

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2016-409-83
[2016] NZHC 1218**

IN THE MATTER of Canterbury Earthquake Recovery Act
2011, 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
in relation to a decision of the Independent
Hearings Panel on the Commercial and
Industrial Chapter (Stage 1) of the
Proposed Christchurch Replacement
District Plan

BETWEEN KI COMMERCIAL LIMITED
Appellant

AND CHRISTCHURCH CITY COUNCIL
Respondent

Hearing: 8 June 2016
(On the papers)

Counsel: D Pedley for Appellant
J Winchester for Respondent

Judgment: 8 June 2016

JUDGMENT OF MANDER J

[1] The appellant, KI Commercial Limited (KIC), filed a notice of appeal against the decision of the Independent Hearings Panel (the Panel) on behalf of the Christchurch City Council (the Council). The appeal relates to the Commercial (Part) and Industrial Chapter (Part) Stage 1 decision of the Proposed Christchurch Replacement District Plan (the Plan), notified by the Council on 15 January 2016.

[2] KIC appealed that part of the decision that amends the permitted activity rule (r 15.7.2.1) to further restrict commercial services, office activity and retail activity in the Commercial Mixed Use Zone (CMUZ). Various errors of law were identified and questions of law articulated for determination by this Court.

Amended notice of appeal

[3] Leave is granted to KIC to amend its original notice of appeal. It now appeals against those parts of the decision that relate to permitted activities P2, P9 and P10 of r 15.7.2.1 as drafted by the Panel, insofar as they would allow as permitted activities retail activities, commercial services or office activities which existed as at the date of the decision, and insofar as they relate only to the appellant's properties at 9 and 11-13 Bernard Street, Addington (the appellant's properties). These properties were zoned Business 4 under the Operative Christchurch City Plan and contain existing buildings that were previously used for a range of commercial activities.

[4] Pursuant to the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 and s 301 of the Resource Management Act 1991 (RMA), the Crown had given notice of its intention to appear and be heard in relation to the appeal lodged by KIC. However, given the amended notice of appeal effectively limiting the scope of the appeal to an alleged error of law specific only to KIC's properties and interests in Bernard Street, Addington, the Crown no longer has an interest. It has filed a memorandum seeking leave to withdraw with no issues as to costs. Leave to withdraw is granted.

Background

Procedural background

[5] Stage 1 of the Plan was notified on 27 August 2014. The overall purpose of the Plan was to replace the Operative Christchurch City Plan with chapters 15 and 16 containing objectives, policies and methods to manage the use of commercial and industrial zoned land within Christchurch.

[6] KIC lodged submissions on these chapters. These together with other submissions on the Plan were heard and considered by the Panel on behalf of the Council. On 15 January 2016, the Council notified the decision. The following month KIC filed its appeal, and subsequently the Crown filed a notice of intention to appear and be heard in relation to the appeal.

[7] The parties have engaged in settlement discussions to resolve the issues raised by the appeal. The amended notice of appeal to which I have referred, which refines both the error of law and relief sought so that it is confined only to the appellant's interests, has been filed as part of the proposed settlement.

Factual background

[8] KIC's properties have been vacant since the Canterbury earthquakes due to ongoing repairs and renovations in preparation for reoccupation of the buildings. When the Plan was notified it proposed to zone KIC's properties and the surrounding area as Industrial General to encourage industrial activities and made only very limited provision for activities such as retail, office and commercial services. KIC lodged a submission on the Plan seeking to change the proposed zoning from Industrial General to Commercial Core in order to allow for a broad range of activities, including the establishment of new retail, offices and commercial activities at permitted premises.

[9] KIC filed evidence in support of its position and the Council filed rebuttal evidence which included an amended position to support the following outcome:

- (a) The majority of the Addington area (including the appellant's properties) would be zoned Commercial Mixed Use.
- (b) The rules for the CMUZ would permit a wide range of activities, including the use of existing buildings for offices, retail and commercial services.

[10] A planning witness called on behalf of the Council, Mr Mark Stevenson, gave evidence about the Council's amended position, and in particular the proposed

r 15.7.2.1, P1 and P8 which would permit retail and office activities to occur in an existing building.

