

Before the Independent Hearings Panel
at Timaru

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions in relation to
Timaru Proposed District Plan – Hearing B

and: **Fonterra Limited**
Submitter 165

Legal submissions on behalf of Fonterra Limited

Dated: 12 July 2024

REFERENCE: B G Williams (ben.williams@chapmantripp.com)

chapmantripp.com
T +64 3 353 4130
F +64 3 365 4587

PO Box 2510
Christchurch 8140
New Zealand

Auckland
Wellington
Christchurch



LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED

INTRODUCTION

- 1 These submissions are provided on behalf of Fonterra Limited (*Fonterra*) in relation to its Clandeboye milk processing Site (the *Clandeboye Site*).
- 2 The legal submissions provided for Fonterra in the context of Hearing A provided a high-level overview of the Clandeboye Site and its wider interests in the Timaru District Plan review process, which are not repeated here.
- 3 These submissions have been prepared in relation to Fonterra's request for a "*Clandeboye Dairy Manufacturing Zone*" (*CDMZ*), as it relates to Fonterra's Clandeboye Site operations. Although being presented as a part of Hearing B, a number of the issues and evidence will also be relevant to the wider plan review process.
- 4 These legal submissions will:
 - 4.1 provide a high level overview of the relief sought; and
 - 4.2 address main legal issues arising from the submission, being:
 - (a) scope;
 - (b) reverse sensitivity;
 - (c) the criteria for special purpose zones in the National Planning Standards; and
 - (d) the National Policy Statement for Highly Productive Land 2020 (*NPS-HPL*).

RELIEF SOUGHT

- 5 The Clandeboye Site is currently zoned 'Industrial H Zone' and 'Rural Zone 1' in the operative Timaru District Plan (the *Operative Plan*).
- 6 This zoning has been rolled into the Proposed Timaru District Plan (*PDP*), with the site being zoned General Industrial Zone (*GIZ*) and General Rural Zone (*GRUZ*) (subject to a number of overlays).
- 7 Fonterra's position, as expressed through evidence, is that the proposed *GIZ* provisions are not the most appropriate for the site and its operations.
- 8 In particular, given the scale and economic importance of the Clandeboye Site within the district and region, a primary reason for including the proposed *CDMZ* is to reduce the time, cost and uncertainties associated with consenting the maintenance, upgrading and development of the long-established site.

- 9 The proposed CDMZ creates a policy framework that is efficient and provides greater certainty to Fonterra and the Timaru District Council (the *Council*). The proposed zone also recognises the regional and national significance of the site by enabling activities and buildings consistent with the operational requirements of the site, managing effects beyond the site and acknowledging that sensitive activities will compromise the ability of the Clandeboye Site to meet its operational needs.
- 10 The relief sought has been significantly refined through the evidence of **Ms Tait**. These amendments narrow the focus of the proposed zone to reflect the actual and realistic operational needs of the site.
- 11 The proposed CDMZ captures what already exists on the site with scope for small-scale developments (including maintenance/replacement works), opportunities to capture changes in technology and a proposed energy conversion project (the *Biomass Plant*).
- 12 The bulk and location of buildings on the Clandeboye Site will be managed by an Outline Development Plan (*ODP*) appended to the chapter. Large scale projects, not anticipated by the ODP, will still require resource consent.

LEGAL ISSUES

Scope

- 13 As mentioned above, Fonterra has refocused and narrowed the relief sought since its original submission on the PDP. The refined package is significantly less enabling compared to the original relief.
- 14 The original drafting for (what was then) the '*Special Purpose Zone – Strategic Rural Industry*' was intended to apply more widely than just the Clandeboye Site and was promoted initially by Fonterra, Silver Fern Farms and Ravensdown. Since the close of submissions Fonterra has recognised that a more targeted special purpose zone is appropriate.
- 15 The amendments reflect what is relatively limited future development for the Clandeboye Site (i.e. as opposed to authorising extensive new plant and expansion of the site). As noted in the evidence of **Mr Burdett** and **Ms Tait** the foreseeable (i.e., with the lifetime of the plan) developments are:
 - 15.1 the Biomass Plant intended to replace existing coal powered heating source at the site; and
 - 15.2 typical replacement of buildings/plant from time to time (which would expect to have a materially similar envelope to the existing buildings/activities on site and otherwise covered by existing use rights in any event).
- 16 As such, the updated proposed CDMZ provisions recommended by **Ms Tait** reflect a more focused approach.

