Independent Hearings Panel

Christchurch Replacement District Plan

Te paepae motuhake o te mahere whakahou a rohe o Ōtautahi

IN THE MATTER OF section 71 of the Canterbury Earthquake Recovery Act 2011 and the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014

AND

IN THE MATTER OF proposals notified for incorporation into a Christchurch Replacement District Plan

Date of hearing: 2 and 3 November 2015

Date of decision: 26 August 2016

Hearing Panel: Environment Judge John Hassan (Chair), Ms Sarah Dawson, Mr Alec Neill, Mr Gerard Willis

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DECISION 39

Chapter 8: Subdivision, Development and Earthworks (part) — Stage 2

Outcomes: **Proposals changed as per Schedule 1**

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INTRODUCTION

[1] This decision is one of a series of decisions by the Independent Hearings Panel ('Hearings Panel'/'Panel') concerning the formulation of the Christchurch Replacement District Plan ('CRDP').[1] It concerns two issues deferred from the Panel's Decision 28: Subdivision, Development and Earthworks — Stage 2 ('Stage 2 subdivision decision'),[2] namely the minimum lot size standard to be applied to subdivision within the Papakāinga/Kāinga Nohoanga Zone ('PKN zone'), and a volume threshold for earthworks. Our companion PKN zone, Decision 37, is being issued together with this decision.

[2] We use the following terms:

(a) 'Notified Rule' refers to the proposed restricted discretionary rule 8.3.1.1 Table 1 (as to minimum lot size) notified as part of the Council's Stage 2 Chapter 8, Subdivision, Development and Earthworks proposal;

(b) 'Revised Rule' refers to the revision to that rule finally proposed jointly by the Council, Te Rūnanga o Ngāi Tahu and Ngā Rūnanga ('Ngāi Tahu') and the Crown, ('Joint Parties') by joint memorandum on 8 June 2016 ('8 June Joint Memorandum');[3]

(c) 'Decision Rule' refers to the version of that rule included in Chapter 8 by this decision.

[3] The matters relating to earthworks volumes were not contentious, and we address these separately in this decision.

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1 This decision follows our hearing of submissions and evidence. Further background on the review process, pursuant to the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 ('the OIC'/'the Order') is set out in the introduction to Decision 1, concerning Strategic Directions and Strategic Outcomes (and relevant definitions, 26 February 2015 ('Strategic Directions decision'). Members of the Hearings Panel who heard and determined this proposal are set out on the cover sheet.

2 Decision 28: Subdivision, Development and Earthworks — Stage 2, 15 July 2016, at [8].

3 Joint memorandum for the Council, the Crown, Te Rūnanga o Ngāi Tahu and Ngā Rūnanga regarding subdivision minimum net site areas (also relevant to Papakāinga (Stage 2) proposal), 8 June 2016.

Rights of appeal

[4] Under the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 ('OIC'), the following persons may appeal our decision to the High Court (within the 20 working day time limit specified in the OIC), but only on questions of law (and, for a submitter, only in relation to matters raised in the submission):[4]

(a) Any person who made a submission (and/or further submission) on the Notified Version;

(b) The Council; and

(c) The Ministers.[5]

Identification of parts of Existing Plan to be replaced

[5] The OIC requires that our decision also identifies the parts of the existing Banks Peninsula District Plan and existing Christchurch City Plan (together 'Existing Plan') that are to be replaced by the Decision Version.[6] The Stage 2 subdivision decision did not replace any Existing Plan provisions because of the range of matters it deferred (including the minimum lot size matter for this decision and several matters for decisions on Chapter 9 Natural and Cultural Heritage). As decisions on those Chapter 9 matters have yet to be issued, this decision does not replace any Existing Plan provisions. The Panel anticipates that replacement, including of the Existing Plan subdivision provisions, would be able to occur once the Panel's decision on Issue 9.5 of Chapter 9 is issued.

Conflicts of interest

[6] As set out in the Stage 2 subdivision decision, disclosures as to potential conflicts of interest were posted on the Independent Hearings Panel website, and on various occasions during the hearing Panel members disclosed that submitters were known to them either through

4 OIC, cl 19.
5 The Minister for Canterbury Earthquake Recovery and the Minister for the Environment, acting jointly.
6 OIC, cl 13(3).

current or previous business and/or personal associations.[7] No submitter raised any issue in relation to these matters.

