

To: Andrew Wells, Principal Advisor, Overseas Investment, LINZ

From: Luke Hilton, Senior Solicitor, Overseas Investment, LINZ

ASSESSMENT REPORT: **Datagrid New Zealand Limited Partnership –Time Extension Variation**

Date	23 May 2023	Classification	IN CONFIDENCE: Commercially sensitive
LINZ reference	202100622	Deadline	25 May 2023

A. Proposal to vary consent conditions

Background

1. Datagrid New Zealand Limited Partnership (**Applicant**) is a New Zealand limited partnership, formed on 1 March 2021. The Applicant received consent under the Act on 23 December 2021 (the **Original Consent**) to acquire approximately 42.8167 hectares of sensitive land at Taylors Road and Flora Road East, Makarewa, Southland (the **Land**), and significant business assets as the total expenditure expected to be incurred, before commencing the Datagrid, exceeds \$100 million. The Datagrid is expected to cost over \$1 billion to develop.
2. The Land is currently used to grow silage. The Applicant intends to use the Land to develop a carbon-neutral, hyperscale data centre (the **Datagrid**).¹

Original Consent requirements

3. The Original Consent required the Applicant to:
 - (a) Apply for relevant consents under the Resource Management Act 1991 (**RMA**) and the Building Act 2004 by 30 June 2023 (**special condition 1**).
 - (b) Obtain all relevant consents by 31 January 2024 (**special condition 2**).
 - (c) Construct and operate the Datagrid (**special condition 3**). The Applicant was required to commence construction of the Datagrid by 30 June 2024 and complete construction and begin operation of the Datagrid by 1 January 2027.

Reasons for extension request

4. The Applicant acquired the Land on 28 January 2022, and has been progressing matters in relation to establishing the Datagrid (see further below). However, the Applicant has advised that it will not be able to meet its current milestones because it now seeks to become a Requiring Authority (**RA**) (as a network utility operator) under the RMA and use the designation process (in lieu of a land use consent) to advance the establishment of the Datagrid.

¹ A hyperscale data centre is a large, business-critical facility, designed to efficiently support robust, scalable applications and are often associated with big data-producing companies. Hyperscale is also a term that embodies a computing system's capability to scale, at orders of magnitude, to meet tremendous demand.

5. The Applicant intends for the Datagrid to be part of a system and network of data conveyance by linking to terrestrial cables and potentially the new proposed trans-Tasman and domestic subsea cable system (Hawaiki Nui). The Applicant proposes to operate a network for the purposes of telecommunication² as defined in the Telecommunications Act 2001³ and will therefore fall within the definition of "network utility operator" under the RMA.⁴
6. The Applicant submits that it is in the process of making an application to become a RA⁵ and believes that there is a reasonable chance of success. The process is likely to take six to nine months, and a decision is expected by March 2024. Regional resource consents may also be needed from Southland Regional Council.
7. The Applicant has advised that it has lodged its application for RA status and this is being processed by the Ministry for the Environment (**MFE**) currently. MFE has requested some further information from the Applicant in respect of its application and this will be provided by 29 May 2023. The Applicant considers that there is a reasonable chance of success. DLA Piper (the Applicant's advisers) have had considerable experience with lodging applications with MFE for RA status. We are not aware of any information or circumstances to suggest that the application would not be successful.
8. The Applicant wishes to use the designation process in lieu of the land use consent because the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**)⁶ has implications for the establishment of Datagrid. The NPS-HPL applies to and constrains the ability for highly productive land to be inappropriately used or developed. A large proportion of the Land falls within the definition of highly productive land.
9. In October 2022 the Applicant applied for resource consent with Southland District Council (**SDC**) for the establishment of Datagrid. While the resource consent application has been accepted by the SDC, it has since been put on hold. SDC has also advised that there is a high likelihood that the application will be publicly notified.
10. The Applicant has also advised that it is also not able to submit the building consent application until the resource consent has been completed. This is because the terms of the resource consent will affect the nature of construction, and will therefore affect the content of the building consent application.

Variation sought

11. The Applicant seeks to vary the conditions of consent by extending the milestones as follows:
 - (a) special condition 1 by one year from 30 June 2023 to 30 June 2024.
 - (b) special condition 2 by one year and six months from 31 January 2024 to 30 July 2025.

