

**Decision required under the Overseas Investment Act 2005: Colin David Rath**

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<b>Date</b>	19 January 2018
<b>Security Level</b>	Commercial: In Confidence
<b>Priority</b>	High
<b>Case Number</b>	201720030
<b>Decision Required By</b>	As soon as possible

**Contact for Telephone Discussion**

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<b>Name</b>	<b>Position</b>	<b>Telephone (wk)</b>	<b>Cellphone</b>	<b>First Contact</b>
Lizzie Barone	Manager Applications	[REDACTED]	[REDACTED]	✓
[REDACTED]	Advisor	[REDACTED]		

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## Executive Summary:

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1. Colin David Rath ("**Applicant**") seeks to acquire a freehold interest in approximately 28.74 hectares of farm land at 244-246 Georges Road, Waipara, Canterbury ("**Land**"), which contains an established vineyard, residence, tasting room, café, B&B and wine manufacturing equipment ("**Investment**").
2. **We recommend that consent is granted to the transaction.**
3. This is a permanent residency based application. The Applicant is a citizen of the United States who has been granted an entrepreneur work visa by Immigration New Zealand. The Investment is his pathway to obtain a residence class visa in approximately two years.

## Good Character

4.



5. Overall we remain satisfied that the individuals with control of the relevant overseas person are of good character. Our analysis of the good character criterion in relation to these matters and the Applicant's submissions in relation to them are discussed at paragraph 27-28.

## Instructions

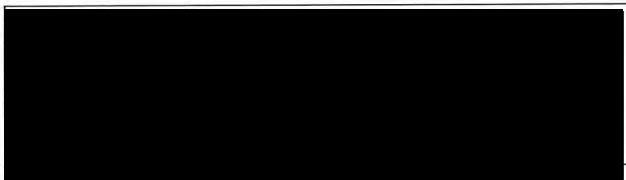
6. Please see **Appendix 2** for instructions on how to make a decision and guidance on the relevant factors and criteria for consent.

## Decision:

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7. I have determined that:
  - (a) the '**relevant overseas person**' is (collectively) Colin David Rath; and Waipara Winds Limited (company number 6153095).
  - (b) the '**individual with control of the relevant overseas person**' is Colin David Rath.
8. I am satisfied that the criteria for consent in section 16 have been met:
  - (a) the individual with control of the relevant overseas person has business experience and acumen relevant to the overseas investment; and
  - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment; and
  - (c) the individual with control of the relevant overseas person is of good character; and
  - (d) the individual with control of the relevant overseas person is not an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009; and
  - (e) the individual with control of the relevant overseas person is intending to reside in New Zealand indefinitely; and

- (f) the farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedure set out in regulations.
9. Consent is granted to the overseas investment in the form of the Proposed Decision in Appendix 1 and subject to the conditions set out in the Proposed Decision.



Lizzie Barone – Manager Applications

Date

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Report of the Overseas Investment Office  
on the application for consent by  
Colin David Rath  
Case: 201720030

**Contents**

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WHAT IS THE INVESTMENT? ..... 5