REASONS

Statutory framework and higher order documents

[7] The OIC directs that we hold a hearing on submissions on a proposal, and make a decision on that proposal.[8]

[8] It sets out what we must and may consider in making that decision.[9] It qualifies how the Resource Management Act 1991 ('RMA') is to apply and modifies some of the RMA's provisions, as to both our decision-making criteria and processes.[10] It directs us to comply with s 23 of the Canterbury Earthquake Recovery Act 2011 ('CER Act').[11] The OIC also specifies additional matters for our consideration.

[9] We adopt our findings on these matters at [11]–[14] of our Stage 2 subdivision decision.

7 The website address is www.chchplan.ihp.govt.nz.
8 OIC, cl 12(1).
9 OIC, cl 14(1).
10 OIC, cl 5.
11 Our decision does not set out the text of various statutory provisions it refers to, as this would significantly lengthen it. However, the electronic version of our decision includes hyperlinks to the New Zealand Legislation website. By clicking the hyperlink, you will be taken to the section referred to on that website. The CER Act was repealed and replaced by the Greater Christchurch Regeneration Act 2016 ('GCRA'), which came into force on 19 April 2016. However, s 148 of the GCRA provides that the OIC continues to apply and the GCRA does not effect any material change to the applicable statutory framework for our decision or to related Higher Order Documents. That is because s 147 of the GCRA provides that the OIC continues in force. Further, Schedule 1 of the GCRA (setting out transitional, savings and related provisions) specifies, in cl 10, that nothing in that Part affects or limits the application of the Interpretation Act 1999 which, in turn, provides that the OIC continues in force under the now-repealed CER Act (s 20) and preserves our related duties (s 17).

Council's s 32 report

[10] As required, we have had regard to the Council's s 32 report ('Report') concerning the Stage 2 Chapter 8 proposal, including the Notified Rule[12]. At [19], our Stage 2 subdivision decision recorded that we were satisfied that the Report generally presents a clear analysis of alternatives, and the basis for the choices made in the Notified Version. The same could not be said concerning the Notified Rule, which the Report is essentially silent on. We surmise that this may have been because of the pressures on the Council's resources during the formulation of the notified regime that Mr Matheson described to us in the hearing concerning the Council's then-proposed Chapter 4 Papakāinga zone. In any case, no submitter has challenged the Notified Rule on the basis of any lack of associated s 32 evaluation and this apparent gap in the Council's evaluation does not impede our evaluation under s 32AA of the RMA.[13]

Section 32AA evaluation

[11] In the following paragraphs, we report our evaluation of the Revised Rule and set out our related reasons for determining it is the most appropriate for inclusion in Chapter 8 of the CRDP.

Contextual chronology

[12] The following chronology is to provide context for our evaluation of the Notified and Revised Rules (and provisions related to earthworks):

(a) The Notified Rule specified restricted discretionary activity as the most permissive classification for subdivision in the notified Papakāinga zone (in common with how the notified Chapter 8 proposals treated subdivision generally). However, for restricted discretionary subdivision in the notified Papakāinga zone, the Notified Rule specified no minimum lot size to apply (both for Māori Land and Other Land), subject to two activity standards:

[12] Section 32 Subdivision, Development and Earthworks, Section 32 Evaluation Section 32 Report Publicly Notified on 27 August 2014.

[13] RMA, s 32A(2).

(i) The subdivider was required to be tangata whenua of the ancestral land and should provide evidence to the Council of such status, endorsed by the relevant rūnanga and to provide the written approval of the relevant rūnanga for the subdivision.

(ii) The site was required to be capable of containing a permitted residential unit.

(b) In the lead-up to the hearing on Stage 2 subdivision, the Council and then the Joint Parties asked that we defer consideration of the Notified Rule until the Chapter 4 Papakāinga zone hearing. This was first raised by the Council in its Statement of Issues filed in advance of the Subdivision Stage 2 pre-hearing meeting. The Council raised it again in its updated statement of issues filed in advance of the Papakāinga zone pre-hearing meeting. The Joint Parties also made this request in a joint memorandum of counsel, dated 14 August 2015.[14]

(c) On 18 September 2015, the deferral requests were declined for reasons given in a Minute,[15] and the matter of the appropriateness of the Notified Rule was traversed at the Subdivision Stage 2 hearing, in November 2015.

