

IN THE MATTER

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

AND

IN THE MATTER

of an application by the Litt Family Trust for subdivision and land use consents at 435 Manawapou Road, South Taranaki.

LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED

20 JULY 2021

1. INTRODUCTION

- 1.1 These submissions are made on behalf of Fonterra Limited ("**Fonterra**") in opposition to the application by the Litt Family Trust for subdivision and land use consents at 435 Manawapou Road, South Taranaki ("**Site**").
- 1.2 The application seeks to subdivide a cropping pastoral site with an associated residential dwelling into two separate lots ("**Subdivision**"). The Subdivision would enable the development of a further residential activity on the new "Lot 2" by splitting the existing residential dwelling from this land. This triggers the requirement for a discretionary consent under the South Taranaki District Plan ("**District Plan**") as it exceeds the minimum lot size limits under the Rural Zone. The application also seeks retrospective consent for a tiny house. The Site is within close proximity to the Whareroa Dairy Factory – Fonterra's largest and most significant manufacturing facility in the Taranaki Region.
- 1.3 Fonterra is strongly opposed to the Subdivision. This is because it enables further residential activities within close proximity of the Whareroa Dairy Factory, and risks setting a precedent for other residential activities to establish in breach of the Rural Zone provisions within the vicinity of the Site and more broadly throughout the Rural Zone.
- 1.4 Residential activities, by their very nature, are sensitive to, and fundamentally incompatible with, the large-scale heavy industrial operations. The establishment of even a small number of sensitive activities can cause reverse sensitivity effects on Fonterra's ability to operate and develop the

Whareroa Dairy Factory. This application could also encourage or set a precedent for the establishment of other residential activities in the area, which may exacerbate the reverse sensitivity effects and materially affect Fonterra's decision to invest or reinvest in the Whareroa Dairy Factory.

- 1.5 Fonterra is also concerned with the effect for granting the Subdivision would have on the integrity of the provisions of the newly operative District Plan, and in particular of the Rural Zone. District plans are central to the operation of the resource management system. Their importance has been emphasised throughout the RMA, with the Supreme Court explicitly recognising that:¹

The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". [...] The plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it.

- 1.6 Fonterra urges the Committee to uphold the provisions and integrity of its newly minted District Plan, rather than undermine its clear objectives and policies through inappropriate development.
- 1.7 Fonterra therefore opposes the Subdivision, and seeks that it be declined.

Evidence

- 1.8 Fonterra will call evidence from the following witnesses:
- (a) **Ms Brigid Buckley** (Corporate) – National Policy Manager at Fonterra. Ms Buckley's evidence explains the history and significance of the Whareroa Dairy Factory and its role as part of Fonterra's manufacturing network, describes Fonterra's approach to managing reverse sensitivity effects, and highlights the key reverse sensitivity effects that will arise if the Subdivision is granted.
 - (b) **Ms Abbie Fowler** (Planning) – Associate and Environmental Planner at Mitchell Daysh Ltd. Ms Fowler's expert planning evidence outlines the effects of the Application, and her assessment of the Subdivision against the planning framework.

¹ *Westfield (New Zealand) Ltd v Discount Brands Ltd* [2005] NZSC 17 at [10].

Structure of submissions

- 1.9 These submissions will address the following matters:
- (a) Fonterra's interests and operations in South Taranaki, including its participation in the development of the District Plan and its operations at Whareroa;
 - (b) Fonterra's position on the two activities for which the applicant seeks consent;
 - (c) The decision-making framework the Committee must follow;
 - (d) The reverse sensitivity issues raised by the application; and
 - (e) The precedent effects that would be generated should the Subdivision be granted.

2. FONTERRA IN HAWERA AND THE TARANAKI REGION

- 2.1 Fonterra is the largest farming co-operative in New Zealand, with more than 11,400 staff based in New Zealand.² As a global leader in dairy nutrition, Fonterra exports its products to more than 100 markets worldwide and operates 25 milk processing sites throughout New Zealand, collecting more than 17 billion litres of milk in 2019.³
- 2.2 As explained in Ms Buckley's evidence, Fonterra has significant interests and assets throughout the Taranaki Region. The most significant of these is the Whareroa Dairy Factory. Whareroa is responsible for 20% of Fonterra's national production and comprises a broad range of activities, including processing milk-based products, a seven hectare distribution centre, vast on-site storage facilities, a gas-fired co-generation plant, and a railway siding for distributing products around New Zealand and to ports for export. The factory operates 24 hours a day and seven days a week and plays a key role in the regional milk processing network. The milk used at Whareroa is sourced from around 1500 farms in the Taranaki region, and Whareroa directly employs over 1000 full time equivalent staff.
- 2.3 Fonterra also has significant landholdings in farms surrounding the Whareroa Dairy Factory. Like many rural activities, farms generate noise, odour and

² Evidence of Brigid Buckley, at [3.2].

