

10 August 2022

Central Hawkes Bay District Council
c/- The Property Group

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Attention: Ryan O'Leary

RM 220003 — Response to Questions 2, 15 and 16 of Further Information Request

1. This letter is a response to questions 2, 15 and 16 of the Council's Further Information Request dated 17 March 2022.

Question 2

2. Stages 1 and 2 of the subdivision (RM 180160) have now been completed and titles have been issued. A copy of the registered title plan is **attached**. A copy of the newly issued records of title are **attached**. All lots have been sold and transferred to their purchasers except for the following lots: 2, 6, 7, 8, 15, and 17.
3. We take this opportunity to note that all lots in stages 1 and 2 have given written approval to this application under s 104(3). Our basis for this conclusion is set out below.

Covenants agreed

4. Each of the lots in stages 1 and 2 are subject to land covenant 12415482.12 which is registered against each of the titles to the land. A copy of that covenant is **attached**.

5. An extract from that covenant is set out below with relevant passages highlighted:

Annexure Schedule	Page 2 of 2 Pages
<p style="text-align: right; margin: 0;">2015/5049 APPROVED Registrar-General of Land</p>	
<p><i>Insert instrument type</i></p> <p style="border: 1px solid black; padding: 2px;">Covenant instrument to note land covenant</p>	
<i>Continue in additional Annexure Schedule, if required</i>	
<p>INTRODUCTION</p> <p>A. The Covenantor is the owner of the records of title described as the Burdened Land in Schedule A.</p> <p>B. The Covenantee has been established for the purposes of owning maintaining and administering certain communal facilities on the Burdened Land and to control the design and development of any residential dwellings on the Burdened Land.</p> <p>C. Any person who shall be a owner from time to time of one or more of the records of title contained in the Burdened Land is required to become a member of the Paoanui Point Management Society Incorporated ("Society") and for so long as that person continues to be the owner of one or more of the records of title contained in the Burdened Land that person shall remain a member of the Society and abide by the rules of the Society.</p> <p>COVENANT</p> <p>1. The Covenantor covenants for itself (and it's successors in title) with the Covenantee, that upon becoming the owner of one or more of the records of title contained in the Burdened Land, the Covenantor shall join as a member of the Society and shall remain a member while the Covenantor is a owner of one or more of the records of title contained in the Burdened Land and shall continue to fulfill the obligations of a member as set out in the rules of the Society including, without limitation, ensuring that any transferee of one or more of the records of title contained in the Burdened Land executes a deed of covenant in favour of the Covenantee agreeing to be and remain a member of the Society while a owner of one or more of the records of title contained in the Burdened Land and to continue and fulfill the obligations of a member as set out in the rules of the Society.</p>	

6. A copy of the registered rules of the Society are **attached**. The relevant rule reads:

7.1 Future Development: The Members acknowledge that the development of Paoanui Point may be ongoing, and that the Society is required to allow the Developer such access to, and interests in, the Communal Facilities as are necessary or desirable for the development of Paoanui Point to proceed, and to allow the Developer to add, remove or alter structures and services forming part of the Communal Facilities, and to procure that its Members amend these Rules if such amendment is necessary or desirable for the development of Paoanui Point to proceed. Each Member agrees:

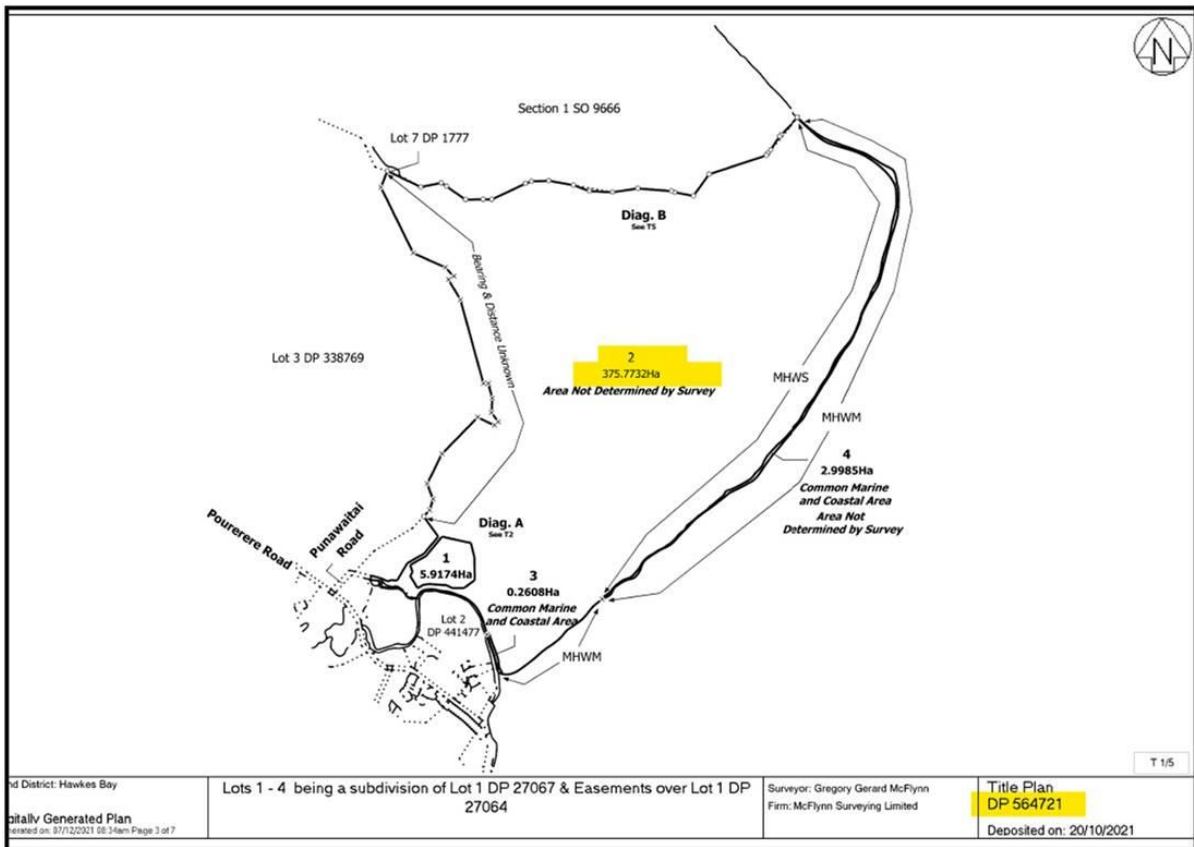
...