WHO IS MAKING THE INVESTMENT..... 6

DOES THE APPLICANT MEET THE INVESTOR TEST CRITERIA? ..... 7

DO THE INDIVIDUALS INTEND TO LIVE IN NZ INDEFINITELY? ..... 10

HAS THE FARM LAND BEEN OFFERED ON THE OPEN MARKET? ..... 11

CONSENT CRITERIA ..... 11

THIRD PARTY SUBMISSIONS..... 11

APPENDIX 1 - PROPOSED DECISION..... 13

APPENDIX 2 - INSTRUCTIONS..... 17

APPENDIX 3 - SENSITIVE LAND ..... 18

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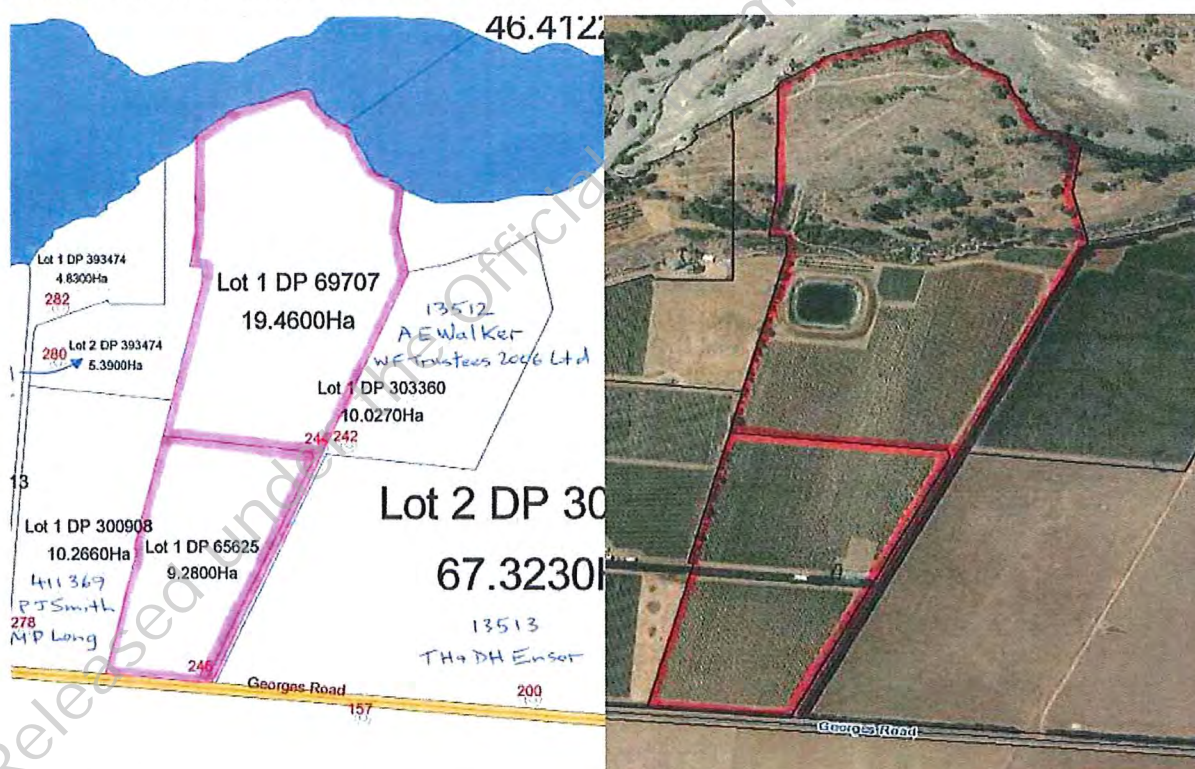


## What is the Investment?

<b>Applicant</b>	<b>Colin David Rath</b> (United States of America 100.0%)
<b>Vendor</b>	<b>Dancing Water Holdings Limited</b> (New Zealand 100.0%)
<b>Consideration</b>	
<b>Recommendation</b>	Grant Consent

## Description of the Investment

- Colin David Rath ("**Applicant**") has applied for consent to acquire a freehold interest in an area of approximately 28.74 hectares of non-urban land at 244-246 Georges Road, Waipara, Canterbury ("**Land**"), which contains an established vineyard, residence, tasting room, café, Bed & Breakfast and wine manufacturing equipment ("**Investment**").
- A map and an aerial photo of the Land are outlined in red as below:



- Comprised in two titles, the Land is on a lower terrace adjacent to the Waipara river, and it is about 55 minutes' drive from Christchurch via State Highway One.
- The Investment is the vehicle for Mr Rath and his family to obtain a residence class visa in New Zealand in approximately two years through the entrepreneur pathway.
- Mr Rath entered into a sale and purchase agreement ("**Agreement**") with the vendors to acquire the Land on 21 October 2016, and the Agreement is conditional on consent under the Overseas Investment Act 2005 ("**Act**").

