

**BEFORE THE HIGH COURT
AT CHRISTCHURCH**

CIV 2016-

UNDER The Canterbury Earthquake (Christchurch Replacement District Plan)
Order 2014 and the Resource Management Act 1991

AND

IN THE MATTER of an appeal under Clause 19 of the Order

BETWEEN **EQUUS TRUST**

DAVID & SARAH WILSON

JEREMY & TIRE MARTIN

LAI HSI-YING & LAI HSI-CHANG

Appellants

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

NOTICE OF APPEAL

18 July 2016
Next Event Date: 2016

Natural Resources Law

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TO: The Registrar of the High Court at Christchurch

AND TO: The Christchurch City Council

TAKE NOTICE that Equus Trust, David & Sarah Wilson, Jeremy & Tere Martin and Lai Hsi-Yung and Lai Hsi-Chang (the Appellants) appeal to the High Court against the decision (Decision 23) of the Independent Hearings Panel (the Panel) on behalf of the Christchurch City Council (the Council) on the Proposed Replacement District Plan (the District Plan) which was publicly notified on 20 June 2016 (the Decision), on the grounds that the Council made errors of law in respect of parts of the Decision.

The Appellants were submitters on the District Plan.

The parts of the Decision appealed

1 The parts of the Decision appealed are:

- (a) The finding that giving effect to Part 6 of the Canterbury Regional Policy Statement (RPS), as inserted by the Land Use Recovery Plan, does not require the Panel to zone the land industrial (paragraphs 84, 89 and 101).
- (b) The consequential finding that the RPS allows for choice in the zoning of the land (paragraph 85).
- (c) The decision that Policy 6.3.3 of the RPS requires the Panel to have legal certainty that stormwater management and access will be provided before those elements can be shown on the Outline Development Plan (ODP) (paragraphs 131, 132, 148, 149, 150, 154).
- (d) The finding that uncertainty about how stormwater management and access will be legally provided meant that the proposal could not meet the requirements of Policy 6.3.3, and therefore zoning to Industrial was not warranted (paragraphs 154, 155).

Questions of law

2 The Appellants allege that the following questions of law arise:

- (a) Whether in giving effect to the RPS under section 75(3)(c) of the Resource Management Act, the Panel wrongly interpreted the objectives and policies of Chapter 6 of the RPS in concluding that it

had a discretion whether or not to rezone this Greenfields: Business priority area as Industrial.

- (b) Whether the Panel misinterpreted Policy 6.3.3 of the RPS regarding the level of detail and certainty required in respect of stormwater and traffic service connections to be shown in the ODP.
- (c) Whether the Panel failed to take into account relevant evidence relating to stormwater and traffic service connections provided by the Appellant and other submitters.
- (d) Whether the Panel took into account an irrelevant matter relating to road access, namely the power of the relevant road controlling authority to allow modifications to the Southern Airport Access loop road (paragraph 148).

Grounds of appeal

Background – Equus Trust

- 3 Equus Trust owns land at 76 Hawthornden Road ("the Equus Property"). The Trust has been actively seeking an urban zoning for the Property for over a decade, including being involved in what was known as Proposed Change 1 to the Canterbury Regional Policy Statement (PC1).
- 4 In 2010, the Christchurch City Council lodged an appeal with the Environment Court against the Canterbury Regional Council's decision on PC1 to include the Property within what was then known as Special Treatment Area 1. Following discussions, the Regional Council agreed to accept part of the City Council's relief as it related to the Equus Property but agreed, together with the City Council, that the Equus Property would be the subject of consideration as part of what was called the North West Review area process.
- 5 On 1 June 2011 the Trust entered into an agreement with Christchurch City Council and Canterbury Regional Council ("the Agreement") to settle the City Council's appeal on PC1 whereby the Appellant agreed to withdraw the evidence it had filed with the Court and not participate in the Court hearing.
- 6 At clause 2.2 of the Agreement the Christchurch City Council and the Canterbury Regional Council undertook to use their best endeavours to give favourable consideration to the inclusion of the Equus Property as Greenfields business land as part of the North West Review Area.