17 In terms of scope, the caselaw on whether relief sought is within scope of a submission is relatively settled.

18 *Re Otago Regional Council*¹ provides a useful summary of the key authorities and the process to address the question as to whether relief sought is within the scope of original submissions. In that case, the Court noted that:²

It is not unusual for relief to be amended in response to evidence called by other parties and its testing during a hearing. Even so, any proposed amendments must remain within the general scope of the notified plan change or the original submissions on the plan change or somewhere in between.

19 The Court also went on to note:³

...the question about whether the submission is on or about the plan change will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions. It is important to keep in mind that the court cannot permit the plan change to be appreciably changed without a real opportunity for participation by those who are potentially affected.

20 The *Re Otago Regional Council* case also refers to the High Court case of *Albany North Landowners v Auckland Council*⁴, which addressed scope questions under a similar legislative regime as here. In that case, the Court characterised the “orthodox” scope test as whether an amendment was “reasonably and fairly” raised in the course of submissions on a plan change. The Court found that this question should be approached in a realistic workable fashion, including taking into account the whole package of relief detailed in each submission.⁵ It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed.⁶

21 In practical effect what Fonterra is now seeking is a much narrower and more refined set of provisions that are limited to the Clandeboye Site.

22 Submitters have clearly had a chance to participate through the submission process and with ‘materially less’ now being sought, no submitter could reasonably be said to have lost the opportunity to participate. Again, the amendments simply provide a more refined package for the Clandeboye Site and the Timaru District.

¹ *Re Otago Regional Council* [2021] NZEnvC 164.

² *Re Otago Regional Council* [2021] NZEnvC 164 Annexure 2, at [16].

³ *Re Otago Regional Council* [2021] NZEnvC 164, Annexure 2, at [21].

⁴ *Albany North Landowners v Auckland Council* [2016] NZHC 138.

⁵ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [115].

⁶ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [115].

- 23 It is therefore submitted that the relief sought is within the scope of Fonterra's original submission.

Reverse sensitivity

- 24 Reverse sensitivity is well established as an adverse effect that is to be avoided, remedied or mitigated under the Resource Management Act 1991 (RMA).⁷ Effects relating to reverse sensitivity are recognised throughout the Canterbury Regional Policy Statement.⁸
- 25 Reverse sensitivity effects are the adverse effects of establishing sensitive/incompatible activities in the vicinity of existing lawful uses, and the potential for that establishment to lead to restraints on existing uses. Or, as the court has stated (and which was also quoted in submissions by Fonterra as a part of Hearing A):⁹

It is the effect of the new use on existing uses that is the problem not because of the direct effects on the new use but because of incompatibility which in turn may lead to pressure for change.

- 26 Although it is difficult to exactly predict when reverse sensitivity effects will occur, there will inevitably be a tipping point where concerns around such effects become material. Once such a tipping point is reached, the concern is obviously that inadequate planning provisions will not be able to prevent the reverse sensitivity effects being realised nor can such effects be reversed.
- 27 It is also important to remember that reverse sensitivity effects do not exist in isolation. Effects such as (typically) amenity will also arise in relation to those persons and activities causing the reverse sensitivity effect(s).
- 28 It is accepted that as a matter of principle the activity causing the adverse effect (i.e., the operations at the Clandeboye site) should seek to internalise those effects. However, total internalisation of effects in all situations is not feasible, nor is it required under the RMA.
- 29 Fonterra internalises its effects wherever possible. The evidence of **Mr Burdett** sets out the various consents that authorise and include measures to manage these effects. However, the evidence of **Mr Chilton** and **Mr Hay** confirms that effects in relation to odour and noise effects (respectively) extend beyond the boundary of the Clandeboye Site:

