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: 24 August 2016

Date of decision: 9 September 2016

Hearing Panel: Environment Judge John Hassan (Chair), Ms Jane Huria, Ms Sarah Dawson, Dr Phil Mitchell

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DECISION 42

Chapter 15: Commercial (Part) and Chapter 16: Industrial (Part) in relation to Decision 11 and KI Commercial sites at Addington

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Outcomes: **Appealed Rule confirmed unchanged**

COUNSEL APPEARANCES

C Fowler	KI Commercial Limited
J Winchester	Christchurch City Council

SUBMITTER APPEARANCES AND EVIDENCE FILED

P Keung (Filed/Appeared)	KI Commercial Limited
G Sellars (Filed/Appeared)	
A Thompson (Filed/Appeared)	
B Putt (Filed/Appeared)	
B Giddens (Filed)	
G McDermid (Filed)	
M Stevenson (Filed/Appeared)	Christchurch City Council
P Osborne (Filed/Appeared)	

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INTRODUCTION

[1] This decision ('decision') follows directions made by the High Court on an appeal allowed by consent ('consent appeal')[1] in regard to a permitted activity rule (Rule 15.7.2.1 P2, P9 & P10/ 'Appealed Rule') that the Panel's Decision 11 ('Stage 1 decision') determined to include in Chapter 15 (Commercial). More specifically, the matter concerns the most appropriate permitted activity rule for application to two sites at 9 and 11-13 Bernard Street, Addington ('the sites') owned by the appellant, KI Commercial Limited ('KI'/ submitter 789).

[2] This decision follows our hearing of the evidence (and associated legal submissions) of KI and the Christchurch City Council ('Council'), in accordance with the High Court's directions. For the reasons we set out, we have determined to confirm the Appealed Rule unchanged.

Effect of decision and rights of appeal

[3] The effect of this decision and the rights of appeal are as set out in the Stage 1 decision, at [4] and [5].[2] For completeness, this decision does not replace any provision of the Existing Plan beyond that recorded in the Stage 1 decision (at [751]).[3]

Conflicts of interest

[4] Nothing pertaining to this decision alters what is recorded at [10] of the Stage 1 decision. For the record, as was explained to the parties, the Panel chair is not party to this decision simply by reason that he was overseas at the time of the scheduled hearing of this matter.

Contextual background to our decision

[5] The Notified Version proposed Industrial General ('IG') zoning for an area of land at Addington, including the sites. That was a deliberate but significant change from the Business 4 zoning of the Existing Plan that this wider area of Addington enjoyed and which is visible in

1 *KI Commercial Limited v Christchurch City Council* [2016] NZHC 1218, Mander J, 8 June 2016
2 Strategic Directions decision at [5]–[9].
3 While that may go without saying, the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 ('OIC') requires that our decisions identify the parts of the Christchurch City District Plan and Banks Peninsula District Plan (together 'Existing Plan') that are to be replaced by a decision.

the large number of office and commercial premises that developed in the wider Addington area prior to and following the 2011 earthquakes. In effect, the Notified Version aimed to achieve a consolidation and rationalisation of commercial land development, according to a centres based philosophy as is explained in the Stage 1 decision (and as reflected in the relevant Christchurch Replacement District Plan ('CRDP') objectives).

[6] Under the Notified Version, the listed permitted activities in the IG zone included 'ancillary retail activity' and 'ancillary office activity'. Commercial services were specified as restricted discretionary activities. Activities not provided for as permitted, restricted discretionary or non-complying activities, were classed as a discretionary activity. In essence, therefore, activities such as standalone office and retail and commercial services required resource consent (generally as a discretionary activity).

[7] KI opposed the Notified Version's IG zoning, and sought Commercial Core ('CC') zoning for this wider area (including the sites), i.e. the same zoning that is applied to Addington's intended commercial centre, which the CRDP terms the 'Addington Neighbourhood Centre'.

[8] In light of submissions (including KI's), the Council recommended a change from IG to Commercial Mixed Use ('CMU') zoning in its planning evidence and closing submissions for the Stage 1 hearing. In effect, the Council sought to allow an element of recognition for sunk commercial and office investment in the wider area, and to that extent softened its intended strategic rezoning change. An aspect of this was its recommended Rule 15.7.2.1 P2, P9 & P10. This was recommended by the Council's planning witness, Mark Stevenson, and included in an updated set of recommended CMU provisions attached to the Council's closing submissions ('Council's Closing Rule'). The Rule specified 'retail activity', 'commercial services', and 'office activity' as permitted activities in the CMU zone where these were:

> in an existing building or building consented for [retail/commercial services/office] activity at the [date of decision].

[9] Similar to the position applying to IG zoning under the Notified Version, retail, commercial services and office activities that did not meet the 'existing building or building consented' prerequisite required resource consent, as a discretionary activity.

[10] That degree of change was not satisfactory to and was expressly opposed by KI. Its closing submissions to the Stage 1 hearing emphasised that KI continued to seek CC zoning, albeit on the basis of a reduction in the size of the additional CC zoning it originally pursued. That was because of the significantly greater range of commercial retail and office activity it enabled. Its closing submissions pointed out that the CMU zoning did not permit redevelopment of the sites for new retail, office, supermarket, department store, or other commercial services and facilities[4]. On its evaluation of the evidence, it submitted there is "no good reason" for the Panel to decline that relief "to help advance the overall economic prosperity of Christchurch".[5]

[11] The Stage 1 decision confirmed CMU zoning as most appropriate (and CC rezoning inappropriate) for this area. However, instead of the Council's Closing Rule it included the Appealed Rule which added a further material qualifier that meant it applied only when the retail, commercial services and/or office activity was itself also 'existing …at the date of decision'.[6] The Stage 1 decision records (at [389]) as the reason for making this change:

> However, we found Mr Stevenson's drafting of the Commercial Mixed Use zone provisions to be unduly permissive in places, with ambiguity in some of the wording used for permitted activity rules relating to commercial services, office activity and retail activity. In our view, this drafting would give rise to an undue risk of adverse impact on the recovery of the Central City, and also inappropriately dilute the centres based approach. Consequently, we have refined the wording, to ensure that the permitted activity rule only applies to existing and/or consented commercial services, office and retail activities at the date of this decision.

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4 Closing legal submissions on behalf of KI Commercial Limited, dated 10 June 2016 ('KI Stage 1 closing'), at para 7

5 KI Stage 1 closing, at paras 8 and 59. We note that this differs from what KI submitted before us as to its earlier position before the Panel, namely that " …the submitter confirmed at the hearing that the Council's proposal for Commercial Mixed Use zoning took account of the submitter's interests and that 75 per cent of its long-term future plans would be covered by this zone. However, this confirmation was based on the proposed zoning and rule package proposed by the Council at that time, which critically included the ability to use existing buildings for offices, retail and commercial services under Rule 15.7.2.1.". The first part of that submission would appear to derive from the answer Mr Keung gave in Panel questioning, on the transcript p 1128 ll 9 – 32, namely "The plan is not consented but the very long term future plans of what we want to achieve in those two buildings, would be 75 percent covered for in the current mixed use zoning" However, we take KI's closing submissions, rather than Mr Keung's answer to the Panel, as expressing KI's position on the planning outcome sought.

6 For ease of reference, the full text of the relevant rules is in Schedule 1 to this decision.

[12] Initially, KI appealed on a broad basis against the Stage 1 decision. However, by consent it changed the appeal so that it was confined to challenging what we have termed the Appealed Rule.

[13] In allowing the appeal by consent, the High Court recorded[7]:

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

[14] As background to that, the decision records, inter alia[8]:

> Mr Stevenson was questioned about the extent to which offices and retail would be permitted in the [CMU zone] 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 [KI's] witness, Mr Keung, regarding the extent to which the provisions of the [CMU zone] promoted by the Council would take account of the appellant's interest. In that exchange the Panel noted that under the provisions for the [CMU zone] proposed by the Council, [KI's] existing buildings could be used for offices and retail as a permitted activity. Mr Keung confirmed those provisions took account of [KI'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 [KI's] position would not be unduly prejudiced.

[15] The relevant passage of the Stage 1 decision is at [386], and is as follows[9]:

> Mr Keung accepted that the Commercial Mixed Use zone took account of KI's interests and that 75 per cent of its long-term future plans would be covered by this zone. These concessions indicate to us that, to the extent that KI's financial interests are relevant to an evaluation of costs and benefits, our choice of Commercial Mixed Use zoning over Commercial Core would not unduly jeopardise KI's position. Rather, it would appear it is more a question of relative

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7 *KI Commercial* at [18]
8 *KI Commercial* at [11]
9 Referring to the transcript, page 1228, lines 16-29 (Mr Keung).

financial advantage or benefit. Any difference is clearly overwhelmed by the greater economic wellbeing issues we must consider and have addressed.

