IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-

UNDER	the Resource Management Act 1991 and the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014
IN THE MATTER	of a determination of the Independent Hearings Panel on proposals notified for incorporation into a Christchurch Replacement District Plan including as arising from a private plan change request by Memorial Avenue Investments Limited (MAIL)
BETWEEN	Canterbury Trustees Limited, a duly incorporated company having its registered office at 485 Papanui Road, Christchurch, and Herbert Lawrence John Govan of 89 Puriri Street, Christchurch, Company Director, as Trustees of the **G N McVICAR NO 1 TRUST**
	Appellant
AND	**CHRISTCHURCH CITY COUNCIL** of Christchurch, Territorial Authority
	Respondent

NOTICE OF APPEAL
Dated 18 July 2016

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NOTICE OF APPEAL

To: The Registrar of the High Court at Christchurch

And to: The Christchurch City Council

This document notifies you that -

1 On **Monday the 15th day of August 2016** at **11.45am/pm** or as soon thereafter as counsel may be heard Canterbury Trustees Limited and Herbert Lawrence John Govan as Trustees of the **G N MCVICAR NO 1 TRUST**, the Appellant in the proceeding identified above, will appeal to the High Court against part of the decision in Decision 24 dated 13 June 2016, Private Plan Change Request (Memorial Business Park) including Chapter 15 Industrial (Part) and Chapter 6 General Rules and Procedures (Part) (and relevant definitions and associated planning maps) of the Independent Hearings Panel (**the Panel**).

Error of Law Alleged

2 The Appellant alleges that the decision of the Panel is erroneous in point of law in that:

2.1 The Panel erred in law in failing to take into account the following relevant considerations:

(a) The implications of s 85 Resource Management Act 1991 (**RMA**) when including rules where the Christchurch Replacement District Plan (**CRDP**) already contained restrictions imposed through a REPA Designation pertaining to Christchurch International Airport Limited's (**CIAL**) operations;

(b) The consequential unavailability to the Appellant of its statutory remedy under s 185 in the future, if it ever sought to do so;

(c) That it would be open to CIAL as Requiring Authority to lift the REPA Designation at some point in the future if it was no longer required;

(d) If the REPA Designation were ever to be lifted, the rules would remain in force despite there being no REPA Designation;

2.2 The Panel failed to undertake an evaluation in accordance with s 32(1)-(4), in particular:

(a) As to the efficiency and effectiveness of the rules given that the REPA Designation already contained more onerous restrictions;

(b) As to the benefits and costs, and in particular, the implications of s 85 RMA and costs to the Appellant in terms of being denied its access to statutory remedies pursuant to s 185 RMA; and

(c) The ongoing cost to the Appellant as a result of the rules remaining in force, in the event that the REPA Designation were ever to be uplifted by CIAL on the basis that it was no longer necessary;

2.3 In concluding that the rules attaching to the underlying zone were necessary, the Panel erred in law in its approach to the functions and powers of both a Requiring Authority and the Environment Court in relation to its designation under ss 176 and 179 RMA by:

(a) Failing to acknowledge that the existing REPA Designation necessarily serves the wider community interests reflected in Part 2 of the RMA, including in relation to public safety;

(b) That CIAL's decision on any request under s 176 has to be informed by the purpose of the designation;

(c) Any appeal under s 179 from a decision made under s 176 to the Environment Court must be resolved having considered specific mandatory considerations in s 179(3), including:

> (c) The extent to which the decision may be modified without wholly or partly nullifying the effect of the requirement or designation.

Question of Law to be Resolved

3 The Appellant intends to ask the Court to resolve the following questions of law:

3.1 Did the Panel err in failing to take into account the implications of ss 85 and 185 as relevant matters;

3.2 Did the Panel err in failing to undertake an evaluation under s 32(1)-(4) as to the efficiency and effectiveness of the rules, and as to the benefits and costs;

3.3 Did the Panel err in its approach to the functions and powers of both a Requiring Authority and the Environment Court and the extent to which or manner in which Part 2 considerations in relation to public safety is subsumed in the REPA Designation and restrictions, and thus required to be reflected in the exercise of those statutory functions and powers.

Grounds

4 The grounds on which the appeal is brought are:

4.1 The Appellant's land is one of a number of land parcels that is subject to a REPA Designation included in the CRDP by an earlier decision of the Panel[1] which is for the purpose of:

> Airport-Restrictions in respect of land and associated airspace for the purposes of a Runway End Protection Area (REPA), for the safe and efficient functioning of the Airport ...

– and which is followed by a comprehensive list of restrictions on land use activities.

