

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

In the Matter of an appeal under clause 19 of the Order

Between **TE RŪNANGA O NGĀI TAHU**, the representative of Ngāi Tahu Whānui established pursuant to s 6 of the Te Runanga o Ngai Tahu Act 1996

**Appellant**

Between **CHRISTCHURCH CITY COUNCIL** a local authority constituted under the Local Government (Canterbury Region) Reorganisation Order 1989

**Respondent**

Notice of Appeal under clause 19 of the  
Canterbury Earthquake (Christchurch  
Replacement District Plan) Order 2014

Dated: 28 November 2016

---

**lane neave.**

141 Cambridge Tce  
PO Box 13149  
Christchurch  
Solicitor Acting: J Leckie  
Phone: 03 379 3720  
Fax: 03 379 8370  
Counsel Acting: D van Mierlo

To: The Registrar, High Court, Christchurch

And To: The Christchurch City Council

And To: Those parties who filed submissions or further submissions in relation to sub-chapter 9.5 – Ngāi Tahu Values.

**TAKE NOTICE** that Te Rūnanga o Ngāi Tahu (**the Appellant**) hereby appeals against the decision of the Independent Hearings Panel (**the Panel**) on behalf of the Christchurch City Council (**the Council**) on Decision 51: Chapter 9 Natural and Cultural Heritage (Part) Sub-chapter 9.5 – Ngāi Tahu Values of the Proposed Christchurch Replacement District Plan (**the Plan**), notified by the Council on the 31<sup>st</sup> October 2016 (**the Decision**) **UPON THE GROUNDS** that the Decision is erroneous at law.

The Appellant lodged submissions and further submissions in respect of the Plan relating to the matters with which this appeal is concerned.

### **Decision Appealed**

1. The Appellant appeals against part of the Decision (including the schedules to the Decision). In particular
  - (a) Exemption 8.5A.3. b. iii. – being an exemption to Rule 8.5A.2.3 RD6 that provides for earthworks which do not exceed a depth of 0.6m within Wāhi Tapu and Wāhi Taonga sites as identified in Schedule 9.5.6.1, and Kaitorete Spit as identified in Schedule 9.5.6.2, of the Plan.
2. Exemption 8.5A.3.b. iii. is shown in the context of Rule 8.5A.2.3 RD6 below (emphasis added):<sup>1</sup>

#### **8.5A.2.3 RD6**

Earthworks within:

- a. a Site of Ngāi Tahu Cultural Significance identified in Schedule 9.5.6.1;
- or

---

<sup>1</sup> The rule and exemptions are shown as corrected by the Panel in its Decision to make Minor Corrections to Decision 51 dated 22 November 2016.

b. Kaitorete Spit (ID 64) identified in Schedule 9.5.6.2;

except where listed as an exemption in Rule 8.5A.3 b.

RD6 does not apply to land in the Industrial General Zone (North Belfast).

Any application arising from this rule need not be publicly notified, but shall be limited notified to the relevant rūnanga, and Heritage New Zealand Pouhere Taonga in respect of sites on the Heritage New Zealand List / Rārangī Korero, (absent their written approval).

...

### **8.5A.3 Exemptions**

b. The following earthworks are exempt from the provisions of Rule 8.5A.2.3 RD6:

i. earthworks for rammed post holes for fencing, planting holes for trees and plants, the maintenance of existing farm tracks and existing farm ponds, the cultivation of existing pasture, or cropping; or

ii. earthworks for offal pits within Kaitorete Spit (ID 64) identified in Schedule 9.5.6.2 which do not exceed dimensions of 2 metres x 2 metres x 1.5 metres; or

iii. earthworks for purposes other than i. or ii., which do not exceed a depth of 0.6 metres.

### **Errors and Questions of Law**

3. The Appellant alleges that in its decision to include exemption 8.5A.3. b. iii, the Panel erred in law by:

- (a) failing to observe the statutory requirement in s 75(3) of the RMA to give effect to the Canterbury Regional Policy Statement (**CRPS**),
- (b) failing to observe the statutory requirement in s 75(3) of the RMA, in respect of those sites within Schedule 9.5.6.1 located within the coastal environment, and Kaitorete Spit, to give effect to the New Zealand Coastal Policy Statement 2010 (**NZCPS**),