- 7 Following a detailed investigation as part of the North West Review Area ("NWRA") process, the Equus Property was recommended to be included as a Greenfields business zone (as shown in Map 6, Block B of the NWRA Report dated September 2012)
- 8 The NWRA report recommended that the North West Review Area be rezoned to Rural Urban Fringe, with the exception of blocks identified as within Greenfield areas, including the Equus Property. The report also recommended that the area between Hawthornden Road and Russley Road be rezoned for Industrial business purposes.
- 9 Following the Canterbury Earthquakes, section 16 of the Canterbury Earthquake Recovery Act 2011 provided for the Minister to promulgate a Land Use Recovery Plan (LURP). A draft LURP was notified on 6 July 2013 which included the Equus Property within a Greenfields Business area. The Trust made a submission in support of the Property's inclusion as a Greenfields Business area.
- 10 On 6 December 2013 the Minister released the LURP. Action 24 of the LURP directs the Christchurch City Council to enable in the next review of its district plan an integrated approach to the development of Greenfield priority areas that are located near Christchurch Airport. This included the Equus Property.
- 11 On 30 April 2015 the Canterbury Regional Council initiated a review of the LURP. While some submitters sought reduction of the areas identified in the NWRA, it was recommended by Canterbury Regional Council to the Minister for Earthquake Recovery that all currently identified areas within the NWRA be retained, as this was not a matter of earthquake recovery, and further consideration of these areas would best be dealt with under an RMA process.¹ The Trust also submitted on the LURP Draft Recommendations on 28 August 2015 in which it requested that the Greenfield priority area for business between Hawthornden Road and Russley Road be retained in the LURP and RPS.
- 12 No changes were made by the Minister to the LURP or the RPS in relation to the Property.

¹ 11.1. Canterbury Regional Council Decision Report with Recommendations, 24 September 2015.

- 13 As part of Stage 2 of the Replacement City Plan process, the Christchurch City Council decided that it would not give effect to the LURP but instead opt for a Rural Urban Fringe Zoning.
- 14 The Trust submitted on Stage 2 of the proposed Christchurch Replacement District Plan on 15 June 2015 opposing the proposed Rural Urban Fringe Zoning and submitted that the Equus Property should be zoned Industrial.

Background - Wilson, Martin & Lai

- 15 David & Sarah Wilson, Jeremy & Tire Martin and Lai Hsi- Yung and Lai Hsi-Chang own properties at 270 Russley Road, 280 & 298 Russley Road and 82 Hawthornden Road, Christchurch (the Wilson, Martin & Lai Properties).
- 16 As part of the NWRA process referred to, at paragraph 7 above, the Wilson, Martin & Lai Properties were recommended to be identified as a Greenfield priority business area.
- 17 In common with the Equus Property, the Wilson, Martin & Lai Properties were also identified in the LURP as a Greenfield Priority Area – Business Area. This included identification in Chapter 6 of the Canterbury Regional Policy Statement, which implements the LURP.
- 18 On 15 June 2015, a joint submission was lodged with the Christchurch City Council seeking that the Wilson, Martin & Lai Properties be rezoned as Industrial General or similar. The joint submission is identified in the Council records as submission No. 2278.
- 19 The Decision is by the Independent Hearings Panel relating to the Appellants' submissions on the Replacement District Plan.

Failure to give effect to the RPS

- 20 The legal issue identified by the Panel is set out in paragraphs 75 and 79 of its decision:

[75] For both groups, there is a preliminary legal issue concerning the proper interpretation of the CRPS and, in particular, Map A: For those sites that are identified as Greenfield Priority Area — Business on Map A, whether the non-industrial zoning proposed by the Notified and Revised Versions would give effect to the CRPS (and not be inconsistent with the LURP).

[79] ... the issue we must determine, [is] whether we must zone land industrial if it is identified as a Greenfield Priority Area — Business in Map A, CRPS.

