



## FINANCIAL MARKETS AUTHORITY

TE MANA TATAI HOKOHOKO - NEW ZEALAND

# Securities Act (Benvale Park Limited) Exemption Notice 2013

Pursuant to section 70B of the Securities Act 1978, the Financial Markets Authority gives the following notice (to which is appended a statement of reasons of the Financial Markets Authority).

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### Notice

- Title**

This notice is the Securities Act (Benvale Park Limited) Exemption Notice 2013.
- Commencement**

This notice comes into force on 13 April 2013.
- Revocation**

This notice is revoked on the close of 30 September 2017.
- Interpretation**

(1) In this notice, unless the context otherwise requires,—  
**Act** means the Securities Act 1978  
**Benfield Family Trust** means the trust by that name established by deed dated 1 April 1996  
**communal facilities** means all land, ponds, wetlands, natural and landscaped features, including walkways and any other amenities within Benvale Park described as Lot 20 being part of Lot 35 DP 405390 as shown as Rotorua District Council Resource Consent Number RC13422 02 and owned, leased, maintained or otherwise held or operated by Benvale Park Limited for use by owners or

occupiers of developed properties, by invitees, or by certain classes of those persons

**computer register** means—

- (a) a computer register within the meaning of section 4 of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002; or
- (b) a certificate of title issued under the Land Transfer Act 1952 or the Unit Titles Act 1972

**controlling entity** means a person that—

- (a) is the developer or an associated person, or agent, of the developer; and
- (b) has the power, directly or indirectly, to—
  - (i) exercise, or control the exercise of, the rights to vote attached to 50% or more of the voting securities of the specified entity; or
  - (ii) effectively control the activities of the specified entity in respect of the developed properties or the communal facilities (or both)

**developed property** means a property within the development for which a computer register has been or will be issued or created, as part of the process of development,—

- (a) for an estate in fee simple or a leasehold estate under the Land Transfer Act 1952; or
- (b) for a stratum estate under the Unit Titles Act 1972

with the exception of any property comprising the land in proposed Lot 20 being part of Lot 35 DP405390 as shown on Rotorua District Council Resource Consent Number RC13422 02 (South Auckland Land Registry)

**developer** means—

- (a) the trustees for the time being of the Benfield Family Trust; and
- (b) includes any assignee or successor in title of Benfield Family Trust (in whole or in part) that continues the promotion and carrying out of the proposed development

**development** means Lots 23-27 DPS70519, Lots 8-10 and 14-17 DPS81034, Lots 1 and 2 DP311013, Lots 15-18 DP327261 and Lots 31 and 32 DP405390 together also with the proposed Lots 1-4, 7, 10-20 and 24 being parts of Lot 35 DP405390 as shown on Rotorua District Council Resource Consent Number RC13422 02 (all such land being in the South Auckland Land Registry)

**lease**, in relation to the lease of land by a specified entity of communal facilities within a development, means lease pursuant to a memorandum of lease registered under the Land Transfer Act 1952

**offer** means the offer of specified securities to the public

**owner of a developed property** means a registered proprietor of a fee simple, leasehold, or stratum estate in a developed property

**Regulations** means the Securities Regulations 2009

**rules** means the constitution of the company

**sale agreement** means an agreement for the sale of a fee simple, leasehold, or stratum estate in a developed property adopted or entered into by a developer as vendor

**settlement** includes, in relation to a sale of a leasehold estate in a developed property, taking possession under the lease

**shareholder** means a shareholder of Benvale Park Limited

**specified entity** or **company** means Benvale Park Limited, a company incorporated under the Companies Act 1993 that—

- (a) owns, leases, licenses, maintains, administers, or operates the communal facilities in whole or in part; or
- (b) will own, lease, license, maintain, administer, or operate the communal facilities in whole or in part

**specified security** means a share in the company.

- (2) In this notice, unless the context otherwise requires, a reference to the completion of the development is a reference to the time when—
  - (a) all of the physical works in connection with the development have been completed; and
  - (b) all relevant computer registers for developed properties have been issued or created; and
  - (c) all required code compliance certificates for the development have been issued under the Building Act 2004.
- (3) Any term or expression that is defined in the Act or the Regulations and used, but not defined, in this notice has the same meaning as in the Act or the Regulations.

## 5 Exemptions

Every developer, the specified entity, and every person acting on behalf of either or both of them is exempted from sections 33(3), 37, 37A, and 54 of the Act and the Regulations (except regulation 23) in respect of specified securities of which the developer or specified entity is an issuer.

