be managed through additional standards being applied to require fencing.

27 These include additional requirements for restrictions on development where there would be adverse effects on te Mana o te Wai of the Waikato and Waipā rivers; requirements for assessment of stormwater capacity and effects on open space areas, among others.

28 *Waikanae* at [31].

could be included for the implementation of qualifying matters and the broadened related provisions section as envisaged by the Department Report (and accepted by the Select Committee and the Act) would be frustrated.

27. The scope of KiwiRail's relief is clearly not frustrated by either the *Waikanae* or *Clearwater* decisions. KiwiRail maintains that its relief remains in scope.



A A Arthur-Young / T F Power
Counsel for KiwiRail Holdings Limited