[16] The High Court directed us as follows[10]:

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

[17] The following then ensued in the lead up to the hearing:

[18] Initially, KI sought[11] that we dispense with a hearing, on its assumption that the Council did not oppose the replacement of the Appealed Rule with one that would have specified (without any constraints) a rule ('KI's Initial Rule') that was significantly broader than the Council's Closing Rule and that would specify the following as a permitted activity:

> Office activity, commercial services, and/or retail activity at 9 and 11-13 Bernard Street Addington (CB29B/221 and CB29B/220).

[19] Surprisingly, given the agreed position of the parties before the High Court, the Council's initial indication to the Panel was that it did not oppose KI's Initial Rule but that it would abide the Panel's decision on whether the rule met relevant statutory requirements, including whether it would achieve relevant objectives. [12] Following further Panel enquiries, the Council informed the Panel that, despite the more permissive nature of KI's Initial Rule, its narrower geographic extent could allow the Panel to surmise that the risk it presented to the CBD's recovery was "lower than that identified by Mr Osborne[13]. However, the unreliability of that assurance was demonstrated in response to a further Panel enquiry. A few days later, on 3 August 2016[14], the Council informed the Panel that it had sought the views of the experts who

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10 *KI Commercial* at [22]

11 Memorandum of counsel for KI Commercial Limited regarding process for reconsideration, dated 9 June 2016

12 Memorandum of counsel for Christchurch City Council, in response to legal submissions for KI Commercial dated 1 July 2016, dated 8 July 2016

13 Memorandum of counsel for Christchurch City Council regarding resumed Commercial Stage 1 hearing, dated 27 July 2016

14 Memorandum of the Council regarding relief sought by KI, 3 August 2016.

gave evidence for the Council at the Stage 1 hearing and they did not consider KI's Initial Rule appropriate. Therefore, the Council informed us that it was not in a position to certify that KI's Initial Rule accorded with the purpose of the RMA.

REASONS

FINDINGS OF THE STAGE 1 DECISION ON FRAMING MATTERS

Preliminary legal matter concerning the effect of the High Court's direction

[20] In legal submissions of 1 July 2016, KI submitted[15] that:

> As is confirmed by the High Court judgment, the Panel's reconsideration is limited to the interests of the submitter in relation to the submitter's property.

[21] We took that as meaning that the High Court's direction did not allow us to consider the range of other matters as may be relevant to our determination under the RMA and OIC, including as provided for under s 32AA. However, contrary to that submission, the High Court's direction is as we have set out at [16]. We understand that direction to require that we receive, rehear and reconsider the evidence on these matters but not on the basis that we are limited to considering the interests of KI. Counsel for KI at the hearing, Mr Fowler, confirmed KI agreed with our interpretation[16] and we apply it in this decision.

[22] As was accepted by KI, our Stage 1 decision findings on the statutory framework, the Higher Order Documents, and RMA principles are the proper starting point for what we must decide.[17] Other than in the confined respects it identifies, and which we have noted, the High Court decision does not call on us to revisit those findings, particularly as to the following:

(a) The statutory framework[18] (at [11] – [13]);

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15 Legal submissions on behalf of KI Commercial Limited, dated 1 July 2016, at para 5

16 Transcript, p 2062, ll 17 - 41

17 Transcript, p 2066, ll 1 - 26

18 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) ('Strategic Directions decision'). 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

(b) The relevant statutory documents ('Higher Order Documents') including, in particular, the Canterbury Regional Policy Statement 2013 ('CRPS') (at [19] – [39], and [47] - [52]);

(c) The Council's s 32 reports (at [40] – [43]);

(d) The remainder of our s 32AA evaluation, including our evidential findings, other than in the specific respects directed; or

(e) The remainder of our decision, including as to the zonings confirmed (including the CMU zoning of the sites) and the provisions in Schedule 1 to the Stage 1 decision, other than in respect to the Appealed Rule.

[23] Our following s 32AA evaluation proceeds on that basis.

OUR S 32AA EVALUATION

The s 32AA matter in issue

[24] The sole matter in issue is as to the most appropriate permitted activity regime for retail, commercial services and office activities on the sites for inclusion in Rule 15.7.2.1.

[25] In terms of the requirements of s 32AA, RMA (and as described in the Stage 1 decision), our evaluation of this is to examine what is the most appropriate way to achieve the relevant CRDP objectives[19]. As noted, those objectives are as determined by the Stage 1 decision (and the Panel's Decision 1, on Strategic Directions and Strategic Outcomes).

hyperlinks to the New Zealand Legislation website. By clicking the hyperlink, you will be taken to the section referred to on that website. The repeal of the Canterbury Earthquake Recovery Act 2011 ('CER Act') by the Greater Christchurch Regeneration Act 2016 ('GCRA') does not materially alter that position. That is because s 147 of the GCRA provides that the OIC continues in force. Further, Schedule 1 of the GRCA (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).

19 As required by s 32AA and s 32(1)(b).

[26] As KI put it in its opening submissions, the nature of our evaluation under s 32AA is a comparative one.[20] KI submitted that the choice for this comparison is broadly between what 'currently exists' (i.e. the Appealed Rule) and KI's proposed relief which it modified in its opening submissions ('KI's Revised Rule') by the addition of the following cap (i.e. for permitted retail, commercial services and/or office activities on the sites):

> Up to a maximum gross floor area of 3,600m^2 across both properties.

[27] In view of s 32AA and the related evidence, we find the proper range of options we should consider broader than simply between the Appealed Rule and the KI Revised Rule. That is, 32AA directs that we identify and examine 'other reasonably practicable options for achieving the objectives'.

[28] The comparative assessment we undertake under s 32AA is as to the efficiency and effectiveness of the relevant rule alternatives for achieving related objectives. That calls on us to 'identify and assess benefits and costs". As the High Court has directed, those include benefits and costs for KI. However, importantly, our frame of reference must be broader than that. That is, s 32AA directs that we assess the benefits and costs of the environmental, economic, social, and cultural effects that we anticipate from implementation of the provisions in issue. It further directs that we bring within that consideration of the opportunities for economic growth and employment that we anticipate would be provided or reduced (which we take to mean as a consequence of the different rule choices under consideration).

[29] Of course, our evaluation of these matters is according to the findings we make on the evidence and related submissions. In this case, that includes our findings on the evidence and representations heard as directed on this occasion, as well as the findings in our Stage 1 decision (except to the extent that we determine we should revisit those earlier findings in view of what we now hear and consider). Our evaluation also assesses the risk of acting or not acting to the limited extent we find there is uncertain or insufficient information about the subject matter of the provisions (namely, the alternative rules in issue).

[20] Transcript, p 2066, l 16

The relevant objectives

[30] While Mr Putt, KI's planning witness, and Mr Stevenson offered different interpretations of objectives, and counsel for KI appeared to see the relationship between some of them differently from Mr Stevenson, the relevant Chapter 15 objectives are not in dispute and are as follows:

> **15.1.1 Objective — Recovery of commercial activity**
>
> a. The critical importance of commercial activity to the recovery and long term growth of the city is recognised and facilitated in a framework that supports commercial centres.
>
> **15.1.2 Objective — Centres-based framework for commercial activities**
>
> a. Commercial activity is focussed within a network of centres (comprising the Central City, District, Neighbourhood, Local and Large Format centres) to meet the wider community's and businesses' needs in a way and at a rate that:
>
> i. supports intensification within centres;
>
> ii. enables the efficient use and continued viability of the physical resources of commercial centres and promotes their success and vitality, reflecting their critical importance to the local economy;
>
> iii. supports the function of District Centres as major focal points for commercial, employment, transport and community activities, and Neighbourhood Centres as a focal point for convenience shopping and community activities;
>
> iv. gives primacy to the Central City, followed by District Centres and Neighbourhood Centres identified as Key Activity Centres;
>
> v. is consistent with the role of each centre as defined in 15.1.2.1 Policy – Role of centres Table 15.1;
>
> vi. supports a compact and sustainable urban form that provides for the integration of commercial activity with community, residential and recreational activities in locations accessible by a range of modes of transport;
>
> vii. supports the recovery of centres that sustained significant damage or significant population loss from their catchment including the Central City, Linwood, and Neighbourhood Centres subject to 15.1.4.3 Policy – Suburban centre master plans;
>
> viii. enhances their vitality and amenity and provides for a range of activities and community facilities;
>
> ix. manages adverse effects on the transport network and public and private infrastructure;

x. is efficiently serviced by infrastructure and is integrated with the delivery of infrastructure; and

xi. recognises the values of, and manages adverse effects on, sites of significance to Ngāi Tahu and natural waterways (including waipuna).

15.1.3 Objective — Office parks and mixed use areas

a. Recognise the existing nature, scale and extent of commercial activities within areas zoned Commercial Office and Commercial Mixed Use, but avoid the expansion of existing, or the development of new office parks and/or mixed use areas.