## 6 Conditions

The exemptions in clause 5 are subject to the conditions that—

- (a) subscribers for specified securities have, before subscription, received from the developer a copy of each of the following documents:

- (i) the rules and any agreement for the management of the specified entity's affairs:
  - (ii) a specimen of all deeds or agreements providing for the transfer of communal facilities from the developer to the specified entity or for the lease or licence of communal facilities by the specified entity:
  - (iii) if the subscriber is not the owner of a developed property, a specimen of the sale agreement:
  - (iv) a specimen of all material instruments that will be executed by subscribers for specified securities, deeds, or agreements that contain provisions concerning the rights and obligations referred to in paragraph (b)(vii); and
- (b) subscribers for specified securities have, before subscription, received from the developer a document that sets out—
- (i) a description of the areas of land that make up the development:
  - (ii) a description of the communal facilities that are intended to be owned, leased, licensed, maintained, administered, or operated in whole or in part by the specified entity at the completion of the development:
  - (iii) a statement that all the physical works in connection with the development of the communal facilities have been completed:
  - (iv) when the communal facilities are intended to be transferred, leased, or licensed to the specified entity:
  - (v) the material risks of those communal facilities not being transferred, leased, or licensed to the specified entity at the intended time:
  - (vi) a statement as to what stage the development is at, or expected to be at, at the end of each calendar year within the period beginning on the date of commencement of the development and ending on the estimated date of the completion of the development:
  - (vii) a description of the rights and obligations of shareholders of the specified entity in relation to the communal facilities and the specified securities:
  - (viii) a description of the voting rights of the subscriber, as a shareholder of the specified entity, in respect of the specified securities (including a statement as to whether the rules provide for voting by classes of



- shareholders, or by a representative, in relation to particular matters); and
- (c) subscribers for specified securities have, before subscription, received from the developer a statement of levies, fees, or charges payable by shareholders of the specified entity in relation to the communal facilities for each calendar year in the period beginning on the date of commencement of the development and ending on the estimated date of the completion of the development that—
    - (i) comprises estimates, historical data, or both;
    - (ii) contains a statement as to whether the levies, fees, or charges payable are fixed, variable, or based on the capital value of the developed property;
    - (iii) contains, if a levy, fee, or charge is variable, a statement of the factors that influence how the levy, fee, or charge can vary;
    - (iv) contains, if a levy, fee, or charge is based on the capital value of a developed property, a statement of a formula by which the levy, fee, or charge can be calculated, together with a worked example;
    - (v) contains a statement of the principal assumptions on which any estimates are based;
    - (vi) contains a statement as to whether the estimates have been reviewed by an independent third party acting in his or her professional capacity or consist only of the expression of an opinion of the developer; and
  - (d) it is a term of the offer that the rules provide that the specified securities may be subscribed for by entering into an agreement to purchase a developed property if the subscriber is not the owner of a developed property and, if the subscriber is the owner of a developed property, by completing an application form attached to an offer document which includes the terms of the specified securities; and
  - (e) it is a term of the offer that the rules provide that only an owner of a developed property may be a shareholder of the specified entity; and
  - (f) it is a term of the offer that the rules provide that every owner of a developed property is entitled to be a shareholder of the specified entity; and
  - (g) deposit moneys paid by a subscriber for specified securities are held in:

- (i) a nominated trust account operated by a lawyer, an incorporated law firm, a conveyancing practitioner, or an incorporated conveyancing firm under the Lawyers and Conveyancers Act 2006; or
  - (ii) a trust account operated by a real estate agent under the Real Estate Agents Act 2008; or
  - (iii) a trust account operated by a trustee company under the Trustee Companies Act 1967;
- until the latest to occur of the following:
- (iv) if the subscriber is not the owner of a developed property, a sale agreement for a developed property of which that subscriber is to become the owner has become unconditional;
  - (v) any specified security has been issued or transferred to the subscriber; and
  - (vi) the communal facilities are owned or leased by the specified entity;
- (h) no specified security shall be issued or transferred to a subscriber until,—
- (i) if the developer represents or agrees that certain communal facilities will be owned, leased, or licensed by the specified entity at the time of settlement of the sale agreement, those communal facilities are owned, leased, or licensed in accordance with that representation or agreement; and
  - (ii) if any interest in land is included in the communal facilities to be owned or leased by the specified entity at the time of settlement of the sale agreement, that interest is registered on the computer register for that land at that time; and
- (i) in respect of any communal facility that the developer represents or agrees will be owned, leased, or licensed by the specified entity at the completion of a certain stage of the development or at the completion of the development, it is a term of the offer that—
- (i) a deed of transfer, lease, or licence or a binding agreement for lease for the communal facility has been executed in favour of the specified entity; and
  - (ii) in respect of a communal facility that is an interest or estate in land, the transfer or lease is registered immediately after the subdivision of the land and the issue or creation of a separate computer register for an estate in fee simple or leasehold in respect of the land on which the communal facilities are to be situated; and