6. On 17 October 2016 Mr Rath signed a renewable short-term lease and a periodical tenancy agreement for the existing vineyard and associated buildings on the Land, so that he could reside and operate the vineyard and associated businesses on the Land until the settlement of the Investment ("**Lease**").

7.

### Vendors

8. Dancing Water Holdings Limited ("**Vendor**") is a New Zealand incorporated company 100% controlled by its director Ross Trowsdale. The C+R Family Trust holds 99.8% shares in the Vendor, with all trustees and beneficiaries (including Ross Trowsdale) being citizens or ordinarily residents of New Zealand.
9. Before the Lease was signed with the Applicant, the Vendor was operating the vineyard on the Land. The Vendor also produced wine under several labels with grapes grown and purchased in the region, and sold wine in New Zealand commercial outlets.

### Reasons for Sale

10.

11.

### Sensitive Assets

12. The Land is sensitive as it is non-urban land exceeding 5 hectares. Please see **Appendix 3** for details. We note part of the Land is adjacent to the Waipara river and is special land; however as this is a permanent residency based application, there is no requirement to offer back special land.
13. The Land has been used for vineyard and associated tourism and grape/wine selling businesses, and will continue to be used for the same purposes after the completion of the Investment.

## Who is making the Investment

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### Applicant

*Who the Applicant is*

14. Being a citizen of the United States of America ("**the US**"), Mr Rath is an overseas person under the Act. He has been granted an entrepreneur work visa in New Zealand, and intends to obtain a residence class visa in New Zealand in two years under the entrepreneur pathway.
15. Mr Rath plans to acquire the Land through his company Waipara Winds Limited (company number 6153095) ("**Waipara Winds**") which was registered in New Zealand on 7 November 2016.

*Who owns the Applicant*

16. Mr Rath is the 100% shareholder of Waipara Winds, the nominated acquirer of the Investment.

*Who controls the Applicant*

17. Mr Rath is the sole director of Waipara Winds, and is the only person who has control of the Investment by providing all funding and business experience required.
18. Following the Investment, through his company Waipara Winds Mr Rath will be the only person responsible for the management of the vineyard and associated businesses.

**Relevant Overseas Person**

19. We have determined that the '**relevant overseas person**' is
  - **Waipara Winds Limited**, being the nominated acquirer of the Investment; and
  - **Colin David Rath**, being the 100% owner of the Applicant

**Individuals with Control**

20. We have determined that the '**individual with control of the relevant overseas person**' is **Colin David Rath**, as he is the sole director of the Applicant and the only decision maker of the Investment.

**Business Activities**

21. Since the Lease was signed in October 2016, Mr Rath has been operating the vineyard and properties on the Land through his 100% owned and controlled company New York Grape Escape Limited ("**NY Grape**") (company number 6153128) which was incorporated on 7 November 2016 in New Zealand. Mr Rath submits that NY Grape will be dismissed prior to the Investment. Grapes from the Land have been sold to wine making contractors.
22. Following the Investment, Mr Rath will operate the vineyard and associated businesses on the Land through Waipara Winds, and will continue to supply grapes to local wine makers. He also intends to rejuvenate the vineyard, tasting room, café, B&B, and the French style residence in order to create a tourist destination in the Waipara region for both locals and international travellers.

**Does the Applicant meet the Investor Test criteria?**

**Business Experience s16(1)(a)**

The relevant overseas person, or the individuals with control of the relevant overseas person, must have business experience and acumen relevant to the overseas investment. There is considerable flexibility in determining what is relevant and more or less specific expertise may be required depending on the nature of the investment. Business experience and acumen that contributes to an investment's success may be treated as relevant even though the investor may have to supplement its experience and acumen by utilising the experience and acumen of others to ensure the investment succeeds.