- 21 The Panel summarised its approach to its interpretation of the RPS as follows:

[84] We also see that philosophy reflected in the CRPS. However, that is to the opposite effect of what Mr Cleary (and Mr Hutchings) submitted. That is, consistent with the LURP's generous approach to supply (i.e. its identification of Greenfield Priority Area — Business land), the CRPS does not direct that all such identified land be zoned industrial. Rather, it allows for choice, including in the determination (by zoning, for example) of the nature, timing and sequencing of new development particularly, so as to assist land use and infrastructure integration: see CRPS Policy 6.3.5.

[89] Turning to the CRPS, we agree with the Council's submissions that there is no requirement in the CRPS that Greenfield Priority Areas — Business be zoned industrial and "give effect to" does not automatically lead to the conclusion that land must be zoned industrial at the present time.⁷⁵ First, we note that it would be highly unusual, and potentially ultra vires, for a regional policy statement to seek to impose any such direction, given it is a subordinate statutory instrument intended to achieve the purpose of the RMA: s 59. In any case, such an interpretation is plainly invalid on a reading of the CRPS in the round, as the Council rightly notes is the proper approach (on which we refer to Powell).

- 22 The Panel referred to *Powell v Dunedin City Council* [2004] 3 NZRL 721 (CA) which is authority for a purposive approach to interpretation. However, *Powell* is of limited assistance in this case. It related to interpretation of a single rule in a district plan, whereas the Decision is concerned with interpretation of the objectives and policies of Chapter 6 of the RPS. The Supreme Court's decision in *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2014] NZSG 38 concerned a plan change and the requirement to "give effect to" the New Zealand Coastal Policy Statement (NZCPS). The Court summarised the approach to interpretation on the NZCPS as follows:

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a

stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another.

- 23 Following the direction in *King Salmon*, a purposive interpretation of Chapter 6 of the RPS - and in particular, Policy 6.3.1(1) - Development within the Greater Christchurch Area, Policy 6.3.1 - Principal reasons and explanation, Policy 6.3.5 - Integration of land use and infrastructure, Objective 6.2.2(4) - Urban form and settlement pattern, Objective 6.2.6 - Business land development, Objective 6.2.2 - Principal Reasons and explanation, Policy 6.3.3 - Development in accordance with outline development plans, Policy 6.3.6 - Business land - would recognise a positive direction in the RPS requiring rezoning the Property to Industrial. Rezoning the Property to another zone (in this case Rural Urban Fringe) rather than Industrial fails to give effect to the RPS.
- 24 A regional policy statement may contain policies that are flexible or inflexible, and may have the effect of rules in the ordinary sense of the term. If the Chapter 6 provisions are unusual, they arise from unusual circumstances. Chapter 6 was inserted at the direction of the Minister for Earthquake Recovery and provides a resource management framework for the recovery of Christchurch. In those circumstances, the provisions could be expected to be more directive than might otherwise occur.
- 25 In addition, the RPS contains other directive policies relating, inter alia, to provision of sufficient residential land to address housing affordability, provision of development opportunities on Maori Reserves and the phasing out of over-allocation and improvement of water quality in some circumstances. Those policies have been given effect to through the Regional Plan and have resulted in plan provisions requiring positive action.

ODP requirements for stormwater and road access

- 26 The Panel declined to rezone the Property on the grounds that stormwater flow paths and road connections must be shown on the ODP in order to give effect to Policy 6.3.3, but because legal arrangements were not in

place for those connections there was insufficient certainty to include them on the ODP.

27 Policy 6.3.3 requires:

Development in Greenfield priority areas and rural residential development is to occur in accordance with the provisions set out in an outline development plan or other rules for the area. Subdivision must not proceed ahead of the incorporation of an outline development plan in a district plan. Outline development plans and associated rules will:

...

(3) To the extent relevant show proposed land uses including:

(a) Principal through roads, connections with surrounding road networks, relevant infrastructure services and areas for possible future development;

(f) Land required for stormwater treatment, retention and drainage paths;

(6) Document the infrastructure required, when it will be required and how it will be funded;

(9) Show how other potential adverse effects on and/or from nearby existing or designated strategic infrastructure (including requirements for designations, or planned infrastructure) will be avoided, remedied or appropriately mitigated.

