under: the Resource Management Act 1991

in the matter of: an application to the Selwyn District Council to change the Selwyn District Plan ('PC 50') - including proposed amendments to the 'Dairy Processing Management Area'.

Submissions in reply on behalf of Fonterra Limited

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SUBMISSIONS IN REPLY ON BEHALF OF FONTERRA LIMITED

INTRODUCTION

1 These submissions are provided by Fonterra Limited (*Fonterra*) by way of reply in relation to plan change 50 (*PC 50*).

2 At the outset it is emphasised that there is clearly a high level of agreement between the experts called by Fonterra and those called as part of the section 42A Officer Report – and very few matters that need to be addressed by way of reply.

3 To this extent, the only real opposition to PC 50 was from the witnesses called on behalf of the Buttle interests. Although there was some discussion at the hearing as to why limited weight should be placed on the concerns raised, it is also submitted that whether regard is had to the 'no-complaints covenants' or not the net position is still the same – i.e. the case for Fonterra is that the evidence is overwhelmingly in favour of PC 50 being approved (only subject to the minor amendments that were set out in **Mr Chrystal's** evidence).

4 Even if (in the alternative) regard is to be had to the Buttle evidence it is submitted that:

4.1 other than a general sentiment of 'not in my back yard' and broad concerns around expansion, there was very little real-life substance to any of the matters raised. Further, a significant amount of the evidence was based on speculation and conjecture (or addressed matters such as noise which were significantly outside the expertise of the witnesses that presented on behalf of the Buttle interests) – again the Buttle evidence should be given little if any weight; and

4.2 even where some regard to be had to some of the matters raised (again in the alternative) then in almost all cases no actual relief was sought by the Buttle interests (other than to decline PC 50 in its entirety). With no actual suggested relief it is submitted that there is little if any scope to suggest or make further amendments to the provisions of PC 50.

5 Other than the final section of these submissions (which discusses the covenants further), the balance of these submissions in reply simply assumes the covenants are not in place.

6 This reply is therefore limited to a discussion of:

6.1 the narrow scope of inquiry and the relevance of the issue of odour;

6.2 whether setbacks and additional controls on noise are merited at Darfield;

6.3 the need to also update the Selwyn District plans to include a notation re the Darfield DPMA;

6.4 a general discussion on the noise evidence (and the fact that noise will be less with this proposal);

6.5 whether a cap on development is needed or a relevant consideration;

6.6 what will happen to existing resource consents; and

6.7 the weight that is to be afforded to the Buttle evidence given the covenants.

7 This is based on the general order of the discussion that occurred by way of reply at the hearing.

Scope of inquiry and odour

8 The scope of the inquiry on PC 50 is exceptionally narrow.

9 Fonterra has essentially requested the straight application of existing DPMA provisions at its Darfield site, with only narrow and generally very minor site-specific amendments.

10 It is submitted that it would be entirely inappropriate for a decision on PC 50 to more generally revisit the 'DPMA regime'.

11 Within this (and with reference to the broader discussion of odour):

11.1 it is accepted there is, in a formal sense, scope to consider odour effects but only as it relates to amenity more generally. Again, that does not enable the Council to substantively revisit the general provisions that were introduced through plan change 43 (*PC 43*) and which will now apply to PC 50; and

11.2 this is quite a different situation than the set-backs that apply to certain types of intensive farming (to which there is some reference in the Selwyn District Plan). Whether those intensive farming references are a 'legacy' from the Town & Country Planning Act regime, a feature of the timing of the Selwyn District Plan (which was developed prior to the Natural Resources Regional Plan Air Quality chapter) - or whether they are even appropriate in light of the statutory function of a District Council - is not especially relevant to the determination of PC50. Instead in this instance, it is submitted that the Commissioner can have a high degree of confidence that:

(a) the Regional Council planning framework will mandate a standard of 'no offensive or objectionable odour'

beyond the Fonterra boundary regardless of what Fonterra actually does on site; and

(b) that Fonterra will meet that standard.