29.1 **Mr Chilton** explains that reverse sensitivity effects can arise through enforcement actions or due to the policies in the Canterbury Air Regional Plan that would require Fonterra to reduce their operations if a new sensitivity activity were to occur near the Clandeboye Site.¹⁰

⁷ See for example *Ngatarawa Development Trust Limited v The Hastings District Council* W017/2008 [2008] NZEnvC 100 (14 April 2008).

⁸ See for example, Canterbury Regional Policy Statement Objective 5.2.1 and Objective 5.3.2.

⁹ *Joyce Building Limited v North Shore City Council* [2004] NZRMA 535 at [55].

¹⁰ Evidence of Mr Chilton at [16]-[17].

He concludes that the best method for industries to manage residual or unanticipated odour and dust effects (following implementation of good practice mitigation measure) is being appropriately separated from sensitive activities *"through zoning provisions that recognise the potential for reverse sensitivity effects and minimise the likelihood of sensitive and incompatible activities encroaching on appropriately located industries"*; ¹¹ and

29.2 **Mr Hay** confirms that Fonterra hold resource consents to operate at noise levels higher than those set out in both the Operative Plan and the PDP.¹² He notes that the PDP requires acoustic insulation of noise sensitive activities under a range of circumstances,¹³ but no such allowance is made for dwellings in the GRUZ in proximity to the Clandeboye Site. He concludes *"[s]hould new or altered dwellings be established within the Clandeboye site's current noise emission contours, Fonterra would be unable to meet its consented noise standards."*¹⁴

- 30 Where internalisation is not reasonably possible (as is the case here), then the only feasible means of protecting that activity is to control land use in the surrounding area.
- 31 To justify imposing any restrictions on the use of land adjoining an effects emitting site, the industry should be of some considerable economic or social significance locally, regionally, or nationally.¹⁵ In this regard, the evidence of **Mr Copeland** is that the relief sought by Fonterra will better safeguard economic benefits from the ongoing operations and activities related to the Clandeboye Site, for Fonterra, Fonterra's farmer shareholders, and residents and businesses of the Timaru District and Canterbury Region.¹⁶
- 32 Mr MacLennan, the s 42A Reporting Officer (Rural Zones) has recommended changes to GRUZ-P5 and GRUZ-O3 to avoid reverse sensitivity. Fonterra is supportive of these changes.¹⁷ However, these changes only address part of the issue and are not sufficient in themselves.
- 33 The Clandeboye Site is an established feature within the environment. As such, it is appropriate that the PDP recognise this through providing for the continuation of this activity by way of an appropriate policy and rule framework. As set out, Fonterra is of the view that the GIZ policy

¹¹ Evidence of Mr Chilton at [34].

¹² Evidence of Mr Hay at [27]-[33].

¹³ Such as for dwellings in a residential zone within 20m of the boundary with an industrial zone.

¹⁴ Evidence of Mr Hay at [33].

¹⁵ *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48 at [18].

¹⁶ Evidence of Mike Copeland at [62].

¹⁷ Andrew MacLennan *Section 42A Report (Rural Zones)* at [13.2.14].

framework does not adequately recognise the significance of the site or manage sensitive activities in close proximity to the site.

- 34 It is submitted that the proposed CDMZ (noting that this is intended to work in conjunction with a new Noise Control Boundary and amendments to GRUZ-P5 and GRUZ-S4) reflects a balanced approach that adequately protects Fonterra against reverse sensitivity risks. This is essential to prevent adverse impacts on the future operation and development of the Clandeboye Site (and the flow on effects to the community, economy and environment).