(d) In its opening submissions at the Subdivision Stage 2 hearing, Ngāi Tahu again requested that a decision on minimum lot sizes be made "alongside and as part of, or following, the consideration of broader substantive issues associated with the Papakāinga Zone at the hearing of that Proposal."[16] This position was supported by the Crown.[17]

(e) On 4 November 2015, a Minute was issued giving timetabling directions for closing submissions for the Subdivision Stage 2 hearing. The Minute informed parties, concerning the Notified Rule:[18]

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14 Joint memorandum of counsel for the Crown, Te Rūnanga o Ngāi Tahu and Mahaanui Kurataiao Limited and the Council regarding Stage 2 (Definitions; General Rules and Procedures; Subdivision, Development and Earthworks; Papakāinga Zone; Rural; Open Space), 14 August 2015, at 10–12.

15 Minute in response to deferral issues for Rural and Subdivision Stage 2 hearings, 18 September 2015, at [5]–[6].

16 Opening submissions on behalf of Te Rūnanga o Ngāi Tahu and ngā rūnanga (submitter 2458/further submission 2821), 2 November 2015, at 14.

17 For example, opening submissions for the Crown (Subdivision Stage 2 hearing) at 5;

18 Minute — timetabling directions regarding Council provision of updated Stage 2 subdivision & Earthworks Proposal (Part) and closing submissions and timing of release of decision, 4 November 2015.

> Given the relatively confined submitter interests in the Papakāinga Zone, and the inherent relationships between minimum lot sizes and the extent and nature of other land use controls within that Zone, we agree that it would be appropriate to withhold from issuing our decision on the present proposal for the time being.

(f) On 23 November 2015, the Council filed closing submissions for the Subdivision Stage 2 hearing.[19] They progressed matters to some extent, indicating a position (which the other Joint Parties supported) that there should be no minimum lot size for subdivision in the PKN zone and the two activity standards we have set out at [12](a) should be dropped. The submissions explained that the two standards "were inadvertently carried over from the provisions within the operative Banks Peninsula District Plan."[20]

(g) On 23 and 24 November 2015, the Papakāinga zone hearing took place. As our companion Decision 37 reports, the Joint Parties reached full consensus on the most appropriate provisions for what is now called the Papakāinga/Kāinga Nohoanga zone. On 15 December 2015, the Joint Parties filed a joint memorandum expressing a common position on provisions ('15 December Joint Memorandum').[21] However, it did not express a position on the most appropriate outcome in regard to the Notified Rule.[22] By 13 January 2016, closing submissions were filed.[23] The Council's closing submissions for that hearing referred to the deferral of our decision on minimum lot sizes.[24] Somewhat confusingly, given the fact that the 15 December Joint Memorandum did not express a position on the Notified Rule, the Council's submissions were that the provisions jointly proposed in that memorandum were "the most appropriate way to achieve the aims of the Strategic Directions chapter and the Strategic Outcomes sought by the Panel, and the overarching aims of Part 2 of the Resource Management Act 1991".[25]

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19 The last, those of the Council, being filed on that date.

20 Evidence in chief of Alan Matheson on behalf of the Council (Papakāinga hearing), 5 October 2015, at 6.6.

21 The Joint Memorandum for the Council, Ngāi Tahu and the Crown regarding updates to the revised proposal following the hearing, 15 December 2015. This also included a revised earthworks rule.

22 The Joint Memorandum contained no reference to the question of minimum lot sizes in that zone. While it attached the Joint Parties' agreed position on amendments to other chapters, the only Chapter 8 provision identified was 8.8.2 Permitted Activities: Earthworks (Table 1).

23 Again, the Council as requiring authority was the last to file submissions.

24 Closing submissions for the Council, 13 January 2016, at 2.12.

25 At 6.1–6.2.

(h) The 8 June Joint Memorandum sought the Revised Version, and:[26]

(i) expressed a joint position that:

> the appropriate outcome is that there should be no minimum net site area for 'Māori Land' within the Papakāinga / Kāinga Nohoanga zone, and that for 'Other Land' within that zone, the minimum net site area for the Rural Banks Peninsula Zone should apply; and.