12 At best, given the narrow scope of consideration information on odour might technically assist in determining the overall appropriateness of PC 50 (but on that Fonterra submits the expert evidence from **Mr Chilton** and **Mr Curtis** overwhelmingly suggests a high degree of confidence in odour being kept to acceptable levels such that it should be approved).

13 Again – especially in the absence of any specific relief being proposed by the Buttle interests, it is simply submitted that it would not be appropriate for the Commissioner to revisit the substantive content of the PC 43 provisions to 'retro-fit' some better provision for odour.

Setbacks

14 Through the hearing process, there was an attempt by the Buttle interests to draw some comparisons with, in particular, Fonterra's Studholme (Waimate) site.

15 Like the issue of odour little in terms of relief was actually sought – rather all that was provided was a general criticism of the existing and future environment at Darfield (and some brief comment on the consent conditions that were imposed on matters such as reversing beepers and requirements to fund insulation on the Studholme site).

16 With respect, is simply submitted that any comparison is tenuous at best and ignores the fact that:

16.1 the Darfield site already has extremely large set-backs by virtue of what is an extremely large site (around 680 hectares). This can be compared with the Studholme site where the existing processing site is only around 13 hectares in area (for a total site area of a little over 30 hectares) and is located within very close proximity to State Highway 1 - or (for example) the Edendale and Pahiatua sites where residential activity is effectively next door the processing infrastructure; and

16.2 the evidence presented as a part of PC 50 supports a finding that there is either no increase beyond existing consented limits (e.g. in the case of no offensive or objectionable odours) – or, in the case of matters such as noise, there is actually a reduction over that already permitted.

17 More particularly, at Studholme, the evidence was that nearby dwellings were reasonably contemplated with the noise control boundary (including those that could be built as of right) and could experience adverse noise effects as a result of expansion plans. To

this extent the noise control boundary at Studholme covers large areas of third-party owned land. These were the reasons for conditions that Fonterra would avoid, for example, the use of standard reversing beepers and potentially payment towards some of the cost associated with insulation of nearby housing (see condition 38 of RM150031, attached to **Ms Stewart's** Addendum). Both factors are absent here (with modelled noise actually being less and all reasonable development scenarios on neighbouring land being outside the proposed noise control boundary).

18 In any case it is submitted that such a level of control in PC 50 would be inappropriate given the scope of the plan change and the existing DPMA provisions.

Plan notation

19 Fonterra supports **Mr Chrystal** and **Mrs Rykers'** observation that the DPMA should be included with appropriate notation on planning maps to avoid the DPMA being overlooked in error.

20 The amendments sought by Fonterra as a part of PC 50 are therefore those that were handed up by **Mr Chrystal** at the hearing plus the amendment to the planning maps that was discussed by **Ms Rykers.**

Noise evidence

21 **Mr Buttle** gave evidence that container noise was clearly evident in his bedroom with windows closed in certain conditions.

22 Having since discussed that claim with **Mr Hay**, he responded he would be surprised if the claim was accurate given the screening between loading activity and **Mr Buttle's** house (essentially the entire processing site including stores and dryers). **Mr Hay** said that *"conceivably you might hear the odd low frequency impact on otherwise very quiet nights, but it would have to be at very, very low levels"*. He also said that if any more was true, it was very surprising that neighbours to the north were not complaining directly of container noise.

23 Ultimately it is submitted that the only expert noise evidence in front of the Commissioner is that from **Mr Hay**, **Mr Blakelock** and that from **Dr Trevathan**. All those experts concluded that the proposed noise control boundary would result in 'less noise' and that the level of noise was acceptable given the nature of the site.

24 On noise more generally, and set out in opening legal submissions, it is further noted rail noise and other effects emanating from activities authorised by a designation are not able to be taken into consideration on this plan change request. Notwithstanding, Fonterra has offered up a night rail noise rule (which deals with some of these effects) in the aim of providing community certainty, and works with Kiwirail on operational measures to reduce rail noise.

Development cap

25 Throughout the evidence of **Mr van Kekem** and **Ms Stewart** there were numerous references to development being uncapped and, for example, up to three driers being able to be accommodated within the Outline Development Plan area.