National Planning Standards

- 35 Clause 8 of the National Planning Standards set out the criteria for a special purpose zone to be established. Clause 8(3) provides:

An additional special purpose zone must only be created when the proposed land use activities or anticipated outcomes of the additional zone meet all of the following criteria:

- (a) are significant to the district, region or country*
- (b) are impractical to be managed through another zone*
- (c) are impractical to be managed through a combination of spatial layers.*

- 36 The section 42A Officer concluded that the introduction of a special purpose zone for the Clandeboye Site would not meet the requirements of the National Planning Standards as they consider that Fonterra “*has not demonstrated that it is impractical to manage the Clandeboye site through the GIZ provisions.*”¹⁸

- 37 It is submitted that the Officer has taken an overly narrow view of clause 8(3). ‘Impractical’ does not have the same meaning as ‘impossible’. Although not defined by the National Planning Standards itself, ‘impractical’ has the dictionary meaning of “not effective or reasonable”.¹⁹ It is also important to bear in mind that as a matter of principle, the RMA’s sustainable management purpose is also of relevance to establishing the content of the PDP.

- 38 Therefore, it is not necessary to show that the site is not capable of being managed through another zone or through a combination of spatial layers (i.e., a precinct). What matters is whether the framework is an **effective** means of managing the natural and physical resources at the Clandeboye Site.

¹⁸ Andrew MacLennan *Section 42A Report (Rural Zones)* at [13.2.10].

¹⁹ Definition of ‘impractical’ from the *Cambridge Academic Content Dictionary* (Cambridge University Press, 2009).

Precinct or Special Purpose Zone?

- 39 The s42A Officer, Mr MacLennan, considers that “*from an architecture perspective*” the scale of the activities on the Clandeboye Site can be accommodated within the structure of the existing GIZ framework by introducing a site-specific precinct within the GIZ chapter.²⁰
- 40 It is submitted that Mr MacLennan’s position oversimplifies the extent of issues and undermines the significance of the Clandeboye Site. The framework needed to support the site is much more nuanced than the methods of the GIZ which we note are intended to apply to businesses with one or two activities operating on a single site in an urban location.
- 41 **Ms Tait** points to other Council’s (such as New Plymouth, Wellington City, Selwyn and Waikato) who have considered special purpose zones to be the most appropriate way to manage large scale complex activities. In her opinion, the Council’s application of clause 8(1)(a) of the NPS has “*resulted in the inappropriate use of the GIZ, rather than a more effective and efficient SPZ that provides for the complex operational characteristics of the Clandeboye site.*”²¹
- 42 Consistent with the definition above, **Ms Tait** has taken ‘impractical’ to mean “that it is not sensible, realistic or appropriate to manage the site pursuant to these zones”²². Based on her assessment, she concludes that that “*the criteria for including a SPZ for the Clandeboye Site are satisfied*” and that “*the CDMZ [is] the most appropriate way to achieve the purpose of the RMA*”.²³
- 43 Thus, it is submitted the proposed CDMZ is consistent with the National Planning Standards and is the most effective way of managing the natural and physical resources at the Clandeboye site.
- National Policy Statement for Highly Productive Land**
- 44 The NPS-HPL came into force on 17 October 2022. It generally provides a framework for the avoidance of urban development on land considered ‘highly productive’, with some limited exceptions.
- 45 **Ms Tait** has already discussed the NPS-HPL in her evidence. These submissions look at the issue of NPS-HPL more holistically and focus on the exemptions provided for under clauses 3.6 and 3.11.
- 46 Regional councils are required to map highly productive land within their regions no later than three years after the commencement date of the NPS-HPL. Clause 3.5(7) of the NPS-HPL provides an interim classification of highly productive land before this mapping exercise is complete.

²⁰ Andrew MacLennan *Section 42A Report (Rural Zones)* at [13.2.11].

²¹ Evidence of Ms Tait at [6.7.32].