[31] There are associated relevant policies for those objectives, and the statutory function of rules is to implement or achieve objectives and policies (ss 75 and 76 of the RMA).

[32] Mr Stevenson also refers us to various Strategic Directions Objectives and we agree these are also relevant. They are Objectives 3.3.1 (as to the expedited recovery and future enhancement of Christchurch, including in a manner that meets the community's specified immediate and longer term needs and fosters investment certainty), 3.3.2 (as to clarity of language and efficiency), 3.3.5 (as to business and economic prosperity), 3.3.7 (as to urban growth, form and design, including "a consolidated urban form" that, amongst other things "maintains and enhances the Central City, Key Activity Centres and Neighbourhood Centres as community focal points) and 3.3.8 (as to revitalising the Central City as the primary community focal point).

The evidence

[33] KI called evidence (including rebuttal) from:

(a) Paul Keung, its chief executive officer[21];

(b) Gary Sellars, a registered valuer[22];

[21] Affidavit of Paul Keung on behalf of KI Commercial Limited, dated 28 June 2016 ('Keung EIC'), Rebuttal statement of evidence of Paul Keung on behalf of KI Commercial Limited, dated 22 August 2016 (revised tracked version)

[22] Gary Russell Sellars is a Director of Valuations and Consultancy at Colliers International Valuation, is a Registered Valuer and Fellow of the Property Institute of New Zealand and has some 40 years' experience as a valuer in New Zealand and in Hong Kong. He specialises in commercial and industrial valuation and consultancy within Christchurch and major South Island metropolitan areas. His 1 July 2016 statement was in affidavit form and he also presented a rebuttal statement, dated 22 August 2016

(c) Adam Thompson a consultant adviser in 'urban economics, property market analysis and property development', as a rebuttal witness[23];

(d) Graham McDermid, a registered architect, whose rebuttal evidence was in affidavit form and who was excused attendance by consent[24];

(e) Brett Giddens, the planner who gave evidence for KI at the Stage 1 hearing, whose evidence was also in affidavit form and who was excused attendance by consent (due to unavailability overseas)[25]; and

(f) Brian Putt, a planner, who gave rebuttal evidence (in view of Mr Gidden's unavailability)[26].

[34] The Council called two witnesses who gave evidence to the Panel for the Stage 1 hearing (and whose credentials as experts are recorded in the Stage 1 decision):

(a) Philip Osborne, an economist and co-author of the Property Economics Report[27] referred to in the Stage 1 decision as underpinning the Council's s 32 RMA Report on the Notified Version; and

(b) Mark Stevenson, a planner and the Council's lead planning witness for the Stage 1 hearing (now a consultant, but previously a Council officer).

[35] Before we evaluate that evidence, we make some brief observations about matters pertaining to the independence of the Council's experts.

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23 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, dated 22 August 2016. Mr Thompson has a Batchelor of Resource Studies form Lincoln University and a Master of Planning from Auckland University. In addition, he received a Certificate of Completion from the London School of Economics for his "Dissertation in Urban Economics": Transcript, pp 2112 - 45

24 Affidavit of Graham McDermid on behalf of KI Commercial Limited, dated 19 August

25 Affidavit of Brett Giddens on behalf of KI Commercial Limited, dated 1 July 2016.

26 Statement of evidence of Brian William Putt on behalf of KI Commercial Limited, dated 22 August 2016. Mr Putt is a Director of Metro Planning Limited, a town planning and resource management consultancy based in Auckland but operating nationwide. His qualifications include a Batchelor of Arts in History and Psychology and a Diploma of Town Planning, both from Auckland University. He has some 42 years' experience as a planning and resource management consultant.

27 This is referenced in the Stage 1 decision, at [42]. As noted there, it comprises Appendix 8.3 to Commercial s 32 Report: Property Economics Proposed Christchurch City District Plan Commercial and Industrial Chapters Economic Analysis, November 2013 and also Appendix 8.5 to Commercial s 32 Report: Letter from Messrs Heath and Osborne to Mark Stevenson, 4 June 2014.

[36] In his initially submitted rebuttal statement, Mr Keung put in issue the independence and Code of Conduct ethics of the Council's experts, Messrs Osborne and Stevenson. That was in his statement that "it is nothing short of misleading for the Council and their experts to submit evidence such as this".[28]

[37] The Council's opening submissions took exception to these remarks and KI sought leave to replace Mr Keung's initial statement with one that made a number of changes including removing the remarks. When questioned, counsel for KI informed us that the offending statement of evidence "was completed … at a time when Mr Keung was also involved with Court appointed mediation"[29]. In giving evidence, Mr Keung apologised for the comments and explained that it was "a poorly written document that I reviewed within 15 minutes during a break in a Court hearing in Christchurch and I left it to some people to attend to"[30].

[38] Regrettably, this is not the first such indiscretion on Mr Keung's behalf. His initially submitted statement for the Stage 1 hearing included similarly intemperate and unsupported criticisms of some of the Council's expert witnesses. At that time, the matter was resolved by the Panel granting leave for the statement of evidence to be replaced with one that did not include the offending remarks.[31] At that time, the Panel chair advised KI's then counsel (Mr Pedley) of counsel's responsibilities to ensure particularly egregious and outrageous matters of opinion do not appear in brief of evidence and Mr Pedley acknowledged those responsibilities[32]. However, KI's memorandum of counsel of 15 August 2016[33] used the words "disingenuous and misleading" to describe the use that Messrs Osborne and Stevenson made of a maximum development potential figure of 10,470m^2 for the sites[34]. That was in the context of asking that we require the withdrawal of the evidence of those experts on the surprising footing that these experts' evidence was "in direct contradiction to the settlement agreement" that KI claims to have with the Council in that it was "directly opposed to the specific relief proposed by the submitter"[35].

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28 At para 14 of that initial statement.
29 Transcript, p 2061, ll 9 – 11.
30 Transcript, p 2074, ll 15 - 24
31 Transcript, p1197, ll 18 – 45, p 1198, ll 1 – 27, p 1215, ll 45 – 46, 1216, 1217
32 Transcript, p1217, ll 1 - 7
33 Memorandum of counsel for KI Commercial Limited seeking further directions, dated 15 August 2016.
34 15 August memorandum, at para 7
35 15 August memorandum, at para 5

[39] In essence, each of the now withdrawn statements and the memorandum of counsel demonstrate a fundamental misunderstanding of, and respect for, the proper roles of an independent expert under the Code of Conduct and of the Panel under the OIC and RMA. They are a derogation of the responsibilities of counsel, as was made clear in the exchange between the Chair and Mr Pedley to which we have referred. We reassure the experts concerned that the observations have had no influence on our assessment of them as credible and professional independent experts, duly cognisant of their Code of Conduct responsibilities.

KI evidence received by consent or not cross-examined

[40] The affidavit evidence of Messrs McDermid (architect) and Mr Giddens (planner) were entered by consent due to those witnesses unavailability. The Council elected not to cross-examine the remaining KI witnesses. We explain how that influences our weighting of relevant evidence in our evaluation below.

The sites and the present state and use of the buildings

[41] The Panel undertook a site visit on 24 August 2016. We viewed the buildings from the gravelled street frontage area (comprising an informal carpark and a construction site office) before Mr Keung guided us through the buildings. He briefly pointed out the features and partially reconstructed elements of the buildings, and areas where KI intended to make modifications (including the façade addition, and modifications inside the rear boundary wall that faces the neighbouring bus park).

[42] Bernard Street is a short street running south-west from Lincoln Road towards the main trunk railway line, where it turns sharply left towards the new Court Theatre building. The relevant stretch of Lincoln Road between the Christchurch Southern Motorway (to the east) and the closely proximate intersection with Moorhouse Avenue (to the west) is a busy sometimes congested arterial.

[43] Several blocks along from the Lincoln Road/ Bernard Road intersection is the Addington Neighbourhood Centre, which is zoned CC under the CRDP. However, as we have noted, several new commercial buildings spill beyond that zoned commercial centre, including in the vicinity of the sites. That reflects the significantly more permissive regime for commercial

retail and office activity under the Existing Plan's Business 4 ('B4') zoning. Immediately adjacent the sites, and fronting Lincoln Road, is a larger newer commercial building (with an intervening carparking area and access). A similarly relatively large and modern commercial building fronts Lincoln Road on the other side of Bernard Street. It houses a gym and other commercial and office activities. There is a Council bus depot to the rear of the sites.

