

5 December 2022

Simeon McLean  
Far North District Council

*BY EMAIL*

**2220163-RMACOM 104 Matai Bay Road**

1. You have asked for my advice on:
  - a. The activity status of this application, lodged on 2 September 2021; and
  - b. The relevance of Subdivision General Rule 13.6.8 to the application.
2. In my opinion:
  - a. The correct activity status of the subdivision at the time of lodgement on 2 September 2021 was non-complying under District Plan Rule 13.11 as a consequence of not meeting Rule 13.7.2.1 (Minimum Lot Sizes).
  - b. The non-complying activity status of the lot sizes has since changed as a result of the agreement reached with Council earlier this year that the development can be serviced. This scenario is governed by s88A(1)(b)(iii) of the Resource Management Act 1991 (**RMA**).
  - c. Section 88A(1A) requires the Council must continue to process, consider and decide the application as a non-complying activity.
  - d. It cannot agree otherwise. While the Development Agreement suggests the application is to be processed as a Controlled Activity under the District Plan, clause 19 is clear that the agreement was signed in Council's non-regulatory capacity only and is not binding in any way on Council in its regulatory capacity. It can therefore be put to one side.
  - e. While consent is also now required under any applicable rules in the Proposed District Plan that have immediate legal effect,<sup>1</sup> this does not change the activity status.
  - f. There is no limitation to or restriction on the effects that the Council can consider during its processing of the application, provided:
    - i. they fall within the ambit of the Council's functions under s31 of the RMA; and
    - ii. they could not arise, as of right, by the exercise of extant consents issued by Northland Regional Council (provided those NRC consents can be exercised in the absence of any FNDC consents).

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<sup>1</sup> I note these rules are not "operative" but have legal effect.

- g. The effects of vegetation clearance are clearly relevant. Rule 13.6.8 provides that:
  - i. Vegetation clearance can proceed in advance of subdivision if consented under Sections 12.1 or 12.2;
  - ii. Vegetation clearance can proceed as part of subdivision provided the requisite assessment of effects is provided with the subdivision application;
  - iii. Otherwise a separate land use consent is required;
  - iv. This is additional to any requirements of NRC.
  
- 3. I also wish to record that on the basis of the information currently available to me:
  - a. It is possible that the proposal is also a non-complying activity under the land use rules in the National Environmental Standards for Freshwater.
  - b. I agree with the view expressed in the section 92 request that the application should be “bundled” such that the non-complying activity status applies to the entire application.
  - c. The refusal to provide the further information requested under s92 will lead to the application being fully publicly notified as required by s95C of the RMA.
  - d. There appear to be grounds to defer processing under s91 of the RMA until such time as all land use consent applications are lodged. This would be prudent given the history of litigation arising from this applicant’s previous consenting strategies.
  - e. Regardless, it would seem sensible for FNDC and NRC to jointly hear and consider the applications (as enabled by s102 RMA, and envisaged by Rule 13.6.11).

Kind regards



**Bronwyn Carruthers KC**