7.1.4 that neither the Member nor the Society shall oppose, or take part in any opposition to, the development of Paoanui Point or the Subdivision (including the subdivision and development of

7.1.5 to support any resolution to amend these Rules, where the Society is bound by agreement with the Developer, to procure such amendment; and

7.1.6 to support any resource consent application made by the Developer to subdivide and development Lot 2 on DP 564721 (being the Staged Development).

7. The lot referred to in rule 7.1.6 is the head lot to the subdivision project as depicted below:



8. For completeness, we note that each of the Agreements for Sale and Purchase (ASP's) for each of the lots sold in stages 1 and 2 contain the following clause (emphasis added):¹

22.8 The Purchaser acknowledges that the Property shall be subject to restrictive land covenants that shall be registered over the Property (Grantor) for the benefit of the Management Society ("Grantee") and those restrictive covenants shall also be registered over those other lots in the Subdivision and that form of the restrictive covenants shall include (among other things):

22.8.1 a reverse sensitivity covenant;

22.8.2 **agreement to consent to further development of record of title HBW3/400;**

22.8.3 a fencing covenant;

22.8.4 restrictions on land use;

22.8.5 an obligation to become and remain a member in the Management Society; and

22.8.6 an obligation to abide by the Rules of the Management Society.

9. For the reasons set out below, these covenants and agreements to covenant are written approval of this application by the purchasers and owners of the stage 1 and 2 lots for the purpose of section 104(3).

¹ Copies of the individual ASP's for each lot can be provided if required. However, given the commercial sensitivity of the ASP's, the applicant would seek an order under section 42 of the RMA to protect the content of the APS's before they are provided.

The Law

10. The following is a summary of the relevant law.

Resource Management Act 1991

11. The Resource Management Act 1991 (“**RMA**”) requires special treatment of persons who have given written approval to a resource consent application.

12. Section 104(3) states (emphasis added):

A consent authority must not, —

(a) When considering an application, have regard to—

...

*(i) Any effect on a person who has given **written approval** to the application:*

Coneburn Planning Ltd v Queenstown Lakes District Council

13. In *Coneburn Planning Ltd v Queenstown Lakes District Council*, the Environment Court considered the status of registered covenants.² The case concerned an application to subdivide a lot into 7 lots. Each lot adjacent to the lot proposed to be subdivided had a land covenant registered against its title. The covenants stated that the registered proprietors would not submit any planning, subdivision or development proposed by the appellant and would provide any necessary further written approval for any such planning proposal.
14. Queenstown Lakes District Council argued that any approval under section 104(3) had to be specific rather than generic, that such approval had to relate to an actual application and that the Council should not have to enquire into such land covenants.
15. The Environment Court rejected the Council’s arguments. The Court held that the wording of the covenant, not only obliged covenantees to give written approval, but was itself to be taken as written approval of the application under s 104(3).
16. The Court stated:
- I hold that authorising a general approval under section 104(3) RMA is consistent with the purpose of the RMA because both the procedural and substantive aspects of the efficiency theme may (and do here) outweigh the participatory theme.*

Synlait Milk Ltd v New Zealand Industrial Park Ltd

17. The decision in *Coneburn* has been cited with approval by the Supreme Court.³ The Court States:⁴

Resource Management Act 1991, s 104(3)(a)(ii). Synlait submitted the undertakings required it to give written approval to a resource consent application for a quarry. As we see it, the letter containing the undertakings is, itself, written approval: ... and Coneburn Planning Ltd v Queenstown Lakes District Council [2014] NZEnvC 267.