23. The overseas investment can be described as the acquisition of an estate with an operational vineyard and associated businesses located on it.
24. We have reviewed the information provided by the Applicant and note that:
  - Mr Rath submits that he has over 30 years' experience in marketing and real estate development in the US.



- Mr Rath has been operating the vineyard and associated businesses on the Land for nearly a year, and will remain a full time manager on site following the Investment.
  - He has engaged professionals to work full time on the vineyard and for the associated businesses.
25. Having regard to the above, we are satisfied that the relevant overseas person has business experience and acumen relevant to the overseas investment.

**Financial Commitment s16(1)(b)**

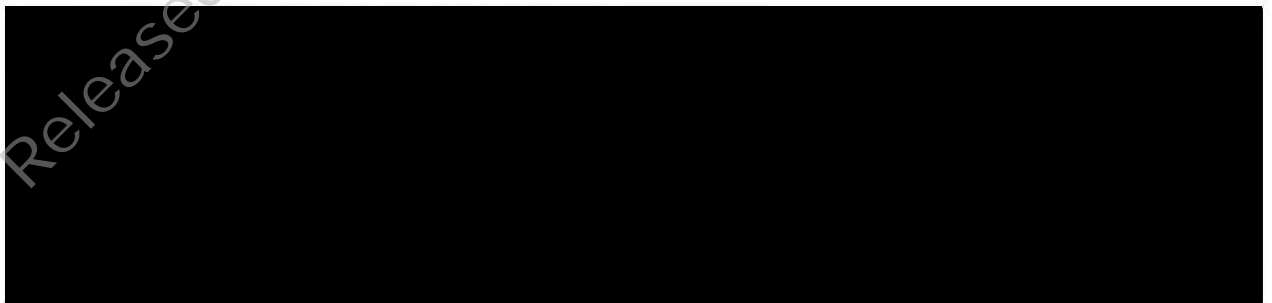
The financial commitment criterion requires the relevant overseas person to have taken actions that demonstrate financial commitment to the overseas investment.

26. We are satisfied that the relevant overseas person has demonstrated financial commitment by:
- entering into the Agreement to purchase the Land;
  - paying the deposit required by the Agreement; and
  - engaging professional advisers.

**Good Character s16(1)(c)**

The decision maker must be satisfied that the individuals with control are of good character. Section 19 of the Act specifies that the decision maker must take the following factors into account (without limitation):  
(a) offences or contraventions of the law by A, or by any person in which A has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not);  
(b) any other matter that reflects adversely on the person's fitness to have the particular overseas investment.

27. The Applicant has provided statutory declarations stating that he is of good character, has not committed an offence or contravened the law as described above, and knows of no other matter that reflects adversely on his fitness to have the Investment. We are satisfied that the statutory declarations can be relied on as they comply with the requirements of the Oaths and Declarations Act 1957.
28. We have also conducted open source background checks on Mr Rath. [REDACTED] Mr Rath has also provided information in relation to good character. Below is a summary and our assessment relating Mr Rath's good character which have been considered under the criterion set out in section 19 of the Act.







Therefore, we are satisfied that the individual with control is of good character.

**Immigration Act s16(1)(d)**

Section 15 of the Immigration Act specifies that certain convicted or deported persons are not eligible for a visa or permission to enter or be in New Zealand. Section 16 provides a power to deny a visa or permission to enter New Zealand for other specified reasons, such as if the individual is likely to be a threat or risk to security or public order.

29. The Applicant has provided statutory declarations stating that Mr Rath is not an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009. We are satisfied that the statutory declarations can be relied on as the Applicant complies with the requirements of the Oaths and Declarations Act 1957. We have also conducted open source background checks on this individual and found nothing relevant to this criterion.
30. Therefore, we are satisfied that the individual who comprises the relevant overseas person is not individual of the kind referred to in section 15 or 16 of the Immigration Act 2009.