- (c) failing to observe the statutory requirement in s 76(1) of the RMA to achieve the relevant objectives and policies of the Plan, in particular Objective 9.5.2.1 and Policies 9.5.2.4 and 9.5.2.7,
  - (d) incorrectly interpreting s 6(e), of the RMA,
  - (e) failing to observe the statutory requirement in s 6(e) of the RMA to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water sites, wāhi tapu and other taonga,
  - (f) incorrectly interpreting s 6(f), of the RMA,
  - (g) failing to observe the statutory requirement in s 6(f) of the RMA to recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development,
  - (h) incorrectly interpreting s 7(a) of the RMA,
  - (i) failing to observe the statutory requirement in s 7(a) to have particular regard to kaitiakitanga,
  - (j) incorrectly interpreting s 8 of the RMA,
  - (k) failing to observe the statutory requirement in s 8 to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi, and
  - (l) failing to give effect to its own reasoning.
4. The questions of law to be answered are whether the Panel erred in the manner outlined in paragraph 3 above.

### **Grounds for appeal**

5. Sections 6(e), 6(f), 7(a) and 8 of the RMA provide;

### **6 Matters of national importance**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and



protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

...

## **7 Other matters**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

...

## **8 Treaty of Waitangi**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

6. Section 75(3) of the RMA provides:

### **75 Contents of district plans**

(3) A district plan must give effect to—

...

(b) any New Zealand coastal policy statement; and

(c) any regional policy statement.

7. Chapter 4 of the CRPS relates to Provision for Ngāi Tahu and their relationship with resources. Relevantly, provisions of the CRPS include;

**Territorial authorities, in order to give effect to their functions under the RMA will:**

### **4.3.15**

Include provisions for the relationship between Ngai Tahu, their culture and traditions, and their ancestral lands, waters, sites, wahi tapu and other taonga within district plans.

#### **4.3.16**

Include methods for the protection of Ngai Tahu ancestral lands, water, sites, wahi tapu and other taonga within district plans.

### **8. Objective 3 and Policy 2(f) and (g) of the NZCPS provide;**

#### **Objective 3**

To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

#### **Policy 2**

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

- f. provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
  - i. bringing cultural understanding to monitoring of natural resources;
  - ii. providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
  - ...
- g. in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and

recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

- i recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and
- ii provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

9. Section 76(1)(b) of the RMA provides

**76 District rules**

- (1) A territorial authority may, for the purpose of—
- (a) carrying out its functions under this Act; and
  - (b) achieving the objectives and policies of the plan,—
- include rules in a district plan.

10. Objectives and policies relating to protection of Wāhi Tapu and Wāhi Taonga were determined by the Panel in the Decision. Relevant Objectives and Policies include;

**9.5.2.1 Objective — Areas and sites of Ngāi Tahu cultural significance**

- a. The historic and contemporary relationship of Ngāi Tahu Manawhenua with their ancestral lands, water, sites, wāhi tapu and other taonga is recognised and provided for in the rebuild and future development of Ōtautahi, Te Pātaka o Rākaihautū and the greater Christchurch Area.

**9.5.2.4 Policy - Wāhi Tapu and Wāhi Taonga**

- a. Avoid any disturbance of urupā, except for activities associated with the identification and protection of such sites which are undertaken by the relevant rūnanga or their authorised agent.



b. Protect Wāhi Tapu / Wāhi Taonga sites from inappropriate development, disturbance, damage or destruction, and ensure activities adjoining these sites do not adversely affect them.

#### **9.5.2.7 Policy - Archaeological sites**

a. Avoid damage to or destruction of Ngāi Tahu Manawhenua archaeological sites within identified Sites of Ngāi Tahu Cultural Significance or any unmarked or unrecorded archeological site when undertaking earthworks, building or utility activities.

11. Schedule 9.5.6.1 consists of mapped Wāhi Tapu / Wāhi Taonga sites located within Christchurch District. The Panel's decision records that the extent of mapping was agreed by witnesses for the Council and Ngāi Tahu, and was not challenged by any expert evidence presented by any other party. The Panel found that the evidence overwhelmingly supported the extent of mapping of sites of Ngāi Tahu cultural significance included in the Plan.<sup>2</sup>
12. Kaitorete Spit is identified in schedule 9.5.6.2. The Panel's decision records that it accepted the evidence of a number of witnesses as to the Wāhi Tapu / Wāhi Taonga values of Kaitorete Spit.<sup>3</sup>
13. In reaching its decision to exempt earthworks to a depth of 0.6m within Sites of Ngāi Tahu Cultural Significance listed in schedule 9.5.6.1 and Kaitorete Spit, from rule 8.5A.2.3 RD 6, the Panel incorrectly interpreted and applied sections 6(e), 6(f), 7(a) and 8 of the RMA, and the objectives and policies of the CRPS and NZCPS by;
  - (a) failing to provide for the protection of these Wāhi Tapu / Wāhi Taonga sites of Ngāi Tahu cultural significance; and
  - (b) failing to give effect to the relevant Objectives and Policies of the Plan.
14. The effect of the exemption provided for in 8.5A.3.b iii is that earthworks to a depth of 0.6m would be a permitted activity where they meet the activity standards set out in rules 8.5A.2.1 P1 – P6. of the Plan.