³ Evidence of Brigid Buckley, at [3.1] – [3.2].

other amenity effects which often conflict with residential activities. An increase in residential development in this area may constrain the productivity and operation of these farms, as well as other farms surrounding the Site.

- 2.4 Given the significance of the Whareroa Dairy Factory, not just to Fonterra but to Hawera and the Taranaki Region more broadly, Fonterra has a strong interest in any activities which may impact its operational capabilities.

3. TWO ISSUES: TINY HOUSE AND SUBDIVISION

- 3.1 There are two core activities that make up the application:

- (a) the subdivision of the existing Site into two, smaller lots; and
- (b) the retrospective consent for a current, illegally built "tiny house" adjacent to the original dwelling on the Site.

- 3.2 The Council's reporting planner in the section 42A report has noted the Committee may decide to "unbundle" the land use consent required for the tiny house from the broader application and grant this consent while declining the overall application to subdivide the land. Fonterra agrees.

Fonterra position on Tiny House

- 3.3 The Committee should approach any application for retrospective consent with caution, particularly one which clearly goes against the intentions of the District Plan's objectives and policies. Allowing such consents to be granted has the effect of encouraging and enabling landowners to benefit from their own wrongdoing. The Committee must be careful to fully interrogate applications for retrospective consents like any other, and not discount their effects simply because "the damage has already been done".
- 3.4 However, Fonterra acknowledges the unique factual matrix which applies to the tiny house. The applicant has explained that the tiny house was built in genuine, but mistaken, reliance on "existing use rights" of a previous secondary dwelling / garage which stood on the same site as the tiny house immediately prior to the tiny house being built. Further, from an effects standpoint, the reporting planner has noted these are minimal, due to the design and proximity of the tiny house to the original dwelling, giving it the effect of being an ancillary dwelling rather than a new, stand-alone development. This use is confirmed by the submission of Ms Litt and Mr

Hurley, the current occupants of the Site, who note the tiny house is used as a bedroom for their teenaged son.

- 3.5 Because of these unique factors, Fonterra would not oppose a decision by the Committee to split the application and grant resource consent for the tiny house, provided the Subdivision component was declined.

Fonterra position on subdivision

- 3.6 Fonterra, however, strongly opposes the Subdivision, which opens the opportunity for a new dwelling to be established on the new "Lot 2". This opposition is based on the reverse sensitivity and precedent effects granting the Subdivision would generate. These effects are outlined further below.

4. DECISION-MAKING FRAMEWORK

- 4.1 The Application sought carries a discretionary activity status under the provisions of the District Plan. This means the Committee must undertake a full interrogation of the application and consider all potential effects of the proposal under section 104 of the RMA.

- 4.2 Under section 104 the Committee must:

- (a) Consider the application, submissions and evidence having regard to section 104(1), being the actual and potential effects on the environment and any offset or compensation proposed, any relevant planning document, and any other relevant considerations.
- (b) Decide the weight that should be given to the matters in subsections 104(1)(a), (ab), (b) and (c). Section 104 does not give primacy to any of the matters over each other. All the matters are to be given such weight as the Committee sees fit in the particular context of the current circumstances.⁴
- (c) Having regard to the effects in the context of properly weighted objectives and policies under section 104(1) and any other relevant consideration, assess whether the proposal promotes the sustainable management of natural and physical resources and decide to grant or decline consent accordingly.

⁴ *Kennett v Dunedin City Council* (1992) 2 NZRMA 22 (PT) at pg 31.

5. REVERSE SENSITIVITY

- 5.1 Reverse sensitivity is a well-established planning principle,⁵ and is an adverse effect for the purposes of the RMA.⁶ It refers to the susceptibility of established, effects-generating activities (which often cannot internalise all of their effects) to complaints or objections arising from the location of new sensitive activities nearby. Reverse sensitivity is broader than just being about noise – concerns can relate to a wide range of effects. Such complaints can place significant constraints on the operation of established activities, as well as their potential for future growth and development. In extreme cases, reverse sensitivity effects can force established activities to relocate elsewhere or close.
- 5.2 It is a common misconception that activities under the RMA must, or can, internalise all effects. Large scale industry or infrastructure often are simply unable to do so due to their size, and therefore seek to establish their operations away from sensitive activities in order to effectively avoid such effects. In Fonterra's case, it has sought to cement this buffer by purchasing significant blocks of land surrounding the Whareroa factory, to avoid sensitive activities developing into this area. This intentional isolation is undermined when sensitive activities erode these buffers, and establish within range of an existing operations potential effects.
- 5.3 Further, Fonterra is not arguing that its existing operations will have an unacceptable impact on residential development on Manawapou Road. Case law makes it clear that effects do not have to be unacceptable to give rise to reverse sensitivity effects.⁷ Even the perception of unacceptable adverse effects which are not substantiated can result in reverse sensitivity effects (such as complaints, or submissions by neighbours against ongoing operations).
- 5.4 The Environment Court has issued two decisions this year which strongly reaffirm the concept of reverse sensitivity and rejected proposals for

⁵ See *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16 (EnvC) at [57]; *Affco New Zealand v Napier City Council* EnvC Wellington W 082/2004, 4 November 2004 at [29]; *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673 at [60].