## Do the individuals intend to live in NZ indefinitely?

### Intention to reside in New Zealand indefinitely - s16(1)(e)(i)

The Ministerial Directive Letter states that an intention to reside in New Zealand indefinitely must involve a definite plan and accompanying actions. In determining whether a person is intending to reside indefinitely, the regulator must consider any active steps that have been taken by the investor to actually reside in New Zealand.

In order for this criterion to apply, the Applicant will generally:

- hold a residence class visa or an entrepreneur work visa; and
- show actions and plans, with supporting evidence, consistent with an intent to reside in New Zealand within 12 months.

#### *Residence class visa or entrepreneur work visa*

31. Mr Rath has been granted an entrepreneur work visa in principle when this application was lodged, and has since been issued such a visa. He submits that he is likely to get permanent residency if he resides in New Zealand for two more years and runs the proposed businesses successfully (being the rejuvenation of the vineyard and associated tourism and grape/wine selling businesses on the Land).

#### *Actions and plans consistent with an intent to reside in New Zealand within 12 months*

32. Mr Rath and his family have been living in the residence on the Land since November 2016.
33. Mr Rath has been operating the vineyard and associated businesses on the Land since he signed the Lease in October 2016.
34. He intends to remain in New Zealand and operate the vineyard and associated businesses for another two years until he obtains a residence class visa under the entrepreneur pathway.
35. Mr Rath have undertaken other actions consistent with an intention to reside in New Zealand in the near future, including:
- Entering the Agreement and the Lease for the estate and associated businesses;
  - Enrolling three children at local schools, e.g. the Waipara primary PTA;
  - Purchasing two family cars and installing two electric car chargers in the Bistro parking;
  - Shipping a 20-foot container of possessions to New Zealand in September 2017; and
  - Selling his yacht and transferring private funds from the US to New Zealand.
36. The Applicants have also provided details of further actions that it intends to take in the future that are consistent with an intention to reside in New Zealand including:
- Mr Rath intends to rejuvenate the vineyard and renovate the associated buildings within three years from date of the consent;
  - Mr and Ms Rath will work full time on the Land to run the proposed businesses for three years; and
  - Mr Rath is in the process of acquiring the exclusive contract to be agent for Art Battles [www.artbattles.com](http://www.artbattles.com) for New Zealand, and to present its events on the vineyard and major cities in New Zealand.

37. On the basis of the above information, we are satisfied that the individual who comprises the relevant overseas person intends to reside in New Zealand indefinitely.
38. We recommend conditions of consent be imposed requiring the Applicants to cease to be an overseas person in New Zealand within three years of the date of consent, and to dispose of the property if they fail to meet this requirement.

## **Has the farm land been offered on the open market?**

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### **Farm land advertising - s16(1)(f)**

The Regulations require farm land or farm land securities to be offered for acquisition on the open market to non-overseas persons for at least 20 working days (or longer if the advertisement states or implies that offers will be accepted for that longer period). The purpose of such advertising is to ensure non-overseas persons have reasonable notice that they are available for acquisition. The Regulations do not require that the vendor accept any alternative offer made by a non-overseas person.

39. The Land was extensively advertised on mass media by Harcourts for approximately three months before the Agreement was entered into. The advertisements were first targeting existing operators in the wine industry in New Zealand and then potential overseas buyers.
40. We have reviewed the advertising of the Land, and are satisfied that it complies with the advertising procedure set out in the Regulations.

### **Consent criteria**

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41. As detailed above, we are satisfied that the criteria in section 16 are met, and therefore consent should be granted to the Investment.

### **Third Party Submissions**

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42. No third party submissions were received.

## Appendices

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APPENDIX 1 -	PROPOSED DECISION.....	13
APPENDIX 2 -	INSTRUCTIONS.....	17
APPENDIX 3 -	SENSITIVE LAND .....	18

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## **Appendix 1 - Proposed Decision**

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**Notice of Decision**

**Case: 201720030**

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**Decision Date**

19 January 2018

**Decision**

Consent is granted to **Waipara Winds Limited** to acquire a freehold interest in approximately 28.74 hectares of farmland at 244-246 Georges Road, Waipara, Canterbury.