²² Evidence of Ms Tait at [6.7.8].

²³ Evidence of Ms Tait at [6.7.27].

47 Clause 3.5(7) provides:

Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:

(a) is

(i) zoned general rural or rural production; and

(ii) LUC 1, 2, or 3 land; but

(b) is not:

(i) identified for future urban development; or

(ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

48 At the commencement date the Clandeboye Site:

48.1 was zoned 'Industrial H Zone' (industrial zoning) and 'Rural Zone B' (rural zone); and

48.2 comprised of LUC Class 2 and 3 land.

49 It is clear that industrial zoned land (being the significant majority of the site) is not 'highly productive land' under clause 3.5(7) and is therefore excluded from consideration under the NPS-HPL.

50 A small area of land (approximately 5.5ha) on the northwestern side of Rolleston Road at 2-10 Kotuku Place and 37 Rolleston Road (the *HPL Land*) is rural zoned land and is therefore a potentially relevant for consideration under the NPS-HPL.

51 The relevant NPS-HPL policies are identified in **Ms Tait's** evidence and contain themes of prioritising and supporting the use of highly productive land for land-based primary production and protecting highly productive land from inappropriate use and development.

52 It is clear from the objectives and policies of the NPS-HPL that it does not seek to provide absolute protection of highly productive land, nor does it specify that there should be no loss of highly productive land within a region or district.²⁴

²⁴ National Policy Statement for Highly Productive Land s 32 evaluation report, at p 6.

- 53 As the definition of 'urban' in the NPS-HPL includes "*any special purpose zone*"²⁵, the propose CDMZ package technically constitutes the rezoning of this small parcel of 'highly productive land' from rural to urban under the NPS-HPL.
- 54 In our submission, clause 3.6(4) or clause 3.11 can be relied on to enable the rezoning of the HPL Land.
- Clause 3.6: Restricting urban rezoning of highly productive land**
- 55 Clause 3.6(4) provides a pathway for the urban zoning of highly productive land, where that:
- (a) *the urban zoning is required to provide sufficient development capacity to meet expected demand for housing or business land in the district; and*
 - (b) *there are no other reasonably practicable and feasible options for providing the required development capacity; and*
 - (c) *the environmental, social, cultural and economic benefits of rezoning outweigh the environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.*
- 56 We step through each of these subclauses below.
- (a) is the rezoning required to provide sufficient development capacity to meet expected demand for business land in the district?*
- 57 The Growth Management Strategy Review: Business report (the *GMS Report*),²⁶ prepared for the Council as part of the District Plan review process, assesses the availability of developable industrial land and identifies additional land for potential release to be brought forward in the PDP.
- 58 Vacant land owned by large corporations, including Fonterra-owned land at the Clandeboye Site, was specifically excluded from this assessment (and considered unavailable for future development) because "*it was assumed that this [land] was being reserved for future growth of those organisation*".²⁷
- 59 The industrial zoned land at Clandeboye has been specifically accounted for in the reports prepared for Council. The further currently rurally zoned land has been identified as being required to meet the future needs of the site. Making this rural land unavailable for business development by refusing to

²⁵ National Policy Statement for Highly Productive Land 2022, clause 1.3.

²⁶ Timaru District Council Growth Management Strategy Review: Business (PlanZ Consultants Ltd, 6 May 2022).

²⁷ Timaru District Council Growth Management Strategy Review: Business (PlanZ Consultants Ltd, 6 May 2022) at p11.

rezone it could result in an insufficiency of business land to meet the expected demand.

- 60 Rezoning is therefore required by Council in order for it to provide sufficient development capacity to meet Fonterra's operational requirements and therefore demand for business land in the district.

(b) are there are no other reasonably practicable and feasible options for providing the required development capacity?