26 To be clear:

26.1 Fonterra's assessments have been based on two driers. This has been put forward as the reasonable 'worst case' scenario in terms of development that was both large and included other effects such as noise and air discharges. Drier buildings are but one of the many buildings that can be found on a processing site. Other buildings such as product stores, utility buildings, equipment workshops and other water treatment infrastructure are already found on site. Were market demand to change in the future then processing infrastructure could for example include buildings involved in the manufacture of butter, yoghurt and other dairy products with smaller, but quite different, *potential* effects.

26.2 Given the above it would be entirely inappropriate to include an activity based restriction within the plan change; and

26.3 as traversed at the hearing, whatever happens on site is effectively "capped" in several key senses: by an outline development plan that is very specific in terms of areas and heights, by the noise control boundary (which would limit Fonterra to two 30 tonne dryers) and other rules around (for example) lighting, signage, planting and various other controls.

27 In simple terms it is 'crystal ball gazing' to consider what the actual activity might be – and, it is respectively submitted it would be inappropriate to attempt to constrain Fonterra to certain activities and not others.

Effect of PC 50 on resource consents

28 PC 50 will not 'cancel' or 'replace' any resource consents.

29 In simple terms:

29.1 for the buildings and activities already established on the property then those activities will (given it is a landuse activity) carry existing use rights. Where the existing use rights were established via landuse consents that include certain obligations that are not addressed in PC 50 (such as the continuation of a community liaison group or the use of certain access locations) then Fonterra understands and records that those matters will continue;

29.2 in the future Fonterra will be able to use the Outline Development Plan (and associated permitted activities) to undertake expansion – should it choose to do so. Again this will not in itself impact on the existing obligations on Fonterra under the existing consents (and/or existing use rights)

30 In terms of demonstrating this in practice it is understood that since the approval of PC 43, Synlait has not (for example) surrendered its existing resource consents (rather these will effectively continue to 'sit in the background' in terms of existing operations, with further development being authorised by the DPMA provisions).

31 In effect this will be same approach that is taken at Darfield.

32 For completeness it is also noted that matters such as requirements for management plans and a community liaison group is also a part of a number of Regional Council consents. If expansion were to occur then it can be anticipated that conditions of a similar nature will be imposed. Further, Fonterra also has a requirement via its ISO14001:2004 (and soon to be 2015) Environmental Management System to undertake meaningful consultation with its community and wider stakeholders.

Covenants

33 In a narrow sense Fonterra generally agrees with **Ms Eveleigh's** legal submissions to the extent that she advises that covenants do not change effects.

34 At paragraph 3 of her Memorandum dated 27 March 2017, **Ms Eveleigh** also sought to clarify that the submission *"does not seek to complain about the existing authorised activities or to limit, prohibit or restrict activities carried out in accordance with the existing resource consents*." This on the basis of apparent common ground that the covenants extend to such matters. Ms Eveleigh made a similar assertion at paragraph 8 of her opening legal submissions that *"[a]uthorised and permitted activities are not in contention in these proceedings."*

35 As note in the introduction to these submissions, Fonterra has not asked the Commissioner to take a view on the legal effect of the covenants. However, it is submitted that "no complaints" covenants arising from commercial agreements between the parties ought to have a significant bearing on the weight afforded to a submitter's complaint-related evidence, particularly where that submitter's counsel has said so in written submissions to the Commissioner on two occasions.

36 For example, it is submitted that it is difficult to see how **Mr van Kekem's** evidence as to the site's largely unsubstantiated complaint history, **Mr Buttle's** odour diary or his 'complaint fatigue' (similarly unsubstantiated) does not put authorised and permitted activities in contention.

37 Similarly, **Ms Stewart's** evidence's (for example at paragraph 41) that future rural dwellings have an *"expectation of rural amenity"*, and that would be negatively impacted by *"proximity to the large industrial scale dairy factory"* squarely fails to accept the current operations.

38 For immediate purposes it is simply submitted that the Commissioner should be careful to afford any real weight to such evidence - but it is also equally submitted that even were these no such covenants in place then the case for Fonterra is that the evidence still overwhelmingly favours effects being less than minor and PC 50 being approved.

Dated 7 April 2017

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Ben Williams
Counsel for Fonterra Limited