Only the named consent holder may give effect to the investment, not a subsidiary of the consent holder, a trust, or other entity.

Consent is granted subject to the following conditions:

**Statutory Conditions of Consent**

Section 28 of the Overseas Investment Act 2005 ("**Act**") provides that it is a condition of every consent, whether or not it is stated in the consent, that:

- (a) the information provided by each applicant to the Overseas Investment Office or the relevant Ministers in connection with the application was correct at the time it was provided; and
- (b) each consent holder must comply with the representations and plans made or submitted in support of the application and notified by the Overseas Investment Office as having been taken into account when the consent was granted, unless compliance should reasonably be excused.

For the purposes of section 28(1)(b), the representations and plans made or submitted in support of the application and taken into account when consent was granted are those contained in the correspondence listed in the statutory declaration of Colin David Rath on 16 January 2018 and in all attachments annexed to that correspondence.

**Special Conditions**

Interpretation

Any term or expression that is defined in the Overseas Investment Act 2005 and used, but not defined, in this consent has the same meaning as in the Overseas Investment Act 2005.

**Act** means the Overseas Investment Act 2005.

**Application** means the final version of the application dated 8 August 2017.

**Consent Holder** means Waipara Winds Limited (company number 6153095).

**Individuals with Control** means Colin David Rath.

**Investment** means the Land.

**Land** means a Freehold Interest in approximately 28.7400 hectares at 244-246 Georges Road, Waipara, Canterbury, being land comprised in the computer freehold registers CFR CB40C/475 and CFR CB41A/409 (Canterbury).

**OIO** means the Overseas Investment Office.

**Regulations** means the Overseas Investment Regulations 2005.

**Settlement Date** means the date the acquisition of the Investment took place.

Special Conditions

*When the transaction must be given effect to*

1. The consent will lapse if the Investment has not been acquired by and transferred to the Consent Holder within 12 months of the date of consent.

*Good character*

2. The Individuals with Control must:
  - (a) continue to be of good character; and
  - (b) not become an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009.

*Residency requirement*

3. For the period from the date of consent until he ceases to be an overseas person, Colin David Rath must live in New Zealand and be present in New Zealand for not less than 183 days in any 12 month period that this condition has been complied with.
4. By June 2020, Colin David Rath must submit an application for a residence class visa to Immigration New Zealand and provide the OIO with evidence that this condition has been complied with.
5. By 30 June 2021, Colin David Rath must:
  - (a) possess a residence class visa and provide the OIO with evidence that this condition has been complied with;
  - (b) cease to be an overseas person (as defined in section 7 of the Act); and
  - (c) provide a statutory declaration to the Overseas Investment Office stating that Colin David Rath has ceased to be an overseas person, and why Colin David Rath has ceased to be an overseas person.

*Reporting to the OIO*

6. The Consent Holder must notify the OIO in writing as soon as practicable, and no later than 12 months from the date of consent, whether settlement of the acquisition of the Investment took place. If settlement of the acquisition of the Investment did take place, the notice must include:
  - (a) the Settlement Date;
  - (b) final consideration paid (plus GST, if any);
  - (c) the structure by which the acquisition was made, and who acquired the Investment;
  - (d) where applicable, copies of transfer documents and settlement statements; and
  - (e) any other information that would aid the OIO in its function to monitor conditions of consent.
7. The Consent Holder must notify the OIO in writing within 20 working days if:
  - (a) the Consent Holder, any Individual with Control, or any person in which the Consent Holder or any Individual with Control has, or had at the time of the offence or contravention, a 25% or more ownership or control interest, commits an offence or contravenes the law (whether convicted or not); or

- (b) any Individual with Control:
    - (i) ceases to be of good character; or
    - (ii) commits an offence or contravenes the law (whether convicted or not); or
    - (iii) becomes aware of any other matter that reflects adversely on an Individual with Control's fitness to have the Investment; or
    - (iv) becomes an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009;
  - (c) the Consent Holder:
    - (i) becomes an overseas person; or
    - (ii) disposes of the Investment.
8. If requested in writing by the OIO, the Consent Holder must provide a written report within 20 working days (or such other timeframe as specified) on any matter relating to its compliance with:
- (a) the representations and plans made or submitted in support of the application and notified by the regulator as having been taken into account when the consent was granted; or
  - (b) the conditions of this consent.