² Although the Datagrid may fall within the definition of 'telecommunication services' under the Telecommunications (Interception Capability and Security) Act 2013, section 20A of the Overseas Investment Act 2005 (mandatory national interest) does not capture the establishment of a business, or land or property where it is being acquired for the purpose of establishing a business.

³ In all material respects, the Telecommunications (Interception Capability and Security) Act 2013 replicates the definition of 'telecommunication' from the Telecommunications Act 2001.

⁴ Section 166 of the RMA.

⁵ The Applicant intends to apply for network operator status under sections 102-105 of the Telecommunications Act 2001, and to become a requiring authority under section 167 of the RMA on the basis that Datagrid is a network utility operator as defined by section 166 of the RMA, being a person who "operates or proposes to operate a network for the purpose of— telecommunication as defined in section 5 of the Telecommunications Act 2001".

⁶ Commenced on 17 October 2022. Highly productive land is land that: (a) is zoned rural or rural production in the relevant district plan; and has a Land Use Capability (LUC) class of 1, 2 or 3.

- (c) special condition 3 requiring commencement of construction by one year and three months from 30 June 2024 to 30 September 2025, and completing construction and beginning operation of the Datagrid by six months from 1 January 2027 to 30 June 2027.

Steps taken since Original Consent

12. The Applicant has submitted that it has taken some steps since the acquisition of the Land. This includes engaging a project development team in July 2022 to work on the regulatory consents and project plans. The Applicant has also requested proposals for design services in July 2022. The application for resource consent to the SDC was filed in October 2022.
13. The Applicant will confirm these in its first report due to be submitted to LINZ by 30 October 2024. This is the first of four annual reporting dates. The Applicant expects to complete the following milestones within the next 12 months:
- (a) applying for RA status (as set out above);
 - (b) completing site investigations;
 - (c) advancing the concept design, subject to consent conditions;
 - (d) assuming that the application for RA status is successful, lodging a notice of requirement for designation for the establishment of the Datagrid; and
 - (e) lodging a resource consent application with Southland Regional Council for regional resource consents (if required).
14. We expect the Applicant to report on its progress on the above milestones in its report due to be submitted by 30 October 2024.

B. How to approach the decision

15. Section 27 of the Overseas Investment Act 2005 (**Act**) provides that conditions of consent may be:
- (a) varied with the agreement of the Consent Holder, or
 - (b) revoked.
16. Conditions which the Act required to be imposed (for example in relation to residential outcomes) may be varied but may not be revoked.
17. The Act does not spell out what the decision-maker must take into account in considering whether to vary a consent. Applying general principles of administrative law, the discretionary power should be exercised reasonably, and consistently with the purpose of the Act:

3 Purpose

- (1) *The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—*
- (a) *requiring overseas investments in those assets, before being made, to meet criteria for consent; and*
 - (b) *imposing conditions on those overseas investments.*
- (2) *This Act also has the purpose of managing certain risks, such as national security and public order risks, associated with transactions by overseas persons.*

C. Our assessment

18. We accept the Applicant's reasons for the need for a variation and consider the variation to be reasonable in the circumstances.
- (a) The variation applied for appears reasonable and is consistent with the purpose of the Act.
 - (b) The changes do not affect the criteria considered under the original consent (they provide further time for the Applicant to comply with special conditions).
19. We consider this variation provides the Applicant sufficient time to lodge applications and obtain consents under the RMA and the Building Act, and commence and complete construction of the Datagrid. The Applicant will be required to provide reporting each year between 30 October 2024 to 30 October 2027 to update us on progress towards compliance with special conditions 1 to 3.
20. We also consider that the introduction of the NPS-HPL, which prevents the Applicant from being able to comply with the Original Consent conditions, was outside the Applicant's control. This change could not have been reasonably anticipated at the time the Applicant applied for the Original Consent. The Applicant submits, and we accept, that it remains committed to establish the Datagrid and would like to complete the project as soon as possible.

D. Recommendation

21. We recommend that the conditions of consent be varied as set out in **Attachment 1** with the varied milestones appearing in red ink with strike outs.

E. Decision

22. I agree to vary the conditions of the Consent as set out in **Attachment 1**.

[s 9(2)(a)]

Andrew Wells
Principal Advisor
Overseas Investment, LINZ
Date: 25 May 2023

Attachment 1 - Proposed Varied Notice of Decision



Consent for Overseas Person to Acquire Sensitive New Zealand Land and Sensitive New Zealand Assets

Read this consent carefully - you must comply with all the conditions. If you do not, you may be required to dispose of the land and/or be subject to fines or other penalties.