- (iii) the deed of transfer, lease, licence or agreement to lease has been provided to the specified entity; and
- (j) if the development is advertised on the basis that the specified entity will own, lease, license, maintain, administer, or operate certain communal facilities in whole or in part at the completion of certain stages of the development or at the completion of the development, it is a term of the offer that the specified entity owns, leases, licenses, maintains, administers, or operates those communal facilities in whole or in part at the completion of those stages or at the completion of the development (as the case may be); and
- (k) it is a term of the offer that if a representation or agreement is made by the developer to the effect that the developer or an associated person of the developer will make a contribution or payment to the specified entity for the purposes of the specified entity's activities,—
  - (i) a binding agreement has been executed to this effect in favour of the specified entity; and
  - (ii) the agreement has been provided to the specified entity; and
- (l) if communal facilities that are estates or interests in land are leased, or to be leased, by the specified entity, the lease contains (or any agreement to lease provides for the lease to contain) an option exercisable by the specified entity to purchase and require a transfer of the fee simple estate in those communal facilities; and
- (m) if, any subscription monies are paid to the specified entity and are no longer required to be held in trust under paragraph (g), prior to the date on which the specified entity is registered on the computer register as the registered proprietor of the fee-simple estate in the land comprising the communal facilities, at all times prior to that date:
  - (i) the subscription moneys will be held by the specified entity in an interest bearing account in the name of the specified entity with a registered bank;
  - (ii) the subscription moneys may only be applied by the specified entity in paying the exercise price payable under the option referred to in paragraph (l);
  - (iii) the interest earned on the subscription moneys may only be applied by the specified entity for 1 or more of the activities referred to in paragraph (n); and
  - (iv) a caveat shall be lodged against the computer register in respect of the land on which the communal facilities are located to protect the specified entity's



interest under the option referred to in paragraph (l) in the fee-simple estate in the relevant land.

- (n) it is a term of the offer that the rules provide that the specified entity is only permitted to carry on 1 or more of the following activities:
- (i) owning, leasing, licensing, maintaining, administering, or operating the communal facilities:
  - (ii) issuing licences to shareholders of the specified entity that confer rights on those shareholders to use the communal facilities, and administering and enforcing those licences in accordance with the rules:
  - (iii) owning, leasing, licensing, maintaining, administering, or operating land outside of the development if the specified entity is required to own, lease, license, maintain, administer, or operate that land in accordance with a resource consent for the development:
  - (iv) managing and administering the specified entity and administering and enforcing the rules:
  - (v) any incidental activities that the specified entity considers are beneficial for shareholders of the specified entity; and
- (o) it is a term of the offer that the rules provide that—
- (i) all moneys paid to the specified entity by its shareholders are applied only for 1 or more of the activities referred to in paragraph (n); and
  - (ii) shareholders of the specified entity have the right to use the communal facilities in accordance with the rules; and
  - (iii) shareholders of the specified entity have the right to vote at meetings of shareholders of the specified entity; and
  - (iv) on a liquidation of the specified entity, each shareholder of the specified entity has the right to share pro rata with all other shareholders of the specified entity in a distribution of any surplus assets of the specified entity; and
  - (v) levies, fees, or charges payable to the specified entity by its shareholders are determined only by a resolution of the shareholders, or of a committee of the shareholders, passed in accordance with the rules; and
  - (vi) the specified entity provides to a prospective purchaser of developed property, within 5 working



days after receiving a request, a copy of the most recent financial statements of the specified entity; and

(vii) financial statements of the specified entity complying with the Financial Reporting Act 1993 are audited annually and are distributed to shareholders of the specified entity as soon as is reasonably practicable after each audit is completed and, in any event, no later than 5 months after the balance date of the specified entity; and

(p) in the case of a specified entity that is a company, the company's constitution prohibits—

(i) the carrying on of trading activities; or

(ii) the carrying on of business for profit.