⁶ *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC W17/04, 14 April 2008 at [22].

⁷ See *Sugrue v Selwyn District Council* EnvC Christchurch C43/2004, 7 April 2004 at [59]; *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC Wellington W017/01, 14 April 2008 at [22].

subdivisions and residential development on the basis that they would have adverse reverse sensitivity effects on neighbouring established activities:

- (a) In *Gibbston Vines Ltd v Queenstown Lakes District Council*, the Court rejected an application for a seven-lot residential subdivision on a property surrounded by two commercial vineyards.⁸ The Court recognised that establishing the residential activities would risk imposing stricter consenting requirements on the vineyards' operations, particularly where these generated noise effects.
- (b) In *Kombi Properties Ltd v Auckland Council*,⁹ the Court rejected an application to establish mixed-used residential / industrial units within a Light Industrial Zone.⁹ Despite proposing only a small number of residential units as part of a broader proposal, the Court considered these would have unacceptable reverse sensitivity effects on industrial activities, and have the potential to restrict noisy or odorous activities, or otherwise subject those industrial sites to greater complaints.

5.5 These two cases are clearly analogous to the application before the Committee. They involved applications for relatively minor residential activities to locate next to established rural production or industrial activities, within a planning framework that supported the rural or industrial activities over residential activities. The Court's strong rejection of those activities provides a clear direction to the Committee in this case to decline the Subdivision on similar grounds.

Reverse sensitivity in the South Taranaki District Plan

5.6 The Subdivision will generate new residential dwellings within the Rural Zone at densities greater than one dwelling per 20ha. That is contrary to the rules of the newly operative District Plan. It is also contrary to the identified issues, objectives and policies of the District Plan which seek to avoid the "reverse sensitivity" effects of new sensitive activities (such as dwellings) establishing next to existing rural or rural industrial activities.¹⁰ The objectives specifically provide (emphasis added):

Objective 2.1.3: To ensure that subdivision, land use and development in the rural environment is of a nature, scale,

⁸ *Gibbston Vines Ltd v Queenstown Lakes District Council* [2021] NZEnvC 23.

⁹ *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 62.

¹⁰ Evidence of Abbie Fowler at sections 4.37 – 4.46.

intensity and location that maintains and, where appropriate, enhances rural character and amenity values.

Objective 2.1.4: To enable the efficient and effective functioning of farming and rural based activities, and ensure that activities are not inhibited by adverse effects of new incompatible land uses.

Policy 2.1.5: Provide for rural subdivision at a scale, design and intensity where it is compatible with the character and qualities of the surrounding environment, and limit more intensive or poorly designed subdivision where the character and qualities would be degraded or compromised.

5.7 These objectives and policies clearly show an intention by the District Plan to maintain the rural character and amenity of the rural zone, and avoid adverse effects on farming and rural based activities. The rules restricting lot sizes and dwellings per lot within the Rural Zone which are triggered by the application give effect to this objective and policy framework. As outlined by Mr Fowler, these restrictions provide a clear illustration to the Committee of what level of subdivision is intended "appropriate" by the District Plan's objectives and policies.¹¹

5.8 In addition, the Rural Industrial Zone, which includes the Whareroa Dairy Factory, includes the following policy:

Policy 2.1.12: Minimise, and where possible, avoid subdivision, land use and development that has the potential to inhibit the efficient use and development of versatile land for farming purposes or other lawfully established rural activities or rural industrial activities in an adjoining Rural Industrial Zone.

5.9 This provides strong direction to "avoid" subdivision that has the potential to inhibit lawfully established rural or rural industrial activities in a zone. The Supreme Court has been clear that avoid means avoid.¹² This clearly directs the protection of rural industrial activities like the Whareroa Dairy Factory, from the reverse sensitivity effects posed by subdivision or other sensitive land use.

Effects on Whareroa Dairy Factory

5.10 Sensitive residential activities are fundamentally incompatible with the large-scale heavy industrial operations that occur at the Whareroa Dairy Factory

¹¹ Evidence of Abbie Fowler at section 4.40.

