

**BEFORE INDEPENDENT COMMISSIONERS**

**UNDER**

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

**AND**

**IN THE MATTER**

of Proposed Private Plan Change 13 to the Hamilton  
City Operative District Plan: Te Rapa Racecourse  
("**PC13**")

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**LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED**

**21 AUGUST 2023**

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**MAY IT PLEASE THE PANEL:**

**1. SUMMARY**

- 1.1 These submissions are made on behalf of Fonterra Limited ("**Fonterra**") in opposition to PC13.
- 1.2 PC13 is within close proximity to Fonterra's Crawford Street Distribution Centre and Canpac end-to-end site (within the Crawford Street Freight Village) – only the Te Rapa Racecourse separates PC13 and Fonterra's operations by some 400m.
- 1.3 The Crawford Street Distribution Centre and Canpac end-to-end site play a critical role in Fonterra's operations in Hamilton City and the Waikato Region. Dairy products from both sites are exported throughout the world. The critical role that these facilities provide the region is clearly recognised in the Hamilton City District Plan ("**District Plan**").
- 1.4 Fonterra is strongly opposed to PC13 and considers PC13 represents further ad hoc, piecemeal rezoning of racecourse land and the proliferation of incompatible land use in proximity to its sites. PC13 raises significant red flags for Fonterra based on its experience with plan changes and reverse sensitivity effects across New Zealand.
- 1.5 PC13 has the potential to lead to significant reverse sensitivity effects. Residential activities, by their very nature, are sensitive to and fundamentally incompatible with heavy industrial operations. With respect, these concerns appear to have been downplayed by the Waikato Racing Club Incorporated ("**WRCI**") in determining to proceed with a private plan change to rezone land to residential – where the surrounding land is predominantly industrial.
- 1.6 Beyond potential reverse sensitivity effects, PC13 is clearly inconsistent with and undermines the planning framework for Hamilton City and the Waikato Region. As set out in Mr Chrisp's evidence, the planning framework seeks to recognise, protect and provide for Fonterra's industrial operations. It is critical that the planning framework is not seriously undermined by the incompatible residential zoning proposed in PC13.
- 1.7 Fonterra submits that enabling residential activities to locate in proximity to the Crawford Street Freight Village will seriously compromise the ongoing viability of the Crawford Street Freight Village and will set a land use pattern that will mean Fonterra and other industrial operators will have to continue to fight as

the District Plan and its protection of industrial activities is progressively eroded. This is clearly not sustainable management.

- 1.8 Contrary to the evidence of Messrs Olliver and Castles for WRCI, it is not "highly speculative"<sup>1</sup> to suggest the racecourse may have another use in the future – this was clearly identified as a potential in the Review of the New Zealand Racing Industry prepared by Mr John Messara ("**Messara Report**") on the racing industry in New Zealand.<sup>2</sup> WRCI also has a history of divesting its landholdings.<sup>3</sup>
- 1.9 Fonterra also submits that allowing the District Plan to be amended in the way proposed through PC13 would fail to give effect to the Waikato Regional Policy Statement ("**RPS**"). Any decision other than to decline the Plan Change would therefore be directly contrary to the requirement of section 75 of the RMA for the District Plan to give effect to the RPS.
- 1.10 Fonterra opposes PC13 in its entirety and seeks that it be declined.

## 2. EVIDENCE TO BE PRESENTED

- 2.1 Fonterra will call evidence from:
- (a) Ms Suzanne O'Rourke (Corporate): National Environmental Policy Manager for Fonterra's New Zealand Operations. Ms O'Rourke has provided background on Fonterra's interests in proximity to PC13, the impact reverse sensitivity effects have had on Fonterra assets across New Zealand and why Fonterra strongly opposes PC13.
  - (b) Mr Mark Chrisp (Planning): Director and Principal Environmental Planner at Mitchell Daysh Ltd. Mr Chrisp has outlined how the integrity of the District Plan provisions are being progressively eroded and the planning risks faced at the Crawford Street Freight Village from piece-meal rezoning.

## 3. STRUCTURE OF SUBMISSIONS

- 3.1 These submissions address:
- (a) the direct impact that PC13 has on Fonterra's operations;

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<sup>1</sup> Rebuttal evidence of John Olliver at 10; Rebuttal evidence of Andrew Castles at 4.

<sup>2</sup> John Messara, *Review of the New Zealand Racing Industry* (31 July 2018).

<sup>3</sup> Evidence of Andrew Castles at 12; Evidence of Mark Chrisp at 5.11.

- (b) the legal framework for the Panel's assessment of PC13;
- (c) how PC13 is inconsistent with the strategic planning framework;
- (d) the significant reverse sensitivity issues raised by PC13; and
- (e) the relief sought by Fonterra.