[44] The sites, at 9 and 11-13 Bernard Street, are in two titles but are contiguous. There are two single storey high stud buildings (with mezzanine floors) on them, dating from the 1940s/ 1950s. One features a saw-tooth roofline. Given their close proximity to the rail corridor and Addington Sale Yards, Mr Keung understands that the buildings were originally used by Dalgety & Co, a market trading company that dealt primarily in stock and rural goods. Originally, the buildings occupied 100% of their respective titles. Prior to the earthquakes, they had a gross floor area ('GFA') of approximately 2900m^2.[36]

[45] KI purchased the sites in 2004.[37] At that time, the sites hosted a furniture sales showroom, offices, a caretaker's apartment, and a range of light industrial and commercial activities. Subsequent uses included a range of other office, project management, tourism, retail, storage, educational, industrial and other activities (including a crèche). Mr Keung characterised these as being "predominantly second tier tenancies, being localised businesses or smaller enterprises that would not venture into the CBD".[38]

[46] We accept that evidence of the factual usage history of the sites and buildings, although we do not place weight on Mr Keung's opinion on activities that would not venture into the CBD. We prefer the evidence of relevant experts on those matters, on which the Stage 1 decision makes relevant findings to which we later return.

[47] The buildings were badly damaged during the earthquakes (11 – 13 Bernard Street being red-stickered, 9 Bernard eventually green-stickered). This necessitated tenants vacating both buildings. They have been vacant since those events. Due to extensive damage, the front

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36 Legal submissions for KI Commercial Limited, dated 1 July 2016, at paras 7 – 8. Legal submissions for KI Commercial Limited in support of relief sought by KI Commercial, dated 23 August 2016, at para 2. Keung affidavit, para 40. We note some discrepancies in the descriptions of the pre-earthquake GFAs, with Mr Keung stating 916m^2 for 9 Bernard Street, 1835m^2 for 11 Bernard Street (including a 250m^2 mezzanine). However, we treat these as approximations in any case.

37 Affidavit of Paul Keung on behalf of KI Commercial Limited, dated 28 June 2016, at para 10

38 Affidavit of Paul Keung on behalf of KI Commercial Limited, dated 28 June 2016, at paras 11 - 17

façade of the building at 11-13 Bernard Street was removed and the party wall it shares with 9 Bernard Street needed to be strengthened. KI has also decided to replace the rear brick wall of 11 Bernard Street with a modern structural wall and to bring both buildings up to 100% of Code. It has completed 90% of the strengthening of 9 Bernard Street, including significant upgrading of its steelwork, piles, concrete pads, and a new roof. The remaining internal and external cladding work is on hold pending our decision. The same work is planned for 11 Bernard Street. To date, KI has spent more than $2M on this strengthening and refurbishment work. To date the buildings remain vacant (other than to the extent KI uses them for its construction business) and neither is leased.[39]

[48] In terms of future usage of the buildings, Mr Keung explained that KI envisages a couple of boutique retail outlets, medical facility and, for surrounding tenants, some overflow office space. In addition, KI expects previous tenants that operated a gym facility, dance and arts accessory shop, and a 'café organic food store' would return to fill the space. He presented preliminary architectural plans for this intended refurbishment, including a new frontage facing Bernard Street (in what we observed from our site visit to be a current vacant gravelled space adjacent a construction site office and small informal carpark).

[49] Given Mr Keung's evidence at the Stage 1 hearing that the CMU zone would take account of KI's interests and cover 75 per cent of its long-term future plans[40], we asked him what had changed since. That was particularly given that KI now pursued a permitted activity rule significantly different from the Council's Closing Rule (which, as we have explained, was included in the Council's proposed CMU zone). Mr Keung explained that this was in part because of discussions his legal team were continuing to have at the time with the Council as to "existing use rights that were potentially being offered to us", but which he accepted were not in evidence before the Panel at that time[41]. In addition, he explained that KI subsequently became concerned that the "old wording" would have given rise to problems "related to insurances … and related to [that] if we had to rebuild … we would have lost those rights [in relation] to existing buildings".[42] He also explained that, at the time of the Stage 1 hearing, KI had not thought about "another natural disaster" and particularly the insurance implications of another earthquake. He then went on to suggest that this combination of circumstances,

39 Affidavit of Paul Keung on behalf of KI Commercial Limited, dated 28 June 2016, at paras 18 – 21.
40 Stage1 decision, at [386].
41 Transcript, p 2089, l 1 - 39
42 Transcript, p 2089, ll 39 - 44

including KI's subsequent discovery of insurance related problems, led to what he termed the "amicable solution and way forward" KI reached with the Council[43]. We took that to refer to KI's Initial Rule which we have noted was first put to us following the consent appeal and initially on a basis that the Council did not oppose it.

[50] However, whether that is the actual sequence of events is clouded by what Mr Keung then went on to say, effectively indicating that all such matters were known at the time Mr Keung gave evidence in the Stage 1 hearing, including in answer to the Panel's question concerning the Council's Closing Rule[44]:

> When they proposed that there were discussions between our legal team and the Council and it seemed like a solution that we could live with and we didn't want to aggravate the situation any further and we basically agreed with it. And that is why I said "Look, 75 percent of our needs are going to be met, we are going to compromise and go along with what the Council has suggested" and we backed off pushing for Central Core.

[51] Contrary to Mr Keung's recollection, as we noted at [10], KI's closing submissions for the Stage 1 hearing in fact explicitly pursued CC zoning, albeit over a reduced area of Addington.

[52] From Mr Keung's explanations, we surmise that throughout the Stage 1 hearing and subsequent stages leading to this further hearing, KI has wanted significantly more enablement of commercial activity than what the CMU zoning provides, including what was proposed in the Council's Closing Rule.

Evidence concerning KI's costs and benefits

[53] Mr Keung's opinion was that the impact that the Appealed Rule would have on KI's investment in the sites (by comparison with what he called "the previous zoning") was "over $7M". He explained that the underlying value of the sites/buildings was controlled by two factors: the lease amount (i.e. $/m^2) and capitalisation rate (i.e. ratio of annual net operating income to property asset value). A low capitalisation rate (say 5%) indicates less risk associated with an investment, due to high demand. A high capitalisation rate (say 10%)

43 Transcript, p 2090, ll 35 – 46, p 2091, ll 1 – 18.
44 Transcript, p 2091, ll 18 – 25.

indicates higher risk (e.g. shabby building, "low zoning", needs repairs). By this method, his calculations to derive his $7M sum were as follows:

(a) 9 Bernard Street: 1156m^2 GFA; potential lost rent from CMU zoning (as compared to his reckoning for "office/retail" zoning) \$150/m^2 = \$173,000 (we assume per annum); applying a 7% capitalisation rate "equates to \$2,477,143 plus GST in lost property value".

(b) 11 Bernard Street: 1835m^2 GFA, potential lost rent from CMU zoning (as compared to his reckoning for "office/retail" zoning) \$150/m^2 = \$275, 250; applying a 7% capitalisation rate "equates to \$3,932,143 plus GST in lost property value".

[54] Mr Keung explained that these calculations did not take into account the potential use of the site and overall capitalisation rate, which is always a considered factor when valuing a building for sale. [45]

[55] As can be appreciated, those calculations rely on significant assumptions. Most significantly, Mr Keung would appear to have misunderstood the legal effect of the Appealed Rule in the context of related CMU rules. He stated that "it does not provide for offices, retail or commercial services (other than some limited ancillary activities) unless those activities are existing at the date of the decision".[46] While that is a broadly correct description of the Appealed Rule, it ignores the fact that activities that fall beyond it are classed as discretionary activities and, hence, are not precluded from being consented. As we discuss at [158], a similar misconception appears to underlie KI's closing submissions.

[56] Further, as Mr Keung acknowledges, the Appealed Rule includes a long list of other permitted activities, a number of which would appear at least potential tenants of the buildings given the broad range of previous tenancies Mr Keung has described in his evidence. Those include, for example, P4 (food and beverage outlet), P5 (trade supplier), P7 (second-hand goods outlet), P14 (service industry), P16 (trade and industry training facility), P19 (health care facility), P20 (pre-school) and P21 (gymnasium). Mr Keung's analysis gives us no insight into

45 Affidavit of Paul Keung on behalf of KI Commercial Limited, dated 28 June 2016, at paras 29 – 31.
46 Affidavit of Paul Keung on behalf of KI Commercial Limited, dated 28 June 2016, at para 25.

how he derived his calculated difference of $150m^2$ between the likely return from such permitted tenancies, as compared to tenancies for office, retail and/or commercial services.

[57] If we assume, even so, that Mr Keung's calculation of that difference is correct, his calculation of a $7M loss of "property value" needs to carry a significant further qualifier i.e. "assuming resource consent, on a discretionary activity application, is not forthcoming".

[58] As we have noted, KI's valuation expert Mr Sellars is a highly experienced valuer. He was far more cautious in his opinion. He explained that the value of investment is driven by two inputs – rent income and yield. Rent income is influenced by the utility value of the property measured in terms of rent; lower utility translating into lower rent. Yield or capitalisation rate is influenced by the investment appeal of the property, measured by factors including lease or tenant quality, building quality, underlying zoning and long term future, including development potential. Hence, restricting the range of commercial activities impacts both rent and yield. He agreed with the evidence that Marius Ogg (the Crown's witness) presented at the Stage 1 hearing as to the relationship between market value and zoning.

