IN THE MATTER of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER of Proposed Private Plan Change 2 to the Hamilton City Operative District Plan: Te Awa Lakes Private Plan Change

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MEMORANDUM OF COUNSEL ON BEHALF OF FONTERRA LIMITED

3 DECEMBER 2019

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TO THE INDEPENDENT HEARING COMMISSIONERS:

Introduction and background

1. This memorandum is filed on behalf of Fonterra Limited ("**Fonterra**"), in relation to the hearing on Proposed Private Plan Change 2 to the Hamilton City District Plan – Te Awa Lakes Private Plan Change ("**PPC2**").

2. The filing of this memorandum has been necessitated by the Applicant's approach to evidence on key matters in dispute (including feasibility and traffic). Fonterra has serious concerns in relation to the appropriateness and procedural fairness of this approach, which are set out below.

Perry's approach to reply evidence

3. In relation to the issues of feasibility and transport, which are both key matters of dispute between a number of parties, including Fonterra, Perry Group ("**Perry**") has adopted an unusual and, in our submission, inappropriate approach to the presentation of its reply evidence.

4. On both Thursday 28 November 2019 (in relation to feasibility) and Monday 2 December (in relation to traffic), Perry's witnesses did not provide a response to the evidence filed by Fonterra until after Fonterra had presented its evidence. This was of most significant concern to Fonterra in relation to traffic, where Mr Apeldoorn produced over 50 pages of fresh reply evidence, more than 30 of which responded directly to Mr Smith's evidence.

5. Fonterra was surprised and, frankly, disappointed to receive reply evidence of this nature only after Mr Martin and Mr Smith had their opportunity to present their views on the outstanding matters of dispute.

Natural justice / procedural fairness

6. The approach adopted by Perry in relation to reply evidence is contrary to accepted practice for hearings under the RMA and basic principles of natural justice and administrative law. It has deprived Fonterra and other submitters of the opportunity to meaningfully respond to the matters raised in Perry's reply evidence.

7. While the Hearings Panel ("**Panel**") has discretion to conduct hearings as it sees fit, the accepted approach for hearings of this nature is for the applicant to present its case, then for submitters to present their case in response, and for the applicant to have an opportunity to reply to submitters through closing legal submissions.

8. It is rare for a statement of reply to introduce fresh evidence. Caution is required where an applicant seeks to introduce new evidence during a hearing, as submitters must have the opportunity to respond to any fresh evidence. When new material is to be introduced through rebuttal or reply evidence, it is preferred practice to allow other parties to comment on any new material. This approach is in accordance with the interests of natural justice, and is critical to ensure that any new evidence is subject to appropriate testing through questioning from the hearing panel and responses from other parties.[1]

9. Section 39 of the RMA requires that the hearing procedure is to be established as is "appropriate and fair in the circumstances". The Court of Appeal has confirmed that a failure to provide an opportunity to respond to evidence could amount to "reviewable procedural unfairness".[2]

10. As a result of the unusual and inappropriate approach taken by Perry in this regard, the Panel is now in the invidious position of having substantive evidence on key matters in dispute that has not been tested, in terms of its relevance, validity and accuracy. The Panel asked no questions of Mr Apeldoorn in relation to either his primary or reply evidence, there has been no caucusing between transport experts in relation to the new matters raised, and other parties' transport witnesses have not been provided with an opportunity to appropriately respond.

11. Any testing would have readily exposed the flawed nature of Mr Apeldoorn's reply evidence. The evidence of Mr Apeldoorn was factually and technically inaccurate in a number of respects, including in relation to the following matters:

    (a) The caucusing minutes attached as Appendix B to Mr Apeldoorn's evidence were not signed by either Mr Smith or Mr Swears (New Zealand Transport Agency) due to a fundamental disagreement concerning trip generation rates. They were never accepted by Mr Smith or Mr Swears, and it was misleading of Mr Apeldoorn to treat the minutes as representing agreement among the transport experts.

    (b) Mr Apeldoorn asserted that Mr Smith either had no regard for, or understanding of, current and future land use environments and land use trip-generating relationships. This is simply not correct. Mr

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1 A Practice Guide for the Conduct of Resource Management Hearings at First Instance, September 2011, Resource Management Law Association, at [3.7].

2 *North Eastern Investments Limited v Auckland Council* [2018] NZCA 629 at [3], and [61] – [66]. See also *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17 and s 27(1) of the Bill of Rights Act 1990.

Smith developed and managed the model used by Perry in its Integrated Transport Assessment for four years (2009 to 2012), is the research officer for the New Zealand Trips Database Bureau ("**NZ TDB**") (whom Mr Apeldoorn quotes), and currently leads Australasian best practice research in this field.

(c) Mr Apeldoorn's claims in relation to Mr Smith's use of the 85th percentile in reaching his conclusions regarding trip generation figures are baseless as Mr Smith's approach is entirely appropriate and in line with accepted practice in this area.

(d) Mr Apeldoorn's assertion that Mr Smith's assessment of PPC2 against the relevant strategic transport documents is limited is misleading. Mr Smith undertook a comprehensive analysis of all relevant planning documents that relate to transport matters, as this is within his area of experts as a transportation engineer. Mr Chrisp, for Fonterra, provides a more fulsome overview of all relevant strategic planning documents, on which Mr Smith reasonably (and appropriately) relied in preparing his evidence.

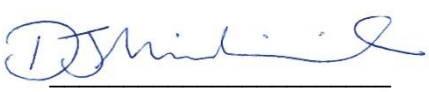
12. Fonterra is conscious of the need to ensure that there is no ongoing back and forth between parties in relation to these matters. Accordingly, in light of the issues with Perry's approach to reply evidence, Fonterra submits that little, if any, weight can be given to that evidence.

Other matters of concern

13. Fonterra's position remains as set out in its opening submission. PPC2 is contrary to the Waikato Regional Policy Statement ("**RPS**"), and certainly does not satisfy the section 75 requirement to give effect to the RPS.

14. Tellingly, Waikato Regional Council's legal submissions clearly set out the correct legal test for the section 75 requirement, being that PPC2 must give "full effect" to the RPS, not "some effect", and no evidence was presented from its experts to demonstrate that PPC2 meets that statutory imperative. Statements of position as to whether a submitter or an expert supports or opposes the proposal, do not provide an answer in relation to whether or not PPC2 gives effect to the RPS.

Dated 3 December 2019



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