#### **4. FONTERRA'S ASSETS IMPACTED BY PC13**

4.1 Fonterra has two critical manufacturing operations in proximity to PC13. These are the:<sup>4</sup>

- (a) Crawford Street Distribution Centre; and
- (b) Canpac end-to-end site.

4.2 More detail on these critical operations and their importance to Fonterra, Hamilton City and the Waikato Region is provided in Ms O'Rourke's evidence,<sup>5</sup> but by way of summary:

- (a) The Crawford Street Distribution Centre operates 24 hours a day, seven days a week. Alongside its domestic market, the site provides export ready dry and cool goods (eg milk powders, cheese and butter products) to the Port of Tauranga which are then exported to overseas markets including the Philippines, Japan, Australia, Mexico and China.
- (b) The Canpac end-to-end site manufactures cans, blends powders, and packages cans and sachets to provide high quality and consistent Fonterra products. It is Fonterra's second largest packaging site.

4.3 Both the Crawford Street Distribution Centre and Canpac end-to-end facility are within the "Crawford Street Freight Village". The Crawford Street Freight Village is recognised in the HDP as a "key regional facility" and "a critical component in ensuring the efficiency of dairy manufacturing and export within the region".<sup>6</sup> The only land separating PC13 from the Crawford Street Freight Village is the Te Rapa Racecourse.<sup>7</sup>

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<sup>4</sup> Evidence of Suzanne O'Rourke at section 3.

<sup>5</sup> Evidence of Suzanne O'Rourke at section 3.

<sup>6</sup> Evidence of Mark Chrisp at 4.8.

<sup>7</sup> Evidence of Suzanne O'Rourke at Figure 1.

## 5. LEGAL FRAMEWORK

- 5.1 The Panel will be familiar with the legal framework for plan changes. But a summary of key provisions is provided below for completeness.

### Overview

- 5.2 PC13 is to be considered under Part 1 of Schedule 1 to the RMA.
- 5.3 Sections 72 to 76 of the RMA are relevant. These address the purpose and content of district plans and the matters that councils are required to consider in preparing district plans.
- 5.4 In terms of the relevant RMA provisions, the Panel needs to be satisfied that PC13:
- (a) Is in accordance with:<sup>8</sup>
    - (i) the Council's functions under section 31 of the RMA;
    - (ii) the provisions of Part 2; and
    - (iii) the Council's duty under section 32 of the RMA.
  - (b) Gives effect to:<sup>9</sup>
    - (i) any national policy statement;
    - (ii) a national planning standard; and
    - (iii) any regional policy statement.
- 5.5 As explained below, in our submission the key legal tests are not satisfied for this plan change.

## 6. PC13 IS INCONSISTENT WITH THE PLANNING FRAMEWORK

- 6.1 This plan change is fundamentally inconsistent with the strategic planning framework. As explained below, PC13:
- (a) fails to give effect to the RPS; and
  - (b) will erode the integrity of the District Plan.

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<sup>8</sup> RMA, section 74.

<sup>9</sup> RMA, section 75(3).

### **PC13 does not give effect to the RPS**

- 6.2 The RPS contains several provisions that require the protection of industrial land and industrial activities from incompatible land uses. These include:
- (a) Objective UFD-O1(7): The minimisation of land use conflicts, including minimising the potential for reverse sensitivity.
  - (b) Policy IM-P4: The management of natural and physical resources providing for the continued operation and development of regionally significant industry by recognising the value and long-term benefits of regionally significant industry to economic, social and cultural wellbeing and avoiding or minimising the potential for reverse sensitivity.
- 6.3 Other key provisions in the RPS are described in Mr Chrisp's evidence.<sup>10</sup>
- 6.4 As described above, the RPS must be given effect to by PC13. "Give effect to" means "implement", being "a strong directive, creating a firm obligation on the part of those subject to it."<sup>11</sup>
- 6.5 In our submission, the changes to the District Plan sought through PC13 (to rezone Major Facilities Zone land to Medium Density Residential Zone land in a predominantly industrial area) are clearly inconsistent with these provisions. PC13 will not minimise land use conflicts by approving residential uses in an industrial area. PC13 does not give effect to these RPS provisions. The changes sought therefore breach the Council's obligations under section 75 of the RMA.

### **PC13 will erode the integrity of the District Plan**

- 6.6 The District Plan has given effect to the strong provisions in the RPS (described above) by identifying and seeking to protect the Crawford Street Freight Village. Policies require activities sensitive to adverse effects of logistics and freight handling facilities to avoid locating in proximity to the Crawford Street Freight Village.
- 6.7 Enabling more sensitive residential activities under PC13 to locate near Fonterra's sites and other industrial sites is clearly not good planning and urban design practice, does not meet the objectives and policies of the District Plan

<sup>10</sup> Evidence of Mark Chrisp at 4.4 and 4.5.