Consent

Decision date: 23 December 2021

Variation date: 25 May 2023

The following people have been given the following **consent**:

Case	202100622
Consent	The Consent Holder may acquire the Land and may invest in the Datagrid subject to the Conditions set out below.
Consent Holder	Datagrid New Zealand Limited Partnership (registration number 50058829) We will also refer to each Consent Holder as you .
Land	A freehold interest in approximately 42.8167 hectares of land located at 370 Flora Road East/Taylor's Road, Makarewa, with legal description Lot 2 DP 526953 contained in Record of Title 847503 (Southland).
Datagrid	A hyperscale data centre.
Timeframe	You have until 31 December 2022 to acquire the Land.

Conditions

Your Consent is subject to the Special conditions, Standard conditions and Reporting conditions (Conditions) set out below. You must comply with them all. Be aware that if you do not comply with the Conditions you may be subject to fines or other penalties, and you may also be required to dispose of the Land.

In the Consent and the Conditions, we refer to the Overseas Investment Office as **OIO, us or we**.

Act means the Overseas Investment Act 2005.

Special conditions

You must comply with the following **special conditions**. These apply specifically to this Consent and were considerations that particularly influenced us to give consent:

Details	Required date
Special condition 1: Lodge notice and apply for relevant consents	
<p>You must lodge:</p> <ul style="list-style-type: none">(a) all applications for consent the notice of requirement to the relevant territorial authority of your requirement for a designation and/or any other necessary applications for resource consent under the Resource Management Act 1991 (or any replacement legislation), and(b) all applications for consent under the Building Act 2004. <p>If you do not, standard condition 6 will apply and we may require you to dispose of the Land.</p>	<p>30 June 2023 (a) and (b) by 30 June 2024</p>
Special condition 2: Obtain required designation and all relevant consents	
<p>You must obtain:</p> <ul style="list-style-type: none">(a) all applications for consent the required designation from the relevant territorial authority and/or any other necessary resource consents under the Resource Management Act 1991 (or any replacement legislation), and(b) all applications for consent under the Building Act 2004. <p>If you do not, standard condition 6 will apply and we may require you to dispose of the Land.</p>	<p>31 January 2024 (a) and (b) by 30 July 2025</p>

Special condition 3: Construct and operate the Datagrid	
You must commence the construction of the Datagrid.	30 June 2024 30 September 2025
You must complete the construction of the Datagrid and begin operation of the Datagrid.	1 January 2027 30 June 2027
If you do not, standard condition 6 will apply and we may require you to dispose of the Land.	

Standard conditions

You must also comply with the **standard conditions** set out below. These apply to all overseas people who are given consent to acquire sensitive New Zealand land, including you:

Details	Required date
Standard condition 1: acquire the Land	
<p>You must acquire the Land:</p> <ol style="list-style-type: none"> by the date stated in the Consent. If you do not, your Consent will lapse or become invalid and you must not acquire the Land, and using the acquisition, ownership and control structure you described in your application. <p>Note, only you – the named Consent holder – may acquire the Land, not your subsidiary, trust or other entity.</p>	As stated in the Consent
Standard condition 2: tell us when you acquire the Land	
<p>You must tell us in writing when you have acquired the Land.</p> <p>Include details of:</p> <ol style="list-style-type: none"> the date you acquired the Land (Settlement), consideration paid (plus GST if any), the structure by which the acquisition was made and who acquired the Land, and copies of any transfer documents and Settlement statements. 	As soon as you can, and no later than two months after Settlement

Standard condition 3: allow us to inspect the Land

Sometimes it will be helpful for us to visit the Land so we can monitor your compliance with the Conditions.

We will give you at least two weeks' written notice if we want to do this.