² *Coneburn Planning Ltd v Queenstown Lakes District Council* [2014] NZEnvC 267.

³ *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157

⁴ At footnote 86.

18. This reference, although brief show clear support of the decision. The Court held that a covenant in that case, not only required written approval to be given, but was itself written approval.
19. The clear consequence of these two cases is that a generic agreement to give written approval to certain classes of resource consent applications is itself approval for the purpose of section 104(3). No further action is required by the person making the agreement.

No Form Requirements

20. For completeness, we note that the Resource Management (Forms, Fees and Procedure) Regulations 2003 contain a Form 8A for “Affected person’s written approval to an activity that is the subject of a resource consent application”. For the reasons below, the presence of that form in regulations does not override the law summarised above that general covenants (and agreements to covenant) are affected party approval for the purpose of section 104(3):
 - a. Both regulation 9 and the form itself state that the relevant section of the Act is section 95E(3). That section relates only to “affected persons” for the purpose of notification decisions. It does not determine who is affected in terms of section 104(3).
 - b. Regulation 4 states: “Use of a form is not invalid only because it contains minor differences from a form prescribed by these regulations as long as the form that is used has the same effect as the prescribed form and is not misleading.”
 - c. Section 104 of the RMA imposes a general obligation on the Council to disregard any effects on all persons who have given written approval to the application. That general obligation is in primary legislation and cannot be overridden by secondary legislation.
21. The irrelevance of the form for the purpose of section 104(3) is confirmed by the fact that in both the *Coneburn* and *Synlait* cases, the written approvals in question bore no resemblance to the form in the regulation. Even so, the Court found that they were written approval for the purpose of section 104(3).

Relevance to this Application

22. The owners of each of the properties in stages 1 and 2 have each accepted the provisions of the covenant when they accepted title to the property. That covenant incorporates the rules of the society and therefore counts as affected party approval under section 104(3) applying the principles in *Coneburn* and *Synlait*.
23. As noted above, the purchasers have also signed contracts obliging them to accept the land covenants requiring them to agree to further development of the HBW3/400 (the head title for this application).
24. In our view, the effects of the purchasers under stage 1 and 2 of the development, and thus the effects of those lots must be disregarded under s 104(3).

Question 15

25. In response to question 15 of the information request, the communal facilities will be owned in shares in common by the owners of these stages of the subdivision lots to be sold. Each of

those lots will have a land covenant requiring them to be a member of an incorporated society and to comply with its rules.⁵

26. The rules of the society will allow the society to control and manage the communal facilities. It is also intended that the Society will enter into a management agreement with the owners to control and manage the communal facilities.
27. No consent conditions are proposed. This is consistent with the consent granted for the previous stages of the subdivision.

Question 16

28. In our view, it is not fanciful or incredible to develop 48 residential dwellings on a single land parcel at this location. One credible business model would be for the land owner to provide a visitor accommodation business through services such as Airbnb or Bookabach. The land owner would construct the individual dwellings on the lot and rent them to holiday visitors on short term contracts generating an income stream.
29. As visitor accommodation, such a business would be a permitted activity (provided it complies with the relevant standards)

Carrington Farms Cases

30. A similar situation was considered and found plausible in the *Carrington Farms* cases.
31. In *Te Runanga-A-Iwi O Ngati Kahu v Far North District Council* (also known as *Carrington Farms*),⁶ the Court considered an application for a subdivision of a lot into 12 lots. The applicant already possessed a land use consent for the construction of 12 residential units on the site corresponding to the 12 locations of the subdivision. The Environment Court was required to consider whether the land use consent was likely to be implemented and thus part of the environment.
32. The land owner argued that, if the subdivision failed, the land would be developed as a “farm park” under the land use consent.⁷ While the Court was initially sceptical, it ultimately accepted that it was likely that the land use consent would be implemented under the “farm park” proposal even if the subdivision consent was not granted.⁸ While this decision was initially overturned by the High Court, it was confirmed by a further appeal to the Court of Appeal.⁹
33. While the *Carrington Farms* cases related to the effect of resource consents on the environment rather than permitted baselines, the Case is still relevant to demonstrate the plausibility of the proposal to have multiple residential lots on a single rural lot.
34. It is worth noting that the Environment Court decision in *Carrington Farms* was made in 2010 when platforms such as Airbnb and Bookabatch were in their infancy. Since that time, the plausibility of the *Carrington Farms* scenario has increased significantly.

⁵ This society will not necessarily be the same society as for stages 1 and 2.

⁶ *Te Runanga-A-Iwi O Ngati Kahu v Far North District Council* [2010] NZEnvC 372.

⁷ At [101].

⁸ At [131] and [213].

⁹ *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221.

35. The applicant says that such an operation is a plausible permitted activity and its adverse effects should be disregarded.

Yours faithfully

GASCOIGNE WICKS



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