OVERSEAS INVESTMENT OFFICE

Land Information New Zealand
Toitū te whenua

Memorandum

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To:	Simon Pope, Manager Enforcement
From:	Jatin Mistry – Senior Investigator Nelson Curry – Senior Solicitor
Date:	25 May 2021
File Ref:	202000831
Subject:	**Administrative penalty of $20,000 for retrospective consent application post-investigation**
For Your:	**Approval**

Summary

1. s9(2)(a) Cambridge Homes NZ Limited (**Cambridge Homes**), have acted as an associate of Vishal Agarwal and Jagadeesh Kunda (**US Investors**) when they purchased residential (but not otherwise sensitive) land at 4 Cambridge Road, Manuwera (**Land**) for $1.37m on 29 September 2020 which was not conditional on OIA consent condition.

2. The breach of the Overseas Investment Act 2005 (the **Act**) appears to be inadvertent for the reasons set out below.

3. Our recommendation is that, if retrospective consent is granted by the Applications Team, an administrative penalty of $20,000 be imposed. The Applications Team have advised that the retrospective consent is likely to be granted.

Facts – why retrospective consent required

Background of the investigation

4. s9(2)(a) (NZ Citizen) signed an Agreement for Sale and Purchase (**ASP**) on 29 September 2020 for the Land, which was not conditional on OIA consent. On 29 November 2020, s9(2)(a) nominated Cambridge Homes NZ Limited (**Cambridge Homes**) and s9(2)(a) as purchasers and the Land was settled on 1 December 2020.

5. The Land is residential land (but not otherwise sensitive) and it is classified as sensitive land under Table 1, Part 1 of the Schedule 1 of the Act from 22 October 2018.

6. On 24 November 2020 Cambridge Homes (on behalf of Vishal Agarwal and Jagadeesh Kunda – US citizens and overseas persons under the Act) submitted an application under the increased housing pathway. The proposed development is to demolish the existing building on the Land and construct six new town houses.

7. This application was rejected at QA stage by OIO Application Team and the matter was referred to enforcement team on 7 December 2020 due to concerns that the ASP entered into by s9(2)(a) should have been subject to OIA consent condition.

8. We commenced an investigation into the transaction on the basis that NZ based persons acted as an associate of US investors.

9. s9(2)(a) was a key person who was in-charge of all matters relates to the Land, dealt with real estate agent, conveyancing and OIO application solicitors and communicated progress with US investors.

s9(2)(a) *and his legal advisor's view*

10. s9(2)(a) advised that he EITHER intended to buy the Land as a residential rental investment or his family development project OR development project with the US investors subject to obtaining OIA consent.

11. s9(2)(a) had received legal advice from Christina Lefever in relation to the purchase of Land and the proposed development. s9(2)(a) (and his legal advisor) maintains that he could acquire the Land as a NZ citizen and then subsequently invite US investors for the proposed development subject to obtaining OIA consent.

12. US investors will have no interest in Land prior to obtaining OIA consent.

13. s9(2)(a) was purchasing the land for his investment and not as an associate of US investors on or around 29 September 2020.

OIO view

14. Our view is that s9(2)(a) was acting as an associate of US investors (all together referred to as the **Parties**) within the terms of section 8(1)(c) and (d) for the purpose of this transaction.

15. Key reasons for this view include:

General intention to undertake joint property development

(a) The Parties began discussing property development investment in New Zealand approximately 7 to 9 months prior to s9(2)(a) entering the ASP for the property. The Parties also created WhatsApp group called "NZ investment" in February 2020.

(b) Communications between the Parties shows a common understanding that a property in New Zealand would be acquired for the purpose of a joint property development project.

Specific intention to acquire property together

(c) We consider the WhatsApp group chat history between the Parties show the purpose of seeking to purchase the property was undertaken jointly or in concert with, or as a consequence of an arrangement or understanding with the US Investors.

In particular:

(d) On 29 September 2020, s9(2)(a) bid in an auction for the property. The agreement for sale and purchase allowed nomination, which stated the nominee is, or by settlement will be, GST registered. s9(2)(a) was successful at auction and:

(i) Approximately six minutes after the auction concluded, s9(2)(a) sent a message to NZ investment group wishing to talk urgently to the US Investors in a half an hour. The parties appear to have spoken on the same day.

(ii) s9(2)(a) sent the US Investors the property related documents on the same day (29 September 2020).

(e) On 1 October 2020, the Parties engaged Ms Lefever as their lawyer to begin the preparation for the OIA consent process.

16. We consider this conduct demonstrates an associate relationship existed between the Parties. The Parties decided to pursue a joint property development venture, sought out and bid for suitable properties, and acquired a property for that project.

17. We do not consider the act of nominating Cambridge Homes NZ Limited and settling in jointly with s9(2)(a) detracts from that view.

Inadvertent breach the Act

18. We are satisfied that the Parties did not intend to entirely circumvent the Act. The Parties made an OIA consent application before the Land was settled.

19. We are satisfied that the Parties did not disguise their behavior and were upfront about their position from the beginning of the investigation.