You must then:

1. Allow a person we appoint (**Inspector**) to:
 - (a) enter onto the Land, including any building on it, other than a dwelling, for the purpose of monitoring your compliance with the Conditions (**Inspection**),
 - (b) remain there as long as is reasonably required to conduct the inspection,
 - (c) gather information,
 - (d) conduct surveys, inquiries, tests and measurements,
 - (e) take photographs and video records, and
 - (f) do all other things reasonably necessary to carry out the Inspection.
2. Take all reasonable steps to facilitate an Inspection including:
 - (a) directing your employees, agents, tenants or other occupiers to permit an Inspector to conduct an Inspection,
 - (b) being available, or requiring your employees, agents, tenants or other occupiers to be available, at all reasonable times during an Inspection to facilitate access onto and across the Land. This includes providing transport across the Land if reasonably required.
3. During an Inspection:
 - (a) we will not compel you and your employees, agents, tenants or other occupiers to answer our questions or to let us look at, copy or take away documents,
 - (b) our Inspector will comply with any reasonable instruction and co-operate with any reasonable health and safety policy or procedure you notify to us before the Inspection.

At all times

Released under the Official Information Act 1982

Standard condition 4: remain not unsuitable to invest in New Zealand	
<p>You, and to the extent that you are not an individual, the Individuals Who Control You must remain not unsuitable to own or control the Land in accordance with section 18A(1) of the Act.</p> <p>The Individuals Who Control You are individuals who:</p> <ul style="list-style-type: none"> (a) are members of your governing body, (b) directly or indirectly, own or control more than 25% of you or of a person who itself owns or controls more than 25% of you, and (c) are members of the governing body of the people referred to in paragraph (b) above. 	At all times
Standard condition 5: tell us about changes that affect you, the people who control you, or people you control	
<p>You must tell us in writing if any of the following events happens to any of the Consent holders:</p> <ol style="list-style-type: none"> 1. You become aware that you and/or any Individual Who Controls you establishes any of the investor test factors listed in section 18A(4) of the Act. 2. You cease to be an overseas person or dispose of all or any part of the Land. 3. Your New Zealand Service Address changes. This is the address you provided us in your application as the address which we will send any legal document we need to serve on you. 	Within 20 working days after the change
Standard condition 6: dispose of the Land if you do not comply with key special conditions	
<p>Some of the special conditions were key to the decision to give consent. If we consider you have failed to comply with one of those Special conditions in a material way we may require you to dispose of the Land.</p> <p>If all or part of this standard condition 6 applies to a special condition, we have said so in that condition.</p> <p>We will give you written notice if we require you to dispose of the Land. After we have given you notice, you must:</p>	
<p>Value the Land: obtain and send us a copy of a market valuation of the Land from a New Zealand registered valuer.</p>	Within six weeks of the date of our notice.

Market the Land: instruct a licensed real estate agent to actively market the Land for sale on the open market.	Within six weeks of the date of our notice.
Dispose of the Land: dispose of the Land to a third party who is not your associate.	Within six months of our notice.
Offer without reserve: if you have not disposed of the Land within six months of our notice, offer the Land for sale by auction or tender without a reserve price or minimum bid and dispose of the Land.	Within nine months of our notice.
Report to us about marketing: tell us in writing about marketing activities undertaken and offers received for the Land.	By the last day of every March, June, September and December after our notice or at any other time we require.
Report disposal to us: send us, in writing, evidence <ul style="list-style-type: none"> (a) that you have disposed of the Land, (b) of disposal (including copies of sale and purchase agreements, settlement statements and titles showing the purchaser as registered proprietor), (c) the purchaser is not your associate. 	Within one month after the Land has been disposed of.

Reporting conditions

We need information from you about how your Investment Plan is tracking so we can monitor your progress against the Conditions and so we can measure the benefits you have brought to New Zealand through your investment.

You must lodge **reports**. They must:

1. be sent to **oiomonitoring@linz.govt.nz** by these dates:
 - (a) ~~Year one:~~ 30 July 2023
 - (b) Year **one** ~~two~~: 30 October ~~July~~ 2024
 - (c) Year **two** ~~three~~: 30 October ~~July~~ 2025
 - (d) Year **three** ~~four~~: 30 October ~~July~~ 2026
 - (e) Year **four** ~~five~~: 30 October ~~July~~ 2027
2. contain information about:
 - (a) your progress in implementing the special conditions;
 - (b) your progress in procuring a contractor to build the Datagrid;
 - (c) the amount, broken down, invested for development purposes; and
 - (d) the number of FTE employees and contractors, including their salaries.

3. follow the format of the template report published on our website at <https://oio.linz.govt.nz/oio-consent-monitoring>.
4. If requested in writing by the OIO, the Consent Holder(s) 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 content was granted or
 - (b) the conditions of this consent.

Released under the Official Information Act 1982