#### *Disposal Process*

9. If in the opinion of the OIO condition 3, 4, or 5 is not complied with, or if Colin David Rath becomes an overseas person again within 5 years of ceasing to be an overseas person, ("**Non-Compliance**") the Consent Holder must dispose of the Investment as follows:
- (a) The Consent Holder must, within 6 weeks of receiving notice from the OIO that in its opinion there has been Non-Compliance (the "**Notice Date**"):
    - (i) procure from an independent New Zealand registered valuer, and provide to the OIO, a written market valuation of the Investment; and
    - (ii) appoint licensed real estate agents to actively market and appropriately advertise the Investment for sale on the open market; and
  - (b) The Consent Holder must dispose of the Investment within 12 months of the Notice Date to a third party who must not be an associate of the Consent Holder. If the Consent Holder has not disposed of the Investment at the expiry of the 12 month period, the Consent Holder must offer the Investment for sale by auction or tender within a further three months (with no reserve price or minimum bid set for the auction or tender) and dispose of the Investment.
  - (c) The Consent Holder must provide a written report to the OIO quarterly (by the last day of March, June, September and December) about the marketing activities undertaken and offers received for the Investment. The Consent Holder must also report at any other time if required by the OIO.
  - (d) The Consent Holder must provide a written report to the OIO within two months of the Investment being disposed of, providing evidence that:
    - (i) the Consent Holder has disposed of the Investment (including copies of any sale and purchase agreements, settlement statements and titles showing the purchaser as registered proprietor); and
    - (ii) the purchaser is not an associate of the Consent Holder.

## Appendix 2 - Instructions

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10. The regulator is required to grant consent in respect of this application if it is satisfied that all of the criteria in section 16 of the Overseas Investment Act 2005 (“the Act”) are met. The regulator must decline consent if it is not satisfied that all of the criteria in section 16 are met. The regulator must not take into account any criteria other than those identified in section 16.
11. For completeness, it is noted that this Application is being assessed under section 16(1)(e)(i) on the basis that the relevant overseas person intends, or all the individuals with control of the relevant overseas person intend, to reside in New Zealand indefinitely. Therefore, there is no requirement to demonstrate the Investment will, or is likely to, benefit New Zealand or that that benefit will be, or is likely to be, substantial and identifiable (a requirement of section 16(1)(e)(ii)-(iii) of the Act). Accordingly, the decision of *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147, insofar as it found that benefits must be assessed using a with or without approach rather than a before and after approach, is not relevant to the Application.
12. In the attached report the Overseas Investment Office addresses the criteria that the regulator is required to consider in this case.

### Conditions

13. Conditions may be imposed on any consent that is granted, under section 25. The attached Report recommends some conditions that you may wish to consider imposing in this case.

### Decision

14. The decision that you are required to make should be based on information available to you that you consider is sufficiently reliable for that purpose. The information that the Overseas Investment Office has taken into account in making its recommendation is summarised in the attached Report.

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## Appendix 3 - Sensitive Land

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1. Waipara, Canterbury

<b>Land Interest</b>	<b>Freehold Interest</b> (approximately 28.7400 hectares)
<b>CTs</b>	CFR CB40C/475, CFR CB41A/409 (Canterbury)
<b>Sensitivity</b>	Is more than 5 hectares of non-urban land
	Includes the foreshore or seabed or riverbed

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