BEFORE INDEPENDENT COMMISSIONERS

AT HAMILTON

UNDER	the Resource Management Act 1991 ("**RMA**")
AND	
IN THE MATTER	of Hamilton City Council Plan Change 12 ("**PC12**")

MEMORANDUM OF COUNSEL ON BEHALF OF FONTERRA LIMITED

26 SEPTEMBER 2024

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Introduction

1. This memorandum is provided on behalf of Fonterra Limited ("**Fonterra**") to respond to matters raised during the presentation of its submissions on 6 September 2024.

No-complaints covenant

2. As outlined during Fonterra's presentation, the courts have found no-complaints covenants inadequate to resolve concerns about reverse sensitivity effects. In *Gibbston Vines Ltd v Queenstown Lakes District Council*, the Environment Court considered a no-complaints covenant to be inadequate in circumstances where the activity operator did not "wish to have to enforce a covenant" and did not see it as "the panacea to resolving either direct effects on the future occupiers or the reverse sensitivity" effects.[1] Furthermore, the High Court has described a no-complaints covenant in the context of reverse sensitivity as a "band-aid" solution.[2]

3. The Environment Court also found "covenants do not avoid, remedy or mitigate the primary effects – nothing becomes quieter, less smelly or otherwise less unpleasant simply because a covenant exists".[3]

4. In a recent judicial review, the Court found a no-complaints covenant was unlikely to sufficiently address reverse sensitivity effects on Auckland Airport arising from a nearby Kāinga Ora housing development. This is because the covenant would apply to the owner of the property but not those living in the development, who would actually be affected by aircraft noise. The Court found it unclear how a covenant could operate to prevent those actually affected by the noise from complaining.[4]

Changes to sought amendments

5. Fonterra has reflected on the discussion with Panel and has further refined the amendments it seeks to policies set out in paragraph 14 of Mark Chrisp's Hearing Statement.

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1 *Gibbston Vines Ltd v Queenstown Lakes District Council* [2021] NZEnvC 23 at [79].

2 *Tasti Products Limited v Auckland Council* [2016] NZHC 1673 at [99].

3 *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC Wellington W017/2008, 15 April 2008 at [27].

4 *Auckland International Airport Limited v Auckland Council* [2024] NZHC 2058 at [106].

Non-residential activities

(a) Amend Policy 4.1.2.2d:

> *New buildings and activities shall mitigate effects on regionally significant infrastructure <u>and regionally significant industry.</u>*

(b) Amend Policy 4.1.2.2.e:

> *Residential land uses should be managed to avoid potential effects, such as noise, from arterial transport corridors, state highways <u>and regionally significant industry.</u>*

(c) Amend Policy 4.2.1.6c by adding an additional point as (xiv):

> *<u>Design measures to minimise reverse sensitivity effects on adjoining regionally significant industry, including acoustic insulation and mechanical ventilation.</u>*

6. Fonterra no longer seeks to amend Objective 4.4.2.2.

7. All other amendments sought by Fonterra remain as set out in Mark Chrisp's Hearing Statement.

DATED: 26 September 2024

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Daniel Minhinnick / Harriett Morrow
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