20. The breach occurred due to narrow interpretation taken by s9(2)(a) and his legal advisor regarding the associates provisions in the Act. The Parties believed that their view and approach was compliant with the Act and they continue to maintain this view.

21. The Parties maintain that s9(2)(a) intended to secure the property for himself or his immediate family. However, the Parties have acknowledged that there is a lack of evidence to support his view.

22. OIO view is that this conduct has breached the Act based on the contemporaneous evidence provided to us and s9(2)(a) conduct shows that there was general intention to do property development with US investors. The Land purchase was part of their overall investment plan.

23. When view holistically, OIO is satisfied that the breach of the Act is inadvertent in nature being narrow interpretation of the Act by the Parties especially associates provisions of the Act.

24. The Parties were co-operative during the OIO investigation into the transaction. The Parties have no adverse compliance history.

25. The Parties have also promptly agreed they would convert their existing consent application to retrospective consent application on the basis that the Land acquisition required consent under the Act.

Assessment of appropriate penalty

26. In accordance with regulation 36 of the Overseas Investment Regulations 2005, the amount of the retrospective penalty is $20,000. I do not consider that requiring the applicant to pay this amount would be unduly harsh or oppressive given the nature of, and the reason for, the retrospective application. I discuss those matters in further detail below.

The Parties submission on penalty

27. The Parties submits that no administrative penalty should imposed because:

(a) The Parties do not hold evidence of their stated intention which could have resulted in different investigation outcome. s9(2)(a) maintains that they have not accepted OIO's views but are willing to resolve the matter in the absence of evidence in their support.

(b) s9(2)(a) co-operated with the investigation and have agreed to retrospective consent pathway to resolve the matters due to uncertainty with the investigation outcome and resulting delays in development and increased costs.

(c) The Parties had incurred additional costs resulting from the investigation and delays amounts to approximately 9(2)(b)(ii) (being 9(2)(b)(ii) per month interest and 9(2)(b)(ii) increase in construction costs and legal costs).

(d) The Parties acknowledge that one of the purposes for imposing penalty is to act as a deterrent.

(e) The investigation has already caused degree of stress, costs and timing implications (ie delays) which are sufficient deterrent for the Parties for any future property acquisitions in a similar manner.

(f) Given that there are differing views and increased costs already incurred, it would be unduly harsh then to impose retrospective penalty of $20,000.

28. See **Appendix 1** for Christina Lefever's full submission on the retrospective penalty dated 17 May 2021.

OIO view on penalty

29. We do not consider the applicant has identified or made out grounds that mean imposing an administrative penalty would be unduly harsh or oppressive given the nature of, and reasons for, the retrospective application.

30. The regulations provide a fixed penalty determined on the basis of consideration paid. The Parties paid $1.37 million for the Land. The quantum is set at $20,000.

31. The Parties embarked on a commercial venture together and acquired Land for $1.37m. The Parties intend to construct six houses, expecting to sell them at or above 9(2)(b)(ii) each, being revenue of at least 9(2)(b)(ii) (estimated cost is 9(2)(b)(ii)). The Parties stand to make a profit.

32. The Parties obtained legal advice about their obligations, including on the question of association for the purpose of the Act. The Parties have been unable to provide evidence to support their stated main intention. We consider an associate relationship did exist for the purpose of the Land.

33. Commercial activities carry regulatory risk. The regulatory risk has eventuated. The Parties have submitted the administrative penalty is unduly harsh or oppressive on the terms of r 36. As above, the reasons identified relate to stress, costs, and time delays associated with our investigation.

34. We do not consider the Parties have identified reasons that are relevant to this assessment. And, even if it were relevant, we do not consider they reach the threshold in the regulations.

35. In particular:

(a) The Parties have not suggested these factors were unusual or extraordinary, or resulted in excessive stress or harm. We would characterise this investigation as routine. Being stressed is a natural response to an investigation. Nothing on these facts suggests this should be forward as a mitigating factor in the assessment.

(b) s9(2)(a) [redacted]

The Parties argued and have continued to argue their position, but have been unable to provide direct evidence to support their views. We consider this confirms the reasons why we chose to investigate.

(c) The cost to the Parties of the delays has not been suggested to have a material impact on the financial position of the Parties, or that they are unable to pay or would suffer specific detriment as a result. The penalty is less than [redacted] of the estimated [redacted] total project cost. The information we have shows the Parties are individually and collectively in good financial positions and stand to gain from this investment. Nothing suggests imposing this penalty would be unduly harsh or oppressive from a financial standpoint.

36. As a result, I do not consider that requiring the applicant to pay this amount would be unduly harsh or oppressive given the nature of, and the reason for, the retrospective application.

Recommendation

37. I recommend that the Regulator impose an administrative penalty of $20,000. I do not consider the amount to be unduly harsh or oppressive having regard to the value of the consideration paid for the Shares, or the nature of, and the reasons for, the retrospective consent.

s9(2)(a)

Agree: X

Disagree:

Simon Pope
Manager Enforcement

Date: 26/05/2021