(ii) jointly requested that the wording of the rule as described in the Council's closing submissions for the Subdivision Stage 2 hearing be modified as follows (additions are shown in underlined italic text and deletions are shown in strikethrough text):

Zone	**Minimum net site area**	**Additional standard**
~~Papakāinga~~ Papakāinga/Kāinga Nohoanga	*Māori Land –* No minimum	
	Other Land – as applies to Rural Banks Peninsula (refer 8.2.3.1 Table 6 Minimum allotment size – Rural Zones)	

(i) By Minute of 10 June 2016, we invited supplementary closing submissions on the Joint Parties' Revised Rule.

(j) On 16 June 2016, Wainui Bay Limited (FS2829) filed supplementary closing submissions.[27] Amongst other things, Wainui Bay submitted that we lacked jurisdiction to entertain the Revised Rule. However, Wainui Bay's further submission was in respect to the Crown's submission on Chapter 4, rather than in relation to the Notified Rule (or indeed other aspects of the Stage 2 Chapter 8 proposal).

(k) On 21 June 2016, the Joint Parties filed joint submissions in reply to Wainui Bay Limited, including as to the jurisdiction point.[28]

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26 Above, n 3.

27 Legal submissions for Wainui Bay Limited in response to joint memorandum on behalf of the Council, the Crown and Ngāi Tahu regarding subdivision minimum net site areas dated 8 June 2016, including as to jurisdiction, 16 June 2016.

28 Supplementary submissions on behalf of Ngāi Tahu, the Crown and the Council, 21 June 2016.

(l) By Minute of 24 June 2016 ('24 June Minute'), we determined the preliminary question, finding we had jurisdiction to entertain the Revised Rule.[29]

(m) On 30 June 2016, Wainui Bay filed a further memorandum ('Wainui Bay 30 June memorandum') simply for the purposes of recording that its position had not altered in terms of the relief it pursued in its further submission (as explained by Mr Peebles) "and/or in relation to the jurisdictional issue set out in Counsel's submission",[30] responding to the Joint Parties 21 June supplementary reply and our 24 June Minute.

(n) On 22 June 2016, as a further step in this saga, the Council's filed an updated, "integrated" version of Chapter 8,[31] and on 27 June 2016 it updated this with some corrections.[32] In view of the preceding chronology we have described, we accept as an inadvertent oversight the fact that neither memorandum included the Revised Rule.

Wainui Bay 30 June memorandum

[13] As we have noted, Wainui Bay's further submission was on the Crown's submission on Chapter 4, not on Chapter 8. The further submission (and related representations by Mr Peebles) are addressed in our companion PKN zone Decision 37 from [36]. The jurisdictional issue is determined in the 24 June Minute, at [9]–[38].

Submissions

[14] We have considered all submissions and note that, with the exception of the Joint Parties, submitters do not raise issues with the Notified Rule.

29 Minute — Determination of preliminary questions as to jurisdiction to grant relief, 24 June 2016.
30 Memorandum for Wainui Bay Limited in response to Panel Minute of 27 June 2016 in relation to the rule package proposed jointly by [the Joint Parties], 30 June 2016.
31 Memorandum for the Council enclosing integrated version of Chapter 8 and seeking corrections to Subdivision, Development and Earthworks Stage 2 and 3 provisions, 22 June 2016.
32 Memorandum of counsel for the Crown regarding corrections to integrated version of Proposal 8 provided by the Council, 27 June 2016; Memorandum of counsel for the Council responding to the Crown, 5 July 2016.

[15] Our Stage 2 subdivision decision, including at [15]–[18], noted our consideration of submissions for that matter. We have noted the submissions of the Joint Parties, which we have also duly considered. Our Stage 2 subdivision decision noted, and made determinations concerning, various submissions dealing with the topic of minimum lot size in the Rural zone. We refer, in particular, to the submissions by Akaroa Civic Trust (2285), Jan Cook and David Brailsford (2241), Brent Martin and Suky Thompson (2418) and Lyttelton/Mt Herbert Community Board (2354). None of those submitters took issue with the Notified Rule. Rather, the submitters were concerned with minimum lot size for the Rural zone, not referring to the notified Chapter 4 proposal for the Papakāinga Zone (although Lyttelton/Mt Herbert Community Board made a submission of 'general support' for the notified Chapter 4 Papakāinga zone).[33] The Panel's findings on those submissions are at [46]–[59] of that decision.