**7 Further conditions that apply for the period that there is a controlling entity**

(1) This clause applies for the duration of the period that there is a controlling entity;

(2) The exemptions in clause 5 are subject to the further conditions that—

(a) subscribers for specified securities have, before subscription, received from the developer a statement that—

(i) describes the rights, powers, and duties of the developer and the controlling entity in relation to the specified entity and the communal facilities; and

(ii) specifies where and how potential investors and shareholders of the specified entity may obtain further information concerning those rights, powers, and duties; and

(iii) states that potential investors should seek professional advice before purchasing a developed property or subscribing for specified securities; and

(b) it is a term of the offer that the rules provide that an independent mediator must be appointed to act in a dispute between any shareholder of the specified entity and the developer or controlling entity concerning the developer's or controlling entity's compliance with the rules when exercising its rights and powers, or performing its duties, as the controlling entity or in its capacity as the developer, if at least 25% of all shareholders of the specified entity (excluding the developer and the controlling entity) vote to appoint a mediator; and

(c) it is a term of the offer that the rules provide that, until the completion of the development, an updated statement of the matters set out in sub-clauses 6(b)(iv), (v), and (vi) and



(c) is provided each year to the shareholders of the specified entity with the financial statements that are distributed under clause 6(o)(vii); and

(d) it is a term of the offer that the rules provide that the provisions in the rules conferring rights and powers on the controlling entity in its capacity as controlling entity will expire or terminate no later than the completion of the development.

**8 Certain conditions cease to apply if rules amended**

(1) After the completion of the development and the communal facilities are owned, leased, licensed, maintained, administered, or operated as described under clause 6(b)(ii), a condition in clause 6(n) or (o) ceases to apply if—

(a) an amendment to the rules is approved by a special resolution passed by the shareholders of the specified entity (excluding the developer); and

(b) the amendment results in the rules no longer complying with the condition; and

(c) subscribers for specified securities have, before subscription, received from the developer a statement that describes the procedure for amending the rules.

(2) In this clause, **special resolution** means a resolution approved by a majority of 75% or, if a higher majority is required by the rules, that higher majority, of the votes of those shareholders entitled to vote and voting on the question.

Dated at Wellington this 11<sup>th</sup> day of April 2013



Sue Brown  
Head of Primary Regulatory Operations  
Financial Markets Authority

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**Statement of reasons**

This notice, which comes into force on 13 April 2013 and expires on 30 September 2017, applies to shares in a company that provides communal facilities in the nature of a stroll garden associated with a real property development.

The effect of the notice is that the developer and the company are exempted from the Securities Regulations 2009 (Regulations) (except

regulation 23) and the following provisions of the Securities Act 1978 (Act):

- section 33(3), which relates to the appointment of a statutory supervisor:
- sections 37 and 37A, which contain the prospectus and investment statement requirements of the Act:
- section 54, which relates to certificates evidencing securities.

The Financial Markets Authority, after satisfying itself as to the matters set out in section 70B(2) of the Act, considers that it is appropriate to grant these exemptions because:

- the securities exempted under this notice are shares in a company which confer rights to use communal recreational facilities associated with the Benvale Park subdivision. Shares may be offered only to certain persons who own land inside the Benvale Park subdivision. While the shares are securities in terms of the Act and Regulations, they are not investments in the usual sense. Rather the company is established as a vehicle through which shareholders can use and enjoy communal facilities, as well as enabling governance and maintenance of those facilities:
- the securities are akin to securities to which the Securities Act (Real Property Developments) Exemption Notice 2007 applies, being shares in a company to manage communal facilities, as part of a real property development. This notice provides exemptions on similar or equivalent conditions to that class notice but tailored to the circumstances of the securities:
- this notice exempts the provision of information not material to subscribers' decision whilst the conditions of the notice require that potential subscribers receive material information about the shares and facilities to assist their decision whether to subscribe, including information about encumbrances against their land and fees. The conditions also include requirements relating to shareholder entitlements, means of subscription, treatment of subscription money, settlement of agreements for sale and purchase of land, control of the facilities, activities permitted to be carried on by the company, and the rules of the company:
- in these circumstances the scope of the exemptions and these conditions mean that the exemptions will not cause significant detriment to subscribers, and that the exemptions are not broader than reasonably necessary to address the matters that gave rise to the exemptions.