



Securities Act (Real Property Developments) Exemption Notice 2007

Pursuant to the Securities Act 1978, the Securities Commission gives the following notice (to which is appended a statement of reasons of the Securities Commission).

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Notice

1 Title

This notice is the Securities Act (Real Property Developments) Exemption Notice 2007.

2 Commencement

This notice comes into force on the day after the date of its notification in the *Gazette*.

3 Expiry

This notice expires on the close of 30 September 2012.

4 Interpretation

- (1) In this notice, unless the context otherwise requires,—

Act means the Securities Act 1978

communal facilities means the following facilities that are, or at the completion of the development will be, owned, leased, licensed, maintained, administered, or operated in whole or in part by the specified entity:

- (a) any land or any right over, or interest in, land within the development designated by a developer or the specified entity for use by owners or occupiers of developed properties, by invitees, or by certain classes of those persons:
- (b) buildings, chattels, fixtures, fittings, plant, equipment, and other amenities within the development designated by a developer or the specified entity for use by owners or occupiers of developed properties, by invitees, or by certain classes of those persons:
- (c) utilities

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

developer means each person promoting, managing, or carrying out a development

development means a real property development undertaken within 1 or more areas of land

incorporation member, in relation to a specified entity that is a society, means a person who—

- (a) was a member of the society on its incorporation; but
- (b) is not an owner of a developed property

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 1983

rules means,—

- (a) in the case of a specified entity that is a society, the rules of the society; and
- (b) in the case of a specified entity that is a company, 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

specified entity means a society incorporated under the Incorporated Societies Act 1908 or 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) in the case of a specified entity that is a society, a participatory security in the form of membership of the society; and
- (b) in the case of a specified entity that is a company, a share in the company

utilities means the following utilities and services:

- (a) access over any roading within the development (including public or private access roads connecting to any highway, road, or access way):
 - (b) gas and drainage reticulation connecting 1 or more developed properties to any gas supply, sewage treatment plant, or disposal system:
 - (c) waste water and storm water disposal systems:
 - (d) service lines connecting 1 or more developed properties to appropriate supply networks:
 - (e) domestic and irrigation water supply reticulation connecting 1 or more developed properties to any water supply system (including storage tanks and treatment facilities):
 - (f) any other utilities or services ancillary to the use of developed properties or the development by owners or occupiers of developed properties, by invitees, or by certain classes of those persons.
- (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, every specified entity, and every person acting on behalf of either or both of them is exempted from sections 33(3), 37, 37A, 38A, and 54 of the Act and the Regulations (except regulation 8) 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) 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)(iii); 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 description of the rights and obligations of members or shareholders of the specified entity in relation to the communal facilities and the specified securities;
 - (iv) a description of the voting rights of the subscriber, as a member or 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 members or shareholders, or by a representative, in relation to particular matters); and
- (c) in relation to a development that the developer represents or agrees will be completed in stages, subscribers for specified securities have, before subscription, received from the developer a document that sets out,—
 - (i) for each stage of the development, the intended communal facilities and when those facilities are

- intended to be transferred, leased, or licensed to, or completed or constructed by or for, or procured by, the specified entity; and
- (ii) the material risks of those communal facilities not being transferred, leased, or licensed to, or completed or constructed by or for, or procured by, the specified entity at each stage; and
 - (iii) 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; and
- (d) subscribers for specified securities have, before subscription, received from the developer a statement of levies, fees, or charges that are estimated to be, or were, payable by members or shareholders of the specified entity in relation to the development and the developed properties 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; and
 - (ii) is itemised in relation to each of the different communal facilities; and
 - (iii) 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; and
 - (iv) contains, if a levy, fee, or charge is variable, a statement of the factors that influence how the levy, fee, or charge can vary; and
 - (v) 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; and
 - (vi) contains a statement of the principal assumptions on which any estimates are based; and
 - (vii) 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
- (e) 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; and
 - (f) it is a term of the offer that the rules provide that,—
 - (i) in the case of a specified entity that is a society, only an owner of a developed property or an incorporation member may be a member of the specified entity; and
 - (ii) in the case of a specified entity that is a company, only an owner of a developed property may be a shareholder of the specified entity; and
 - (g) in the case of a specified entity that is a society, it is a term of the offer that the rules provide that incorporation members may continue as members of the society only for so long as is reasonably necessary to satisfy the membership requirements of the Incorporated Societies Act 1908 but, in any event, must cease to be members of the society on or before the sale of the last developed property by the developer; and
 - (h) it is a term of the offer that the rules provide that every owner of a developed property is entitled to be a member or shareholder of the specified entity; and
 - (i) deposit moneys paid by a subscriber for specified securities are held in any of the following trust accounts until the sale agreement becomes unconditional:
 - (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 1976; or
 - (iii) a trust account operated by a trustee company under the Trustee Companies Act 1967; and
 - (j) no settlement of a sale agreement is completed 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
 - (iii) if the developer represents or agrees that certain communal facilities will be completed or constructed by or for, or procured by, the specified entity at the time of settlement of the sale agreement, those communal facilities have been completed, constructed, or procured in accordance with that representation or agreement; and
- (k) 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 for that 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, or licence has been provided to the specified entity; and
- (l) 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