Consideration of and adoption of findings in related decisions

[16] We have considered and adopt all the findings of our companion PKN zone Decision 37, including as to the statutory framework (and related principles), the Higher Order Documents and the evidence. In terms of those findings, we are satisfied that:

(a) The Revised Rule is appropriate; and

(b) Both the Notified Rule and the rule as described in the Council's closing submissions for the Subdivision Stage 2 hearing are inappropriate.

[17] In essence, that is because both the evidence and Higher Order Documents supporting the enablement of Māori land development pertain to, and also support the Revised Rule, but neither the evidence or Higher Order Documents provide support for applying that approach to the subdivision of Other Land.

[18] We have considered and adopt all findings of the Subdivision Stage 2 decision, insofar as they pertain to consideration of this matter. As to the findings at [46]–[59] of that decision, our findings at [16] also satisfy us that subdivision of Māori land within the PKN zone is

[33] The submission records that the "Lyttelton/Mt Herbert Ward currently has two areas of Papakainga zoning (Rapaki and Port Levy/Kourkourata). The Board acknowledges Ngāi Tahu manawhenua within the district."

materially different from subdivision of land in a Rural zone. Hence, we are satisfied that those findings at [46]–[59] of the Subdivision Stage 2 decision do not give a sufficient basis for determining that a similar minimum lot size approach should be applied. While we reach that view in light of our findings at [16], we are further reinforced in that view by the lack of submissions calling for such a consistent approach, and the Council's support for the other Joint Parties' position on this matter.

[19] We have considered our findings in the Topic 9.2 Decision 38, concerning landscapes and natural character. We are satisfied that none of those findings render the Revised Rule inappropriate. That is particularly in view of the findings on those same matters in our companion PKN zone Decision 37 and the fact that decision incorporates specific provisions for the identified Outstanding Natural Landscape and At Least High Natural Character overlays.

[20] Finally, we have also considered whether there should be any return of the Notified Version's standard to the effect that a site must be capable of containing a permitted residential unit. We find several other examples in Chapter 8 where there is no such standard, and we are satisfied on the evidence that it is unwarranted.

[21] We now turn to the amendment proposed to the earthworks provision. We consider there is no reason to treat thresholds in the Papakāinga/Kāinga Nohoanga Zone any differently from general rural land. As such, we find the proposed change to be the most appropriate for implementing the objectives of the plan.

Revised Rule the most appropriate

[22] For those reasons, we find the Revised Rule best responds to the relevant statutory principles, and the Higher Order Documents, and is the most appropriate for achieving related objectives, and in particular Strategic Objectives 3.3.3, 3.3.5 and 3.3.7, and Objective 4.1.1.

[23] We have made minor drafting refinements to it, to ensure proper consistency with the drafting in Chapter 8. The Decision Rule (renumbered 8.3.3.1, Table 5) is in Schedule 1 to this decision.

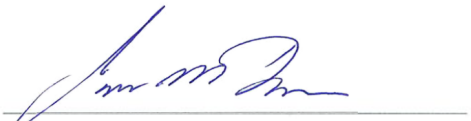
[24] We direct:

(a) Any party who seeks any minor correction(s) to the Decision Rule must file a memorandum setting out the correction(s), **within five working days of the date of this decision**;

(b) The Council must include the Decision Rule in Chapter 8, in accordance with the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.

For the Hearings Panel:

Environment Judge John Hassan
Chair



Sarah Dawson
Panel Member

Mr Alec Neill
Panel Member

Mr Gerard Willis
Panel Member

SCHEDULE 1

Amend Rule 8.3.3.1, Table 5, by adding the following row:

Zone	**Minimum net site area**
Papakāinga/Kāinga Nohoanga	Māori Land – No minimum
	Other Land – as applies to Rural Banks Peninsula Zone (refer Rule 8.3.3.1 Table 5 Minimum net site area — rural zones)

Amend Rule 8.5A.2.1, Table 9, as follows:

Zone/Overlay		**Volume**
Rural <u>and Papakāinga/Kāinga Nohoanga</u>	Rural zones (excluding excavation and filling associated with quarrying activities)	100m³/ha