¹² *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [93].

and the effects these operations lawfully generate. As explained in Ms Buckley's evidence, despite proactive engagement in RMA planning processes and compliance with the consent conditions and/or permitted activity standards, Fonterra has experienced reverse sensitivity issues throughout the country where new sensitive activities have established near its manufacturing sites. These include:

- (a) higher compliance costs to mitigate effects on sensitive neighbours;
- (b) internal costs associated with staff being diverted from duties to investigate and respond to complaints;
- (c) materially increased consenting costs;
- (d) increased risk of consents being declined or subject to more stringent conditions that place constraints and/or additional costs on Fonterra's operations; and
- (e) the potential for land to be rezoned (including to allow further residential development), resulting in additional compliance requirements and costs for Fonterra.

5.11 Reverse sensitivity can also influence decisions by national operators such as Fonterra where and whether to expand or invest. Ms Buckley outlines the experience of Fonterra at Te Awamutu, where investment in a new dryer was not pursued due to encroachment of sensitive activities.

5.12 Reverse sensitivity effects also generally result from complaints by just a few residents. Allowing even a small degree of sensitive development near an existing effects-generating activity can therefore cause significant issues for Fonterra's ongoing operation and development. However, the creation of a precedent for other sensitive activities to establish increases further the risk of reverse sensitivity effects.

5.13 The significance of the potential reverse sensitivity effects on the Whareroa Dairy Factory, must be determined in the context of the various objectives, policies and rules that seek to protect rural and rural industrial activities from such effects. Ms Fowler's evidence outlines the clear objective, policy and rule framework set under the District Plan which do just that.

6. PRECEDENT IMPACT ON DISTRICT PLAN / PLAN INTEGRITY

- 6.1 Beyond the reverse sensitivity effects on Fonterra of the immediate application, allowance of the gradual creep of residential development within the Rural Zone generally has broader effects on the other established rural and rural industrial land uses within this Zone across South Taranaki.
- 6.2 This is referred to as a "precedent effect" and reflects the concern that the desire by decision-makers to treat like cases alike for reasons of consistency and fairness will lead to more inappropriate activities being granted consent in the future. There is no requirement that the facts of each application must be exactly alike for such a precedent effect to occur – broadly similar facts will be sufficient to rely on the precedent of a prior successful consent.¹³
- 6.3 The discussion by the Environment Court in *Kombi Properties Ltd v Auckland Council* explicitly acknowledged the risk of such precedent effects in the context of activities giving rise to reverse sensitivity. In that context, the Court considered whether there were any unique characteristics of the proposal or site which would negate such effects (finding none).¹⁴
- 6.4 Similarly, there are no such unique features of this Site which would promote its subdivision and greater development compared to typical activities anticipated in the Rural Zone. The Site is in rural production as a cropping pastoral site with a single farmhouse dwelling. The application notes that the Site's surrounding environment is "typical of the rural environment in this locality, with large rural land holdings used primarily as dairy farming or cropping." This suggests the Site is broadly similar to most of the other rural land within the vicinity of the site, Whareroa Dairy Factory and the broader South Taranaki Rural Zone.
- 6.5 The similarity of the Site to other rural properties in the broader district suggests granting the Subdivision carries a high risk of setting a precedent effect for similar proposals seeking to subdivide into smaller lots and introduce higher densities of residential activities in rural areas. This carries the risk of the District gradually losing valuable rural land to residential activities, or restricting the operations of existing rural activities due to sensitive residential neighbours.
- 6.6 It is also important to note that the Court in *Kombi Properties* considered the "newly minted" nature of the Auckland Unitary Plan as a factor in

¹³ *Stirling v Christchurch City Council* (2011) 16 ELRNZ 798 (HC).

¹⁴ *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 62 at [199].

discouraging the granting of consent for activities that would set such precedent effects.¹⁵

- 6.7 Fonterra notes the District Plan is similarly "newly minted" and also carries strong objectives, policies and rules which discourage residential development in rural zones beyond clear limits. The Committee should similarly take a strong approach to protect these provisions and uphold the District Plan in order to avoid such precedent effects from undermining them so soon after they became operative.

7. CONCLUSION

- 7.1 The application proposes inappropriate subdivision which would enable further residential development on the Site that is clearly beyond the densities provided for under the District Plan's Rural Zone. Such development risks giving rise to unacceptable reverse sensitivity effects on the Whareroa Dairy Factory. It is also highly likely to set a precedent effect for similar subdivision and residential development of an inappropriate density within the Rural Zone. This would undermine the newly minted District Plan, and threaten a gradual creep of residential activities into the District's rural areas.
- 7.2 Fonterra therefore respectfully seeks that the consents sought be unbundled, and the Subdivision consent application declined.

DATED 20 July 2021



Daniel Minhinnick / Taylor Mitchell
Counsel for Fonterra Limited

¹⁵ *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 62 at [196].