[59] Mr Sellars' opinion was that, *if* KI's properties are not able to be used for offices, retail and commercial services, this will have negative implications for the rental and value of these properties. However, he cautioned that he had not completed any valuation in relation to KI's properties and, hence could not quantify value implications.[47]

[60] We accept Mr Sellars' opinion on these matters, noting that it includes the significant qualifiers we have noted.

[61] Apart from being based on the invalid assumptions we have noted, Mr Keung's calculations have not accounted for a number of the factors that Mr Sellars identified as potentially relevant to investment value. Further, inherently, Mr Keung's calculations were not those of an independent expert but a submitter with a financial stake in the outcome. Therefore, despite the Council's election not to cross examine him, we find we should not rely on his $7M calculation of property value loss. Where it is not practicable to do so, we are not

[47] Affidavit of Gary Russell Sellars on behalf of KI Commercial Limited, dated 1 July 2016, at paras 5, 24 - 26.

required to quantify benefits and costs: s 32(2)(b). On the evidence of Mr Sellars, we find that we should not do so.

[62] However, on the basis of Mr Sellars' evidence, we find that there would be a materially more negative consequence for investment in the sites arising from the relatively more restrictive approach that the Appealed Rule would take to enablement of office, retail and commercial service activities, by comparison to KI's Revised Rule. As activities that fall outside the permitted activity parameters would default to discretionary activity, and hence are at least theoretically capable of being consented, that cost for KI of the Appealed Rule may ultimately be a confined consent application transaction cost (ie the cost of consultants, Council administrative charges, and time in securing consent).

[63] Potentially, there is a risk of loss of development opportunity (i.e. should consent be declined or be granted subject to unacceptable conditions). While we have also taken that risk into consideration, we cannot quantify the related potential costs of such a future loss of investment potential. That is because the package of other relevant rules for the CMU zone allow for a range of other potentially viable development scenarios. As we have noted, Rule 15.7.2.1 allows for a range of other permitted activities. We observe that these include activities that appear to closely match descriptions that KI gave in evidence of what the sites have been tenanted for in the past and what KI expects could be future tenants. While we appreciate that KI seeks opportunity for a range of other activities on the sites, we do not consider the other permitted activities as a proper gauge of any relative loss of investment opportunity in that discretionary activity Rule 15.7.2.4 allows for consent to be pursued for 'any activity not provided for as a permitted, restricted discretionary or non-complying activity'.

[64] However, we accept that the Appealed Rule would give rise to relatively higher (but unquantified) transaction costs for KI and would likely constrain investment opportunity for KI somewhat, as compared to KI's Revised Rule (but on the basis that we cannot practicably quantify the difference). We take those unquantified costs into account in our evaluation of benefits and costs. Alongside that, we next evaluate the evidence on wider economic costs for the community as a whole.

The economics evidence

[65] KI called Adam Thompson, primarily as a rebuttal witness in relation to the evidence of the Council's economist, Mr Osborne. Mr Thompson assessed matters on the assumption of KI's Revised Rule (ie with a cap on office, retail and commercial services across the sites of 3,600m^2). He considered "the proposal would represent an expansion of the Addington Neighbourhood Centre in a manner that is consistent with the intended scale and function of these centres". He told us that "[given] the proposal would potentially have a large retail component, of a type … that is focussed on a local and to a limited extent a sub-regional market, rather than a regional market, this would not present any risk to the commercial performance of the CBD as claimed by Mr Osborne". [48]

[66] Mr Thompson's repeated reference to "the proposal" belies broad assumptions he has made as to what may or may not occur on the sites. His approach was more akin to a resource consent application assessment, than an evaluation for the purposes of s 32AA, RMA (yet still on a highly speculative basis as to what will or will not occupy the sites).

[67] A further difficulty arises in the foundation Mr Thompson has relied on for his opinions that the "proposal" was an "expansion of" the Addington Neighbourhood Centre" and consistent with the intended scale and function of centres. On the first matter, Mr Osborne presented a relatively crude table of retail floorspace for different centres to first demonstrate that Addington Neighbourhood Centre's 6,200m^2 was below an "average" of 7,400m^2 and, hence, opine that an increase to 9,200m^2 (by an assumption that the "proposal" would result in that increase) would "still be consistent with the function of a Neighbourhood Centre at this scale".[49] That is patently superficial, paying no heed to relevant CRDP objectives (against which the appropriateness of rules is to be evaluated under s 32AA) or to the CRPS (to which the CRDP must give effect) or to the Stage 1 decision findings on these matters. Further, from Panel questioning, it appeared that, in envisaging the "proposal" as an expansion of the Addington Neighbourhood Centre, Mr Thompson was in fact unaware that the CC-zoned boundaries of the Centre were not contiguous with the sites but some considerable distance from them. The transcript records, for example[50]:

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48 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, at para 32.

49 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, at paras 44 – 45.

50 Transcript, p 2108, ll 1 -22

> MS DAWSON: But it is not immediately adjacent to these properties on the corner of Bernard Street and Lincoln Road or down Bernard Street? Do you know?
>
> MR THOMPSON: My recollection was that it was. If it is not I will accept that view, however …
>
> MS DAWSON: We probably can get the zoning map up there but if you take it from me that, well you have said that the Plan says that it is the Commercial Core zone that is the neighbourhood centre, and that the Commercial Mixed Use zone is a different concept, treated under different policies?
>
> MR THOMPSON: Yes I may have made an error there by assuming that the large multi-level commercial buildings with retail at ground level were part of that commercial core, in my assessment.

[68] A significant aspect of Mr Thompson's theory that the "proposal" would be "consistent with the centres-based framework" of the CRDP was that it would represent a "consolidation" of the Addington Neighbourhood Centre. In addition to what we have just traversed for that proposition, Mr Thompson drew very heavily on his understanding of Mr Timothy Heath's evidence to the Panel for the Stage 1 hearing. Mr Heath was the Council's retail distribution expert to that hearing and, with Mr Osborne, he co-authored what we have referred to as the Property Economics Report. Mr Thompson's approach of constructing an argument founded on his understanding of another expert's prior opinion completely bypasses his own responsibilities as an expert. It contrasts with the approach taken by Messrs Heath and Osborne (including on this occasion), in clearly underpinning their opinions with sound modelling and research and their understanding of the relevant Higher Order Documents. We reported on all these matters in our findings as to the reliability of the opinions of Messrs Heath and Osborne in our Stage 1 decision (for example, at [41], [42] and [97]).[51] However, Mr Thompson conceded, in answer to the Panel, that he had not read that decision[52].

[69] Mr Thompson characterised Mr Osborne's approach as being "to deliberately restrict supply below the natural market demand"[53]. He asserted that it was contrary to the Proposed

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51 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, for example at paras 9 -12, 35 – 40, 48.

52 Transcript, p 2115, ll 14 - 15

53 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, at para 39

National Policy Statement on Urban Development Capacity ('pNPSUDC') which he said "appears to have been proposed to ensure the opposite of what Mr Osborne has recommended".[54] As Mr Osborne pointed out, Mr Thompson misunderstood Mr Osborne's evidence on this matter (including to the Stage 1 hearing). In summary, it was that the CRDP provides more than sufficient capacity to meet future demand and to be properly framed by reference to applicable CRDP objectives and the Higher Order Documents, particularly the CRPS.

[70] Mr Osborne pointed out, and we agree, that Mr Thompson did not frame his position by reference to the Higher Order Documents or the relevant Strategic Directions or other settled CRDP objectives. His reference to the pNPSUDC was clearly erroneous. Unlike the CRPS, it is a document circulating for comment, not a document that the CRDP must give effect. In addition to not having considered matters with reference to the CRPS, Mr Thompson conceded that he did not know that it is something we must give effect.[55]

[71] Instead, he presented loose and unsubstantiated assertions such as those noted as to consolidation and that "the only regulation that would effectively support the development of the CBD is the provision of public infrastructure and measures to avoid land banking".[56] That comment demonstrates a lack of understanding of the policy context within which the centres based approach of the CRDP has been formulated.

[72] KI did not seek to re-examine Mr Thompson on any matters.[57]

[73] For all of those reasons, we do not find Mr Thompson's evidence in any sense reliable and we do not give it weight in our evaluation. Specifically, nothing in that evidence gives us any cause to revisit the findings we made on these matters in the Stage 1 decision.

[74] Mr Sellars told us that Bernard Street would never attract high end retail, but it is an ideal location for second and third tier retail, commercial services and office accommodation, especially in converted accommodation. We accept that to be the case.

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54 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, at para 92
55 Transcript, p2114, ll 26 – 45.
56 Statement of rebuttal evidence of Adam Thompson on behalf of KI Commercial Limited, at para 29
57 Transcript, p 2115, ll 16 – 21.