<sup>2</sup> At paragraph 130 of the Decision.

<sup>3</sup> At paragraph 163 – 167 of the Decision.



15. The Panel's decision records that the permitted activity earthworks rules now contained in 8.5A.2.1 P1 - P6 contain very generous volumetric limits that would leave sites of Ngāi Tahu cultural significance entirely exposed to destruction, and that this would be contrary to the relevant statutory principles and higher order planning documents.<sup>4</sup>
16. The Panel's decision further records that the narrative exemptions included by the Panel in exemption 8.5A.3 b. i. replace the exemption for earthworks to a depth of 0.6m<sup>5</sup>.
17. The Panel's minor corrections decision records the Panel's view that none of the parties identified or addressed the appropriateness of a general exemption.<sup>6</sup> However closing legal submissions for the Appellant directly addressed the inappropriateness of an 0.6m depth general exemption for earthworks, noting that within pā sites and other archaeological sites remnant features may be very close to the surface.<sup>7</sup>
18. The inclusion of the exemption to RD 8.5A.2.3. that excludes earthworks to a depth of 0.6m within schedule 9.5.6.1 Wāhi Tapu / Wāhi Taonga sites and Kaitorete Spit, from that restricted discretionary rule;
  - (a) does not provide for the protection of Wāhi Tapu and Wāhi Taonga sites,
  - (b) is inconsistent with the Panel's own reasoning,
  - (c) creates a 'permitted baseline' under s 104(2) of the RMA which is inconsistent with the protection of Wāhi Tapu / Wāhi Taonga values,
  - (d) does not achieve Objective 9.5.2.1, and policies 9.5.2.4 and 9.5.2.7, being policies in the Plan of particular relevance to Wāhi Tapu and Wāhi Taonga sites, as required by section 76(1)(b) of the RMA,

---

<sup>4</sup> At paragraph 186 of the Decision.

<sup>5</sup> At paragraph 135 of the Decision.

<sup>6</sup> Decision to make Minor Corrections to Decision 51, dated 22 November 2016, at paragraph 28.

<sup>7</sup> Closing legal submissions for Te Rūnanga o Ngāi Tahu and nga rūnanga, at paragraph 72.

- (e) does not give effect to the CRPS, or the NZCPS (in respect of Wāhi Tapu / Wāhi Taonga sites within the coastal environment) as required by section 75(3) of the RMA,
- (f) does not recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga; or the protection of historic heritage from inappropriate subdivision, use and development as required by sections 6(e) and (f) of the RMA,
- (g) does not give effect to the requirement to have particular regard to Kaitiakitanga as required by s 7(a) of the RMA, and
- (h) does not give effect to the requirement to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) as required by s 8 of the RMA.

### **Relief sought**

19. The Appellant seeks:

- (a) That the appeal be allowed;
- (b) That exemption 8.5A.3 b. iii. be deleted;
- (c) In the alternative to (b) above, that exemption 8.5A.3 b. iii. be remitted back to the Panel for reconsideration in light of the findings arising out of resolution of this appeal;
- (d) Such further and other relief as may be appropriate;
- (e) The costs of and incidental to these proceedings.

Dated at Christchurch this 28th day of November 2016



D van Mierlo / JMG Leckie / S Buckley  
Counsel for the Appellant

This Notice of Appeal is filed by Samantha Buckley, solicitor for the Appellant. The address for service of the Appellant at the offices of Lane Neave, 141 Cambridge Tce, Christchurch.

Documents for service may be left at that address for service or may:

- (a) posted to the solicitor at PO Box 13149, Cambridge Tce, Christchurch; or
- (b) transmitted to the solicitor by facsimile to (03) 379 8370; or
- (c) emailed to [joshua.leckie@laneneave.co.nz](mailto:joshua.leckie@laneneave.co.nz) and [deanvanmierlo@gmail.com](mailto:deanvanmierlo@gmail.com)