<sup>11</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

and threatens to undermine the District Plan. Mr Chrisp outlines the importance of ensuring the integrity of the District Plan provisions are upheld.<sup>12</sup>

- 6.8 It is not "highly speculative"<sup>13</sup> to suggest there may be a future use of the racecourse site. The Te Rapa Racecourse has been identified for divestment in the Messara Report and, as acknowledged by Mr Castles, WRCI has a pattern of divesting or rezoning land to residential uses.<sup>14</sup> As outlined by Mr Chrisp, the further ad hoc rezoning proposed in PC13 will not allow a comprehensive assessment of the most appropriate zoning of the Major Facilities Zone land.<sup>15</sup> It significantly increases the risk of further residential rezoning being proposed even closer to Crawford Street Freight Village, and even greater eroding of the District Plan. Mr Bevan Houlbrooke for Chartwell Investments Ltd, Takanini Rentors Ltd and EcoStream Irrigation Ltd also identifies that PC13 promotes a residential land use pattern which could be expanded upon in future consenting proposals.<sup>16</sup>
- 6.9 Enabling residential activities to locate in proximity to the Crawford Street Freight Village will seriously compromise the ongoing viability of the Crawford Street Freight Village and will set a land use pattern that will mean Fonterra and other industrial operators will have to continue to fight as the District Plan and its protection of industrial activities is progressively eroded.

## 7. REVERSE SENSITIVITY IS A SIGNIFICANT CONCERN

- 7.1 In our submission, the provision of 200 new residential dwellings in a predominantly industrial area<sup>17</sup> raises the very real concern of reverse sensitivity effects.
- 7.2 Reverse sensitivity is a well-established planning principle,<sup>18</sup> and is an adverse effect for the purposes of the RMA.<sup>19</sup>

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<sup>12</sup> Evidence of Mark Chrisp at 5.14.

<sup>13</sup> Rebuttal evidence of John Olliver at 10; Rebuttal evidence of Andrew Castles at 4.

<sup>14</sup> Evidence of Andrew Castles at 12; Evidence of Mark Chrisp at 5.11.

<sup>15</sup> Evidence of Mark Chrisp at 5.15.

<sup>16</sup> Evidence of Bevan Houlbrooke at 74.

<sup>17</sup> Evidence of Mark Chrisp at Figure 2.

<sup>18</sup> See for example *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16 (EnvC) at [57]; *Affco New Zealand v Napier City Council* NZEnvC Wellington W082/2004, 4 November 2004 at [29]; *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673 at [60].

<sup>19</sup> *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC W17/04, 14 April 2008 at [22] and *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 62 at [53].

- 7.3 Reverse sensitivity refers to the susceptibility of established, effects-generating activities (which often cannot internalise all their effects) to complaints or objections arising from the location of new sensitive activities nearby. 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. Critically, effects do not have to be unacceptable to give rise to reverse sensitivity effects.
- 7.4 It appears that the section 42A report and WRCI's experts seek to dismiss concerns relating to reverse sensitivity – despite the obvious support for industrial operations in the planning framework and location of the proposed residential land around a predominantly industrial area.
- 7.5 Ms O'Rourke has outlined how reverse sensitivity is a significant concern to Fonterra.<sup>20</sup> 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.
- 7.6 Mr Chrisp has also identified how enabling residential activities near Fonterra's sites has the potential to result in incompatible land uses and reverse sensitivity issues.<sup>21</sup> The perception of reverse sensitivity effects can lead directly to reverse sensitivity effects.<sup>22</sup>
- 7.7 The potential for reverse sensitivity effects from nearby residential activities (and potential future residential activities if further rezoning is sought at the racecourse) will compromise the ongoing viability of the Crawford Street Freight Village in Hamilton City.

## 8. CONCLUSION

- 8.1 In conclusion, PC13 seeks to change the District Plan in a way that:
- (a) does not give effect to the RPS;
  - (b) compromises the ongoing viability of the Crawford Street Freight Village;

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<sup>20</sup> Evidence of Suzanne O'Rourke at section 4.

<sup>21</sup> Evidence of Mark Chrisp at 3.3.

<sup>22</sup> Evidence of Mark Chrisp at 3.3.

- (c) undermines Hamilton City's planning framework;
- (d) fails to achieve the objectives and policies of the District Plan; and
- (e) fails to achieve the RMA's purpose of sustainable management.

8.2 In our submission this cannot meet the legal tests to be approved under the RMA and Fonterra seeks that PC13 be declined.

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Counsel for Fonterra Limited