28 While Policy 6.3.3(3) enables the Panel to require that the location of road connections and stormwater drainage paths be shown on the ODP that does not mean that all legal arrangements must be in place to achieve those connections. Policy 6.3.3 requires that the listed matters be addressed by ODPs "and associated rules". Notations on an ODP are usually indicative and it is common to give effect to an ODP by inclusion of a non-complying activity rule for any development which is not in accordance with the ODP. Rules may also require that particular infrastructure developments or connections are available prior to land development taking place. Such an approach would give effect to the policy. The Panel were in error in requiring legal certainty so that the matters could be addressed by the ODP alone.

- 29 The Panel's decision not to rezone the Property Industrial because of legal uncertainty on stormwater management and road access was an error of law.

Failure to take into account relevant evidence

- 30 In coming to its conclusion on stormwater and road access, the Panel failed to take into account the following relevant evidence:
- (a) Mr Brian Norton's rebuttal evidence (for the Council) that parts of the area in question, namely 76, 80, and 82 Hawthornden Rd have existing legal rights to an overland flow path for stormwater; and evidence given orally that stormwater issues can be properly dealt with at the time of subdivision;
 - (b) The Property owned by the Appellant has frontage to Hawthornden Rd part of which is available for a secondary stormwater flow path for other areas within the Greenfields Priority Business Area, namely 280 and 298 Russley Rd;
 - (c) Mr Andy Carr's evidence that the costs of any intersection with the Southern Airport Access would be met by owners of the land to be rezoned.
- 31 This evidence was material to the Panel's conclusion on ODP issues, but was not taken into account.

Taking into account an irrelevant matter

- 32 The Panel stated:

[148] It is reasonable to assume that compliance with applicable road design standards would be a significant factor that a road controlling authority would weigh in deciding whether or not to allow for modifications to a road. However, that does not necessarily exclude judgement on the part of that authority as to whether a modification is appropriate, including in safety terms. We have no evidential basis for drawing any conclusions on whether or not the relevant road controlling authority (whether the NZTA or the Council) would allow the modifications that Mr Carr has proposed. We cannot safely draw anything from the fact that the existing loop road makes provision for a minor access, as this is just to serve a few existing rural properties. The authority may or may not regard the design as appropriate.

33 Effectively, the Panel is saying that even if access can be provided in accordance with relevant standards and the rezoning is otherwise appropriate or required by the RPS, a road controlling authority can ignore the rezoning and decide not to allow access to be obtained to the zone. In this situation. The theoretical powers of a road controlling authority are irrelevant to the requirement to give effect to the RPS. Moreover, the Panel's funding in this paragraph fails to give effect to the RPS objectives of providing planning certainty and enablement of rezoning of Greenfield Priority Areas.

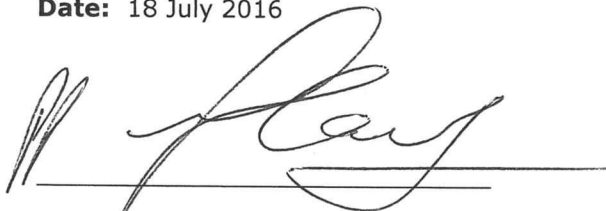
Relief sought

34 Equus Trust seeks the following relief:

- (a) That the Appeal be allowed and the Panel's decision set aside;
- (b) That the Panel be directed to reconsider its decision by rezoning the Greenfields: Business land, including the Property, to Industrial, with appropriate zone provisions;
- (c) That the Panel be directed to reconsider its decision by properly applying Policy 6.3.3 of the RPS;
- (d) Such further and other relief as may be appropriate;
- (e) Costs of and incidental to the appeal.

35 The Appellant attaches a copy of the relevant parts of the decision with this Notice.

Date: 18 July 2016

A handwritten signature in black ink, appearing to read 'M R G Christensen', is written over a horizontal line.

M R G Christensen
Solicitor for Equus Trust

This notice is filed by Mark Raymond George Christensen, solicitor for the Appellant, of Natural Resources Law Limited, whose address for service is at the office of Natural Resources Law Limited, 20 Chateau Drive, Burnside, Christchurch. Documents may be posted to the Solicitor at PO Box 6643 Upper Riccarton Christchurch 8442.