2 February 2023
Sent by Email

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Watchman Residential Limited
c/ Campbell Brown, Planners

For: Michael Brown

By Email: s 9(2)(a)

Dear Michael,

Ngongotahā Housing Development

You have asked us to provide a legal commentary in response to the recent request for further information received from the Ministry for the Environment, reading: "*The request for further information response details that Rotorua Lakes Council, as per their letter dated 10 February 2023, have agreed to consider an application to cancel the consent notice 6238089.1 on Lot 2 DP 337743 should a panel grant resource consents for the project. Please provide further analysis of the consent notice wording and confirm whether it is open to a panel to grant resource consents for the project with the consent notice remaining in place, and if so, how you envisage this could occur (e.g., would a consent condition need to be volunteered by the applicant relating to the consent notice cancellation)*."

Consent Notice 6238089.1 was registered against the title for Lot 2 DP 337743 on 3 December 2004. It contains three clauses:

1. Clause 1 states (emphasis added), "*The owners and subsequent owners of Lot 2 DP 337743 are advised that in accordance with Rule 16.4.3.1(b) of the District Plan that no further lifestyle lots may be excised from Lot 2 DP 337743*". For the reasons set out below, we consider that this clause does not amount to a condition and is no longer operative in effect but, even if we are wrong in that regard, the proposed development is not contrary to the wording in the clause. By way of explanation:

    (a) The use of the word "*advised*" as the operative verb in the sentence indicates that the clause is in the nature of an advice note rather than a condition of consent or ongoing obligation. Had Council intended to impose a condition it would have used imperative language preventing the owner from applying for such a consent. Instead, the language indicates that further lifestyle blocks cannot be "*excised*" under the quoted rule.

    (b) The operative Rotorua District Plan dates from 2016 so the rule referred to in the clause (which was operative in 2004) is no longer in effect and is not part of the (now) operative District Plan. The reference in the clause to a specific rule in the previous District Plan suggests that the Council was concerned with the lifestyle block issue only for the life span of that plan. It would have been a very simple drafting exercise to preclude further subdivision of lots below a specified area (albeit that, in our opinion, such a condition could only have been imposed on an *Augier* basis as a Council cannot impose conditions that prevent parties from exercising their right to

seek consent under the RMA). Given that the quoted rule no longer has any legal effect and is not part of the (now) operative Rotorua District Plan, we consider that the clause is no longer legally or practically enforceable.

(c) The clause does not address all subdivision but only the creation of further "*lifestyle blocks*". The Watchman proposal does not involve the creation of any further "*lifestyle blocks*". Instead, it proposes an urban development which is a far more efficient use of land than the peri-urban sprawl caused by lifestyle block development. In that context, even if the clause is still in effect, the proposal is not contrary to its wording.

2. Clause 2 states (emphasis added), "*The owners and subsequent owners of Lot 2 DP 337743 are advised that any future public water supply to Lot 2 DP 337743 will have an allocation of 102m3 / quarter (1.13m3/day) from the 250 ϕ main in Ngongotaha Road. Any desired increase in this quantity will require an application to be made to Council*." Again, this clause is in the nature of an advice note rather than a condition or obligation requiring ongoing enforcement. Absent sufficient water supply, Watchman will practically be unable to develop the land for urban purposes. Our understanding is that Watchman has therefore made an application for additional water supply and in doing so is acting in accordance with the advice in the clause.

3. Clause 3 states (emphasis added), "*The owners and subsequent owners of Lot 2 DP 337743 are advised that a detailed investigation and report of the contaminated sludge and uncontrolled fill on Lot 2 DP 337743 shall be prepared by a suitable qualified and experienced person and submitted to the District Engineer for approval prior to any further development*". Once more, the language used is that of an advice note rather than a condition or obligation. Furthermore, our understanding is that Watchman has already commissioned a detailed investigation and report regarding the sludge and fill on the site. It has therefore complied with the advice contained in the clause.

4. In the circumstances, we do not consider it necessary for the consent notice to be removed from the title before any consent for the proposal may be granted or implemented. Nor do we consider that the consent notice raises any issues that should or reasonably could delay the processing of any resource consent application or compromise its implementation. In response to the question asked by the Ministry, we consider that:

   (a) It is open to a panel to grant resource consents for the project with the consent notice remaining in place;

   (b) Cancellation of the consent notice, while a logical step in the context of its content and events since 2004, is not a necessary pre-requisite to the grant or implementation of consent for the Watchman proposal; and

   (c) The applicant need not offer and the panel need not impose any consent conditions relating to the consent notice cancellation.

Yours faithfully
ELLIS GOULD

Douglas Allan
Partner / Solicitor

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