[75] He differed from Mr Osborne as to the implications of this for the CBD and other centres. He said there was a shortage of accommodation across the city for the B and C grade commercial activity that the sites would offer. As such, he considered the sites would be unlikely to attract tenants that would otherwise locate in the CBD or other centres.[58] He also expressed the view that tenants for B and C grade spaces would be unlikely to be attracted to the CBD "because this type of retail and office accommodation is not available".[59] Therefore, he disagreed with Mr Osborne on the matter of whether the sites presented any risk for the CBD's recovery through oversupply.

[76] In answer to Panel questions, Mr Sellars agreed that the present lack of interest by developers of B and C grade buildings in the CBD was related to both high building costs and high land values. On the latter, he accepted that, in theory, there was a longer term prospect that land values for areas of vacant land in the CBD could reduce and so open opportunities not presently apparent for the establishment of lower grade rental space. However, he pointed out that there had so far been no such reduction. He agreed that the essential difference between him and other experts (such as the Crown's expert in the Stage 1 hearing, Mr Marius Ogg) was on whether it was realistic that there would be such a reduction in price in land values over the life of the CRDP.[60]

[77] We were surprised that KI elected not to cross-examine Mr Osborne, given the important respects in which he differed from both Mr Thompson and Mr Sellars.

[78] In his written statement[61], Mr Osborne explained why he considered KI's Revised Rule would give rise to economic disbenefits for the Christchurch community. In summary, that was by reason of the following:

(a) KI seeks to increase the level of commercial floorspace in a market that is already over-supplied as a consequence of the significant increase in suburban commercial

58 Affidavit of Gary Russell Sellars on behalf of KI Commercial Limited, dated 1 July 2016, at paras 13 – 14.

59 Rebuttal Statement of Evidence of Gary Russell Sellars on behalf of KI Commercial, dated 22 August 2016, at paras 9 – 11.

60 Transcript, at p 2098 ll 3 – 44, p 2099, ll 1 – 10, p 2100, ll 4 - 30

61 Statement of evidence of Philip Mark Osborne on behalf of Christchurch City Council, dated 11 August 2016, at paras 6.1 – 6.4.

development resulting from the commercial dislocation of the 2011 earthquake sequence;

(b) The increase would be in close proximity to the CBD and a centre currently competing for CBD activity;

(c) There are no benefits from this for the Christchurch community, it would be contrary to the strategic and commercial objectives of the CRDP, pose a risk to the efficient operation of the commercial market and therefore feasible redevelopment of the CBD;

(d) While what is sought for the sites is proportionately relatively low, its effects would likely be more than linear.

[79] As the basis for that opinion, Mr Osborne explained a number of matters also covered in his evidence (and the related evidence of Mr Heath, and other experts) in the Stage 1 hearing. He explained that the loss of CBD premises as a result of the 2011 earthquakes had necessitated the relocation and development of 100,000m^2 of commercial office space to suburban locations. He said we should consider the recovery of the CBD is in that market context, namely of a markedly increased and competitive level of commercial space throughout the suburban network. He noted that capacity evolved without the CBD and, therefore, its current supply levels are artificially high (i.e. assuming the strategic intention of a recovered CBD is realised). He pointed out that recovery of the CBD, and indeed the sustainable recovery of the Christchurch economy, is reliant on re-establishing the primacy of the CBD for commercial activity.

[80] In addressing Mr Sellars' evidence concerning impacts on rental levels and feasible development on the sites, he commented that the sites' competitive impacts were not just on other suburban office development but also on potential and proposed development within the CBD (which he indicated could be to the same extent, if not more). He explained that this was fundamental to the Council's intention to limit additional commercial development in a suburban market already exhibiting over-supply of space. He explained that the finite nature

of commercial demand means increasing supply at Addington would redirect demand from elsewhere.[62]

[81] As to competition with the CBD, he observed that the sites would likely offer B and C grade space, which are sectors where the CBD is currently struggling to compete.[63]

[82] In answer to Panel questions, he said he was not in a position to give an opinion on the relative impact of allowing 3600m^2 of additional retail and/or office space as he had not done the necessary analysis. He favoured an approach of requiring resource consent so that such assessment could be carried out.[64] He acknowledged that fairness was a factor to be considered for existing activities impacted by a change from the B4 zoning regime of the Existing Plan. However, he clarified that he had not been consulted at the time the Council (supported by Mr Stevenson's evidence) recommended for the change from the Industrial General zoning of the Notified Version to CMU zoning.[65]

[83] When pushed in questioning, he said that if we were to change the Appealed Rule in relation to the sites, we should limit any additional permitted commercial activity to the level in existence at the time of the Panel's decision. He prefaced that with caution that he understood 22% of the CBD space is presently vacant and that we should view the exercise as one of "… how little damage can we do rather than avoiding damage altogether.."[66]

[84] We found both Mr Osborne and Mr Sellars credible witnesses. For the following reasons, we prefer Mr Osborne's opinions on all matters of material difference with Mr Sellars (and on all matters concerning Mr Thompson's evidence).

[85] We accept Mr Sellars' opinion that the CBD does not presently compete for B and C grade commercial tenancies and, as such, that what the sites would likely attract would not directly compete with the CBD at this time. However, we do not agree that this means we can dismiss as unrealistic the risk that this position could change in the future. In particular, Mr

62 Statement of evidence of Philip Mark Osborne on behalf of Christchurch City Council, dated 11 August 2016, at 2.1 – 2.12

63 Statement of evidence of Philip Mark Osborne on behalf of Christchurch City Council, dated 11 August 2016, at 2.10

64 Transcript, at p 2141, ll 10 - 37

65 Transcript, at p 2142 ll 3 – 22, p 2143, ll 13 – 33.

66 Transcript, at p 2145, ll 1 – 5, 19 – 21, 25 – 34.

Sellars acknowledged that at least one significant contributing factor in the present lack of significant B and C grade office and retail development in the CBD is the present value of land. Given the significant amount of that land is presently vacant, he also acknowledged the potential for a downwards adjustment of land value during the lifetime of the CRDP. Related to that, there is at least a realistic prospect that, over time, developer interest in development of lower grade leasehold space in the CBD could increase.

[86] We acknowledge that, in a proportionate sense, the sites represent a relatively small potential for additional out-of-centre retail and office development. However, KI's evidence does not include any valid modelling or assessment of that.

[87] We note that the sites are relatively close to the CBD. The lack of present B and C grade development in the CBD does not persuade us that it is an irrelevant ingredient for its recovery over the life of the CRDP. We accept Mr Osborne's opinion that these are grades of development in respect of which the CBD is struggling to compete.

[88] Further, we accept and prefer Mr Osborne's evidence that, in a suburban market already exhibiting over-supply of space and finite or at least not fast growing commercial demand, increasing supply at Addington would redirect demand from elsewhere. In particular, Mr Sellars did not substantiate that there would be no risk of competition as between the sites and other centres for the supply of B and C grade premises. Indeed, as we have noted, Mr Osborne envisaged the sites and surrounding CMU zoned land as an effective extension of the Addington Neighbourhood Centre. The sites cannot be realistically viewed as an enclave for B and C grade offerings and it is not safe to assume that any present shortage of supply for such space will remain so within the life of the CRDP. Markets do not work that way.

[89] We find that, both in terms of the matter of land values in the CBD and the knock on effects referred to by Mr Osborne, it is overly simplistic simply to point to a present lack of demand for B and C grade space in the CBD to argue that allowing KI's relief would not pose material risk. Rather, the commercial market remains in a state of flux in the aftermath of the significant commercial dislocation following the earthquakes. We remain at a point where recovery of the CBD to fulfil the role intended of it by the CRDP objectives is by no means assured.

[90] Therefore, we do not dismiss the risks posed by KI's Revised Rule for the CBD's recovery as being insignificant, in terms of our obligation to evaluate alternatives to determine the most appropriate rule to achieve related objectives. We agree with Mr Osborne that the question concerning what should be allowed as a permitted activity at the sites concerns how little damage can we do rather than avoiding damage altogether.

[91] We find Mr Osborne's evidence to be consistent with, and support, the findings of the Panel's Stage 1 decision. His evidence confirmed the soundness of the Panel's Stage 1 decision findings concerning the vulnerability of the CBD's recovery, the importance of that recovery for the Christchurch economy and the importance of supporting that recovery through the CRDP. We also accept his evidence that allowing for 3600m^2 of additional retail, commercial services and/or office activities as permitted activities on the sites presents a material, albeit unquantified, risk to the CBD's recovery and for the success of the CRDP's centres based approach. We do not find Mr Sellars' evidence to give us any sound basis to revisit those findings.