- 61 As set out by **Mr Copeland**, the Clandeboye site is economically significant (with significant existing investment having occurred). The site is constrained to its existing location and all plant needs to be located together. It is not practical or feasible to suggest that further development could occur elsewhere (and similarly it is not possible for the whole site to relocate for the purposes of accessing industrial zoned land elsewhere).

- 62 For completeness we note that there is no other adjoining rural land that is not HPL.

(c) do the environmental, social, cultural and economic benefits of rezoning outweigh the environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values?

- 63 Fonterra hold land broader than their immediate processing infrastructure in order to future-proof and support its operations. This enables Fonterra to protect the safe and efficient operation, use, maintenance, upgrades and development of their sites. As explained in the evidence of **Mr Copeland**, Fonterra's operations at the Clandeboye Site are of economic significance both at a district and regional level. Enabling Fonterra to continue its activities at the site, without additional constraints on their efficient operations (i.e., by enabling Fonterra to undertake development and repairs) benefits the social and economic wellbeing of residents and businesses in the Timaru District.

- 64 In addition, the use of 37 Rolleston Road for additional infrastructure is likely the most efficient and effective way to enable the delivery of the Biomass Plant (noting that the project is still in the planning stage). Although it must be acknowledged that the conversion of existing coal powered heating is part of Fonterra's wider decarbonisation strategy (to which Fonterra has committed), the benefits of achieving substantial emissions reductions at the Clandeboye Site is a relevant for consideration under this subclause.

- 65 It is noted that Fonterra is not reliant on an 'offset' *per se*. Rather, the benefits associated with the enabling the Biomass Plant (i.e., through reducing reliance on coal/fossil fuels) are relevant to the balancing exercise.

- 66 Overall, the benefits removing additional constraints on Fonterra's operations at the Clandeboye Site and enabling the Biomass Project outweigh the costs of rezoning the relatively small area of HPL. In the particular case of the Clandeboye site there is also a need for a 'reality check' in that currently rurally zoned land adjoining the Fonterra site

already serves various purposes in terms of buffering and managing the effects of the wider Fonterra operation.

- 67 Therefore, rezoning of the HPL Land is permitted under clause 3.6(4) and the NPS-HPL does not impose any barriers to Fonterra's relief.

Clause 3.11: Continuation of existing activities

- 68 Rezoning is also consistent with clause 3.11 which requires territorial authorities to include objectives, policies and rules in their district plans to "enable the maintenance, operation, or upgrade of any existing activities on the highly productive land."

- 69 As noted above, Fonterra own land broader than its immediate manufacturing sites in order to future-proof its operations. The land surrounding the Clandeboye Site owned by Fonterra (including the HPL Land) is therefore arguably part of the existing activities undertaken at the site. This is further supported by future plans for the Biomass Plant which will ultimately enable the future operation of the existing activities at the Clandeboye Site.

CONCLUSION

- 70 Having effective special purpose zone provisions is critical to Fonterra's operations.
- 71 These submissions otherwise repeat what was advised in Hearing A – in that Fonterra is dedicated to ensuring that it undertakes its business in a sound and environmentally responsible manner, and it is committed to improving environmental performance. Fonterra's principal motivation in respect of the proposed Plan is to ensure that its operations at the Clandeboye Site are able to continue in an efficient and sustainable manner.
- 72 Fonterra therefore seeks the relief set out in submissions and amended through the evidence of **Ms Tait**.

EVIDENCE

- 73 Fonterra is calling evidence in support of its submission from:

73.1 **Ms Suzanne O'Rourke** for the company;

73.2 **Mr Ross Burdett** for the site;

73.3 **Mr Mike Copeland** in relation to economics;

73.4 **Mr Richard Chilton** in relation to air quality;


73.5 **Mr Paul Smith** on landscape and visual matters;

73.6 **Mr Rob Hay** in relation to noise;

73.7 **Mr Dave Smith** in relation to traffic; and

73.8 **Ms Susannah Tait** in relation to planning.

Dated: 12 July 2024



Ben Williams
Counsel for Fonterra Limited