- (m) 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 deed has been executed to this effect in favour of the specified entity; and
 - (ii) the deed has been provided to the specified entity; and
- (n) if communal facilities that are estates or interests in land are leased, or to be leased, by the specified entity,—
 - (i) the fee simple estates in those communal facilities are, or will be, owned by all of the members or shareholders of the specified entity; or
 - (ii) the members or shareholders of the specified entity hold, or will hold, a leasehold interest in the developed properties, and the term of the lease for the communal facilities to the specified entity (as specified in the deed of lease or lease agreement) must not end earlier than the term of any leasehold interest in the developed properties that is offered by the developer to the subscribers for specified securities; and
- (o) 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 members or shareholders of the specified entity that confer rights on those members or 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) administering and enforcing a scheme for the regulation and control of matters relating to the use, repair, decoration, and landscaping of, and provision of services to, developed properties;
 - (vi) providing and maintaining services, utilities, facilities, and benefits to developed properties or for the development;
 - (vii) any incidental activities that the specified entity considers are beneficial for members or shareholders of the specified entity; and
- (p) it is a term of the offer that the rules provide that—
- (i) all moneys paid to the specified entity by its members or shareholders are applied only for 1 or more of the activities referred to in paragraph (o); and
 - (ii) members or shareholders of the specified entity have the right to use the communal facilities in accordance with the rules; and
 - (iii) members or shareholders of the specified entity have the right to vote at meetings of members or shareholders of the specified entity; and
 - (iv) on a liquidation of the specified entity, each member or shareholder of the specified entity has the right to share pro rata with all other members or 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 members or shareholders are determined only by a resolution of the members or shareholders, or of a committee of the members or 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 members

- or 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
- (q) in the case of a specified entity that is a society, the society does not have as objects—
 - (i) the carrying on of trading activities; or
 - (ii) the carrying on of business for profit; and
 - (r) 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 if there is controlling entity

- (1) This clause applies if there is, or will be, 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 members or 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; 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 member or 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 members or 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 clause 6(c) and (d) is provided each year to the members or shareholders of the specified entity with the financial statements that are distributed under clause 6(p)(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(o) or (p) ceases to apply if—
 - (a) an amendment to the rules is approved by a special resolution passed by the members or 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 members or shareholders entitled to vote and voting on the question.

9 Revocation

The Securities Act (Residential Property Developments) Exemption Notice 1999 (SR 1999/105) is revoked.

10 Transitional provisions

- (1) If, before the commencement of this notice, a developer, a society, or a person acting on behalf of either a developer or a society has offered specified securities in reliance on the

Securities Act (Residential Property Developments) Exemption Notice 1999, an offer and allotment of those specified securities may continue to be made by those persons in accordance with either—

- (a) this notice; or
 - (b) the Securities Act (Residential Property Developments) Exemption Notice 1999 as in force immediately before that notice was revoked as if that notice had not been revoked.
- (2) In subclause (1), **developer**, **society**, and **specified security** have the same meaning as in the Securities Act (Residential Property Developments) Exemption Notice 1999.
- (3) Until the commencement of section 299 of the Lawyers and Conveyancers Act 2006, the reference to a lawyer, an incorporated law firm, a conveyancing practitioner, or an incorporated conveyancing firm under that Act in clause 6(i)(i) must be treated as a reference to a solicitor under the Law Practitioners Act 1982.

Dated at Wellington this 4th day of December 2007.

The Common Seal of the Securities Commission was affixed in the presence of:

[Seal]

C A N Beyer,
Member.

Statement of reasons

This notice, which comes into force on the day after the date of its notification in the *Gazette* and expires on 30 September 2012, replaces the Securities Act (Residential Property Developments) Exemption Notice 1999 (the **1999 notice**).

This notice applies to participatory securities in the form of membership of an incorporated society, or a shareholding in a company, that

owns, leases, licenses, maintains, administers, or operates communal facilities in a real property development.

The effect of the notice is that the developer and the society or company are exempted from the Securities Regulations 1983 (except regulation 8) and the following provisions of the Securities Act 1978:

- 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 38A, which relates to statements in advertisements by experts:
- section 54, which relates to certificates evidencing securities.

The Securities Commission (the **Commission**) considers that it is appropriate to grant these exemptions because—

- the securities exempted under this notice are memberships in societies and shareholdings in companies set up to own, lease, license, maintain, administer, or operate communal facilities in property developments. These memberships and shares are offered as ancillary features to real estate transactions of a type that are not subject to the Securities Act 1978. While the memberships and shares are securities in terms of the legislation, they are not offered as investments in the usual sense. Rather, the society or the company is established as a convenient vehicle through which residents in a property development can use and enjoy communal facilities and can be required to contribute to the maintenance of those communal facilities:
- the conditions of the exemptions require developers to give purchasers adequate information about the members' or shareholders' interest in the society or company, and the intended communal facilities (including the likely levies or fees associated with these):
- this notice expands on the scope of the 1999 notice in that it accommodates certain arrangements for holding communal facilities not included under the 1999 notice and allows a wider range of communal facilities to be included. The Commission is of the view that the policy of this notice is consistent with the policy underlying the 1999 notice, but provides for greater flexibility:

- the Commission has considered a number of individual exemption applications concerning property developments that are similar in purpose to those covered by the 1999 notice, but for which the arrangements for holding communal facilities or the nature of the communal facilities did not, for various reasons, fit within the terms of the 1999 notice. The exemptions provided and conditions imposed by this notice are generally consistent with these individual exemption notices.

Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*: 6 December 2007.

This notice is administered by the Securities Commission.