[92] More fundamentally, we must consider these matters in the context of being satisfied of what is the most appropriate rule for achieving related CRDP objectives. Objective 15.1.1 emphasises the critical importance of commercial activity for that recovery and the long term growth of the city. Objective 15.1.2(a)(i) refers to commercial activity being 'focussed within a network of centres … to meet the wider community's and businesses' needs in a way that … supports intensification within centres'. Objective 15.1.2 is for that activity to be focussed within a network of centres in a way and at a rate that, amongst other things, gives primacy to the Central City. Related Policy 15.1.2.1 is to maintain and strengthen the Central City and commercial centres as focal points for the community and business through intensification within centres that reflects their functions and catchment sizes in a way that, amongst other things, gives primacy to and supports the recovery of the Central City.

[93] We agree with Mr Stevenson's observation that their centres based approach is deliberately firm on where commercial activity is to be encouraged to be directed (namely to the CBD and other parts of the centres network) and why (namely because of the importance of doing so for the recovery, not only of the CBD but also of the wider Christchurch economy). We find Mr Osborne's opinions properly informed of and consistent with those objectives.

[94] In light of those objectives, we find it would be imprudent to dismiss the potential for B and C grade space to assist CBD intensification and recovery, in the future, simply by reason of the present lack of competition from the CBD in the offer of such space.

The evidence as to the proper interpretation of related objectives

[95] The primary issue in contention between the planning experts, Mr Putt and Mr Stevenson, was as to the extent of flexibility afforded by relevant objectives for new retail, commercial services and office activities to be allowed as permitted activities in buildings on the sites following their repair or redevelopment.

[96] We consider that matter before addressing the differences between those experts on the most appropriate rule for achieving the objectives. At the same time, we address KI's closing submissions on these matters[67].

[97] For KI, Mr Putt argued that the centres-based approach of the CRDP has sufficient flexibility such that KI's Revised Rule is most appropriate for achieving the related objectives. He relied, in particular, on an interpretation he placed on Objective 15.1.3 and in particular the meaning of 'existing' in its words 'Recognise the existing nature, scale and extent of commercial activities within areas zoned … [CMU]'. He argued 'existing' in this context should be read with regard to the statutory purpose of an objective for achieving the RMA's sustainable management purpose which purpose he read to seek avoidance of resource wastage. On that theme of wastage, he characterised the buildings at the sites, in their state of post-earthquakes repair, as a useable physical resource of value to people and communities in providing for their wellbeing. He reasoned that Objectives 15.1.1 – 15.1.3 have the intended flexibility to allow the commercial usage KI sought for the buildings within their designed and intended building envelope. He argued that both Mr Osborne and Mr Stevenson had been overly rigid and deterministic in their interpretations of those objectives.[68]

[98] He also argued that the provision of the CMU zone itself also demonstrates this intended flexibility in the centres based approach. Related to that, he argued that Policy 15.1.3.2, in recognising the existing nature, scale and extent of retail and office activities at Addington,

67 The Council did not specifically address the matter in its closing submissions.

68 Statement of evidence of Brian William Putt on behalf of KI Commercial Limited, dated 22 August 2016, at paras 13 – 15, 20 - 25

should also be read to encompass the built form (including buildings, roads and infrastructure) that supported those activities. He argued that this policy reflected an intended flexibility in approach, including as to the existing environment and usage of the CMU as a land use management tool.[69]

[99] He considered that Strategic Directions Objectives 3.3.1, 3.3.5, 3.3.8 and 3.3.10 also intend to allow flexibility for the return of the existing buildings to commercial usage, once re-developed.[70]

[100] Mr Stevenson interpreted Objectives 15.1.1 and 15.1.2 as establishing a framework that supports centres and not as one offering the extent of flexibility argued for by Mr Putt which he saw as eroding the very outcome that those objectives seek to achieve. He noted the Panel's finding (at [103] of the Stage 1 decision) that implementation of a centres based approach is a market intervention which may have trade competition consequences but which is in the best interests of the community as a whole, particularly a recovering community.[71]

[101] He disagreed with the interpretation Mr Putt offered that Objective 15.1.3 does not limit activities and land use in existing buildings. He said it needed to be read in conjunction with the associated policy framework that clearly anticipates limits on scales and types of activity in order to support a centres based approach. As to the matter of flexibility, he said that the CRDP "seeks to foreclose any expectation that [the CMU zone] [is] a location for new commercial activities beyond those permitted".[72]

[102] KI cross-examined Mr Stevenson on his interpretation of relevant objectives and policies. As to Objective 15.1.3, Mr Fowler put to him that, in context, its use of the word "existing" should relate to commercial activities that were existing at the time of the earthquakes. Mr Stevenson did not agree, referring to the related policies and rules as intending that this word meant "existing at the time of the [Panel's] decision". He disagreed that this approach to interpretation amounted to the tail (i.e. rules, policies) wagging the dog (i.e the objective). [73]

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69 Statement of evidence of Brian William Putt on behalf of KI Commercial Limited, dated 22 August 2016, at paras 30 - 32

70 Statement of evidence of Brian William Putt on behalf of KI Commercial Limited, dated 22 August 2016, at 26 - 29

71 Transcript, p 2148, ll 6 - 23

72 Transcript, p 2148, ll 35 - 40

73 Transcript, p 2152, ll 10 – 45, p 2153, ll 1 - 30

As to whether this resulted in an arbitrary outcome, i.e. dependent on what was in existence at the time of the Panel's decision, Mr Stevenson commented that the CRDP is deliberately firm and seeks to redirect commercial activities from less appropriate to more appropriate locations.[74] He acknowledged this could give rise to potential hardship for landowners such as KI, with investment directed towards re-establishment of what existed at the time of the earthquakes. However, he said this needs to be balanced against the costs and benefits for the whole community considered in terms of the policy framework, including for recovery of the city and the role of the CBD for that recovery.

[103] KI's closing submissions on the relevant objectives focussed on Objective 15.1.3 (and it also refers to Policy 15.1.3.2). It submitted that Mr Stevenson had taken an overly rigid and unsound interpretation of its reference to 'existing'. That was in the sense that Mr Stevenson interpreted it by reference to the scope of permitted activities authorised under Rule 15.7.2.1 P2, P9 and P10. It submitted that we should prefer Mr Putt's alternative more flexible interpretation (whereby 'existing' is taken to refer to activities existing at the time of the Canterbury earthquakes). It argued that this was supported by the fact that the default classification for activities that do not meet permitted activity standards is as a discretionary, rather than non-complying, activity.[75]

[104] We start by noting that we agree with Mr Stevenson and Mr Putt that the range of relevant objectives also include Objectives 15.1.1 and 15.1.2 (and the various Strategic Objectives that we have referred to).

[105] On the matter of the meaning of 'existing' in Objective 15.1.3, we agree that it is not sound to treat that meaning as being proscribed by the scope of related permitted activity rules. Such an interpretation would be potentially at odds with the intended statutory position whereby rules are for the implementation or achievement of objectives (ss 32, 75, 76, RMA). However, it is also artificial to interpret an objective in isolation from related rules. To do so also ignores the intended statutory relationship between objectives and rules. Indeed, KI's submission that we should read the Objective as more flexible in light of the choice of discretionary, over non-complying, activity classification also assumes such a connection.

74 Transcript, p 2153, ll 32 – 46, p 2154, ll 1 – 3.
75 Closing submissions on behalf of KI, dated 5 September 2016,at paras 29 33

[106] Mr Putt's interpretation of 'existing' (as meaning at the time of the earthquakes) puts a gloss on Objective 15.1.3. He did not identify any sound basis for doing so.

[107] His argument that the provision of the CMU zone is demonstration of the flexibility he argued for is plainly invalid in that the zone objectives are the driver of the intentions of a zone, not the other way around. This error is similar to Mr Putt's reliance on other commercial mixed use zones in New Zealand to demonstrate support for KI's Revised Rule. His interpretation that Policy 15.1.3.2 encompasses built form (including buildings, roads and infrastructure) puts a gloss on the plain meaning of that policy for which we can see no justification (unless, of course, we accept Mr Putt's overall view that flexibility is inherently driven from the purpose of the RMA). Likewise, nothing in the plain meaning of Objectives 3.3.1, 3.3.5, 3.3.8 or 3.3.10 supports Mr Putt's position that Objectives 15.1.1 – 15.1.3 are to be read with the gloss he has given them.

[108] As s 5, RMA we accept that, in the relevant context, it could well have the effect of avoiding resource wastage and hence supporting usage of buildings, following their repair. That is because its language is intentionally flexible in allowing for proper weighting of matters in context. However, it does not have that necessary meaning and it does not follow that the plain wording of the objectives must be read with a gloss to accord them a flexibility that provides for the extent of usage sought by Mr Putt's client.