[11] Mr Stevenson was questioned about the extent to which offices and retail would be permitted in the CMUZ under the provisions that he was promoting. In response to that questioning, Mr Stevenson confirmed that his recommendation was that any buildings that exist as at the date of the decision could be used for retail or offices in the future. In addition, there was an exchange between the Panel and KIC's witness, Mr Keung, regarding the extent to which the provisions of the CMUZ promoted by the Council would take account of the appellant's interest. In that exchange the Panel noted that under the provisions for the CMUZ proposed by the Council, KIC's existing buildings could be used for offices and retail as a permitted activity. Mr Keung confirmed those provisions took account of KIC's interests and that 75 per cent of its long term future plans would be covered by this zone. In its decision the Panel relied on the evidence provided by Mr Keung to conclude that KIC's position would not be unduly jeopardised.

[12] The final provisions promoted by the Council for the CMUZ were appended to the Council's closing legal submissions. The Council continued to propose rules that would permit retail and office activities to occur in an existing building (see r 15.7.2.1, P2 and P10), but also proposed a rule to clarify that commercial services are also permitted to occur in an existing building (r 15.7.2.9, P9).

The decision

[13] In its decision on the provisions governing permitted activities in the CMUZ (specifically r 15.2.7.1) the Panel included provisions that are more restrictive than those that had been proposed by the Council and discussed in evidence by the Panel with Mr Keung. In particular, the Panel amended the terms of P2, P9 and P10 of r 15.2.7.1 so that offices, retail and commercial services would only be permitted in existing buildings where those activities were occurring as at the date of the decision. This differs from the version promoted by the Council that was the subject of discussion at the hearing, where existing buildings could be used for the above

activities, regardless of whether or not those activities were occurring in those buildings as at the date of the decision.

[14] As noted by the parties in their joint memorandum, this is an important distinction because KIC's existing buildings are currently not occupied. The change effected by the Panel was made without providing KIC with the opportunity to comment on how the provisions it had imposed may affect its interests. The parties are agreed that there was therefore no evidence before the Panel on the costs for KIC associated with that part of the Panel's decision.

The contended error of law

[15] Under s 32AA of the RMA, the Panel was required to complete a further evaluation of any changes that were made since the initial s 32 evaluation report was completed, including the changes it made in its decision to r 15.7.2.1. This further evaluation must examine the benefits and costs anticipated from implementing the changes, along with the other matters referred to in s 32(1) to (4) of the RMA. The further evaluation must be referred to in the decision in sufficient detail to demonstrate that the evaluation was undertaken in accordance with statutory requirements.

[16] KIC contends that, insofar as its properties are concerned, the Panel committed an error of law by failing to carry out the further evaluation that was required under s 32AA and failing to take relevant matters into account. In particular:

- (a) The Panel did not consider the costs that its decision would impose on KIC when the effect of the Panel's amendment to r 15.7.2.1 was to remove the ability for KIC's properties to be used for commercial services, offices and retail as permitted activities. This is prejudicial to KIC and the underlying investment value of the land.
- (b) The decision to amend r 15.7.2.1 was therefore inconsistent with the Panel's findings at paragraph 386 of the decision, where it relied on

the provisions of the CMUZ as promoted by the Council to conclude that the appellant's position would not be unduly jeopardised.

- (c) Given the timing and unforeseen nature of the changes the Panel made to the provisions that were proposed by the Council and discussed with Mr Keung, KIC was not given the opportunity to comment on the impact of the decision on its interests. This gives rise to issues of natural justice and resulted in the circumstance where the Panel did not have the necessary evidence before it on which to make its decision.

The agreed position of the parties

[17] As mentioned, the parties have engaged in settlement discussions regarding the appeal and have reached an agreed position.

[18] KIC and the Council are agreed the Panel failed to consider the costs on KIC (as required by s 32AA of the RMA) and failed to provide KIC with an opportunity to comment on how the Panel's decision affects its interests in relation to KIC's properties. This had a material impact on the Panel's decision.

[19] Given the nature of this error, KIC and the Council agree the appropriate relief is for the matter to be referred back to the Panel so the interests of KIC in relation to its properties can be properly taken into account by the Panel.

Orders

[20] By consent I allow the appeal and exercise the available power under r 20.19 of the High Court Rules remitting the Panel's decision back to it to reconsider the relevant parts of its decision.¹

[21] In accordance with the agreed position of the parties and because the error involves a failure to consider relevant information and a lack of opportunity to

¹ Resource Management Act 1991, ss 300-307; High Court Rules, r 20.19.

comment, I direct the Panel to provide KIC with an opportunity to make further submissions and provide further evidence on its interests in relation to its properties.

[22] As a result of the filing of KIC's amended notice of appeal and the agreed position reached between it and the Council, the scheduled hearing date of the appeal, 9 June 2016, is vacated and the orders requested in resolution of the appeal made on the papers. The parties are agreed there is no issue as to costs.

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