4.2 In coming to its decision on the REPA Designation (in Decision 5), the Panel took into account:

(a) An earlier decision of the Christchurch City Council rejecting a privately requested plan change that sought to impose REPA controls as rules on the basis that a designation was the more appropriate planning tool as against other planning approaches;

(b) That in relation to the designation being the more appropriate planning tool:

> ... a valid point of difference, given the inherent need for land use restriction to achieve the CIAL's REPA objectives, is that

[1] Decision 5 dated 27 August 2015

> Designation D1 will offer recourse to the remedies of acquisition and compensation under the Public Works Act.[2]

(c) And:

> [84] We are mindful that the RMA provides for legal remedies to land owners affected by a restrictive designation, but these are by no means assured. One potential recourse is an appeal against a decision by CIAL to decline permission to undertake a particular use. We acknowledge that, given the designation purpose, for Area B, of a REPA, success in such an appeal would be by no means certain. In addition, a land owner may be able to apply for an order for land purchase if they can satisfy the statutory prerequisites. Again, we acknowledge that success in such an appeal would be by no means certain.

(d) And also concluded that in light of matters under s 171(1)(a)-(d), and on the basis that *"our consideration of these matters is prefaced by an obligation to "subject to Part 2, consider the effects on the environment of allowing the requirement""*:

> [86] Specifically, we are satisfied that these adverse effects are outweighed by the positive benefits that the designation of Area B will deliver in better enabling people and communities to provide for their safety and wellbeing through a safer and more efficient airport operation.

4.3 Despite those conclusions, in the decision under appeal, the Panel described the central issue as:

> [230] The issue we must now determine is whether the Designation is, itself, sufficient or whether rules imposing restrictions on the use and development of the REPA land should also be included in the CRDP (and, if so, the nature of those restrictions). That was the central question in contention between CIAL, the Trust, and the Council.

– and acknowledged that in respect of the question whether the REPA controls should also be addressed through rules:

> [248] It would appear that, underlying the divergent positions of CIAL and the Trust are their competing commercial interests, particularly as to the potential for compensation for any Public Works Act 1981 purchase of the Trust's land.

4.4 The Panel then went on to conclude that:

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[2] At para [49] Decision 5

> [250] In effect, CIAL presented the counter-view, raising concern that the Trust's approach (i.e. of seeking no restrictions) could be a "springboard" for its s 185 argument that the Designation was hampering reasonable use of land.

4.5 The Panel then made the erroneous findings:

> [251] We found these competing commercial agendas an unhelpful distraction from our task of determining the most appropriate plan regime. In essence, they have led to complex, and ultimately spurious, legal arguments.

4.6 And:

> However, it is not entirely clear whether CIAL must exercise its various relevant requiring authority decision-making responsibilities subject to Part 2 RMA. For instance, unlike ss 104 and 171, s 176 (in regard to CIAL's decisions on written requests to do things on designated land) is not expressly subject to Part 2 RMA.

4.7 The Panel then erroneously concluded:

> ... we are not satisfied that the Designation will be a sufficient method for that management. Decisions CIAL may make on requests under s 176 may not necessarily serve the wider community interests reflected in Part 2 RMA. Public safety is a matter that may go beyond the interests of a proponent seeking s 176 clearance, and beyond CIAL's interests in making decisions under s 176.

4.8 In so concluding, the Panel has erred in law in that it has failed to take into account that by including the REPA controls as rules attaching to the underlying zoning, such restrictions are deemed to not involve the taking of an interest in land in terms of s 85(1) RMA;

4.9 The disadvantage accruing to the Appellant in light of those rules must be borne uncompensated as the underlying policy of s 85 is that public interest takes priority over private property rights;

4.10 The Panel failed to take into account the implications of including rules in terms of the Appellant's access to remedies under s 185 in light of the underlying s 85 policy implications;

4.11 Despite recognising its relevance in its earlier Decision 5 on the REPA Designation, the Panel erred in concluding that the Appellant's arguments around the application of s 185 were "an unhelpful distraction" thereby treating s 185 as an irrelevant matter;

4.12 The Panel failed to consider the implications whereby the REPA Designation is lifted in the future, bearing in mind that the lifting of the designation would not result in the rules being deleted without a dedicated plan change to achieve that outcome.

Relief Sought

5 The Appellant seeks judgment from the Court:

5.1 That its appeal be allowed;

5.2 That the matter be referred back to the Panel for reconsideration in light of the findings of this Honourable Court; and

5.3 Costs.

6 The Appellant is not legally aided.

Dated this 18th day of July 2016.

G K Riach
Solicitor for the Appellant

This Notice of Appeal is filed by **GRAEME KENNETH RIACH**, Solicitor for the abovenamed Appellant of the firm of Harmans. The address for service of the Appellant is at the offices of Harmans Lawyers, 485 Papanui Road, Papanui, Christchurch.

Documents for service on the Appellant may be left at that address for service, or may be:

1. Posted to the solicitor at PO Box 5496, Christchurch 8053; or
2. Transmitted to the solicitor by facsimile to +64 3 352 2274; or
3. Transmitted to the solicitor by electronic mail addressed to graeme.riach@harmans.co.nz

And in all instances, also copied to Counsel Prudence Steven QC by email: pru@prusteven.co.nz.