[109] The fundamental flaw in Mr Putt's interpretation concerns how objectives relate to s 5. The direction in s 32 that we examine objectives for whether they are the most appropriate for achieving the RMA's purpose indicates their statutory function in identifying relevant s 5 priorities for the district. It is plain from reading our Decision 1 on Strategic Directions and the Stage 1 decision that the evidence the Panel heard in those hearings satisfied the Panel of the s 5 priority of earthquake recovery and that directly informed the expression of the relevant objectives. Given the statutory purpose of objectives, where these identify a s 5 priority for a district and an intended response to that priority, it is plainly invalid to look behind that in effect to elicit a new priority or more flexible response to it by the back door of an interpretation of s 5 itself. Further, in doing so, Mr Putt did not have the benefit of the extensive foundation of expert evidence that underpinned the inclusion of the objectives in the CRDP.

[110] Furthermore, as Mr Stevenson observed, Rule 15.7.2.1 provides a range of other permitted activities and related CMU zone rules allow for the consenting of appropriate commercial activities in that zone. In those terms, the CMU zone allows scope for the return of earthquake-damaged buildings to commercial use and that is plainly recognised in Objective 15.1.3. The issue concerns the degree of flexibility intended, not whether or not it is intended.

[111] We find the proper meaning of 'existing' in Objective 15.1.3 plainly evident on the face of the objective itself. The fuller phrase is 'existing nature, scale and extent'. That phrase applies to what follows in the sentence, i.e. 'of commercial activities within areas zoned Commercial Office and Commercial Mixed Use'. Hence, the focus is on what was on the ground, in terms of commercial activities, at the time those zones came into effect. That point of time is then the point by which we measure the following qualifying words, i.e. 'but avoid the expansion of existing, or the development of new office parks and/or mixed use areas'. Again, that focus is on avoidance of expansion on what existed, or was in place, at the time the zones came into effect. That intention is also reflected in the wording of the Appealed Rule, in particular its reference to 'at the date of decision'.

[112] That interpretation is also entirely consistent with the origins of the Appealed Rule. As noted, the Council's Closing Rule (originating from Mr Stevenson recommendation, as the Council's lead planning witness that the Notified Version's Industrial General zoning for land at Addington be replaced with CMU zoning) also used the words 'at the date of decision'.

[113] Therefore, we find that, for the purposes of determining the most appropriate rule, 'existing' in Objective 15.1.3 means existing as at the date that objective came into effect following our Stage 1 decision. It follows that we disagree with Mr Putt's interpretation that 'existing', in Objective 15.1.3, means existing at the time of the Canterbury earthquakes and we reject KI's related submission.

[114] As to the objectives more generally, we find that Mr Stevenson presented a sound interpretation and Mr Putt did not.

[115] We agree with Mr Stevenson in finding that Objectives 15.1.1 – 15.1.3:

(a) Establish a framework that supports centres and does not offer the extent of flexibility argued for by Mr Putt, which would in essence erode the outcome that those objectives seek to achieve.

(b) Implement a centres based approach, which is a market intervention that may have trade competition consequences but is in the best interests of the community as a whole, particularly a recovering community.

[116] We generally agree with Mr Stevenson that the CRDP's centres based approach is deliberately firm in its approach to where commercial activity is to be encouraged to be directed, namely to the centres network, and in view of the s 5 importance of recovery and what recovery requires. All of those matters are addressed in the Panel's Stage 1 decision, and nothing of the evidence of Mr Putt (or the other KI witnesses) gives us any sound basis for departing from those findings or revisiting related objectives.

[117] We do not go so far as Mr Stevenson in that we do not read the objectives as "foreclosing" any expectation that the CMU zone is a location for new commercial activities beyond those permitted. That is because the zone also allows for the consenting of other activities, including in its broadly expressed discretionary activity rule. Importantly, however, that added flexibility ensures a process for the proper evidential testing of new commercial activities against the priorities identified by the objectives and policies (as Mr Osborne noted).

[118] In terms of Objectives 15.1.1 – 15.1.3, in our evaluation of the rule options, we find we should pay particular attention to:

(a) The critical importance of commercial activity to the recovery and long term growth of the city;

(b) The intention to give primacy to the centres' network and focus commercial activity within that network, including to support their intensification, success and vitality (reflecting their critical importance to the local economy); and

(c) The intention to recognise the nature, scale and extent of commercial activities that existed within the Addington area at the date Objective 15.1.3 came into effect, following the Panel's Stage 1 decision.

[119] We now turn to the opinions of Mr Putt and Mr Stevenson on the most appropriate rules.

[120] Mr Putt presented his s 32AA evaluation of why he considered KI's Revised Rule the most appropriate for achieving the related objectives.

[121] In addition to his interpretation of relevant objectives, Mr Putt relied on Mr Thompson's evidence (on wider economic matters) for his opinion that KI's Revised Rule was appropriate. We have already recorded our findings on that evidence and simply note that it takes away from the reliability of Mr Putt's opinion also. Mr Putt also drew from his experience of successful commercial mixed use zoning in other centres in New Zealand (e.g. Auckland, Wellington, Hamilton). In essence, he considered such zones a supportive companion of nearby centres and, as such, CMU zoning should strengthen the Addington Neighbourhood Centre. However, while Mr Putt may well be right about that, it does not help us in that we are not now considering the CMU zoning *per se*, but the most appropriate permitted activity rule under that zoning for the sites in issue. In answer to Panel questions, Mr Putt also opined that the "CBD in Christchurch has got to regenerate its own energy. It cannot exist off forces that do not want to be there".[76] That is far too broad brush an observation to be in any sense reliable. It does not give us any sound basis to depart from the findings we made in our Stage 1 decision, on the basis of a range of expert opinions, and the directions of Higher Order Documents and the related objectives and policies to which we have referred.

[122] Mr Putt noted the significant new buildings in the immediate neighbourhood of the sites, used for office and retail activities whose RMA compliance relies on having been established before the zoning change of Decision 11. He argued that, in this context of substantial new development having taken place, it was important that the zoning of the area undergoing change reflect the land uses that have gained consent even if they have not yet been fully implemented. He supported KI's Revised Rule as providing opportunity for this to occur at the sites.[77] That

[76] Transcript, p 2120, ll 32 – 46, p 2121, ll 1 - 26

[77] Statement of evidence of Brian William Putt on behalf of KI Commercial Limited, dated 22 August 2016, at para 33

argument would appear to ignore the intended statutory purpose of district plans of assisting territorial authorities to carry out their functions in order to achieve the purpose of the RMA (s 72, RMA). Of course, the associated costs and benefits must be evaluated, as s 32 requires. However, if a change of direction in what an existing plan allows for is required to respond to a properly identified s 5 priority, a change can be made.

[123] Mr Putt made significant concessions on the matters of the precedent risk posed by KI's Revised Rule.

[124] When asked whether the KI Revised Rule could pose a risk of being a platform for other people to ask for the same, he answered[78]:

> It is a difficulty that you face with a site specific relief but that is just the circumstances as I see and I did not have any background on this until a week ago. … It is a risk. It is a risk that could arise through public plan change requests in the future. It may actually trigger a review of the structure of the Mixed Use Zone along the lines I have just mentioned, that it could be liberalised in order that it gives a better foundation for the commercial core zones.

[125] Related to that, when asked whether he saw any special circumstances that distinguish the sites from others, bearing in mind that KI's Revised Rule could allow for entirely new buildings, he could not identify any. He acknowledged that risk but said he thought the likelihood of the present ones being demolished, given the amount of money spent on them, was remote.[79] He acknowledged that the position on the sites was different in two respects from those of neighbours, namely that the buildings on the sites are not tenanted at present and some parts of the buildings on them have been demolished.

[126] We do not dismiss the risk in that way, given the broad scope of redevelopment opportunity KI explicitly seeks be allowed as a permitted activity on the sites and the centres-based intentions of the relevant objectives.

[127] Mr Putt also told us that, as he had only been recently instructed, he had not authored or advised on the formulation of KI's Revised Rule and that there may have been other ways to

78 Transcript, p 2121, ll 32 – 45, p 2122, ll 1 – 5.
79 Transcript, p 2122, ll 20 -43

deal with the matters in issue.[80] He offered some broad suggestions on what could be addressed (i.e restricting retail to the ground floor, and matching retail GFA to the building footprint). However, he did not offer any related redrafting.

[128] In view of those concessions and our other findings on Mr Putt's evidence, we find that his evidence does not provide a sound basis for determining that KI's Revised Rule is the most appropriate for achieving the relevant objectives. In essence, we reach the same conclusion in view of our findings on KI's other evidence.

[129] We note that we have also considered the affidavit evidence of KI's other planning witness, Mr Giddens. As it concerned KI's Initial Rule, it has not assisted in our evaluation.

[130] Before dealing with Mr Stevenson's evaluation of the alternative rules, we return briefly to the topic about which he was severely criticised in in KI's 15 August 2016 memorandum of counsel. That concerned the calculation he made in his written evidence, on the basis of KI's Initial Rule, of a theoretical maximum capacity from the sites in the vicinity of 10,470m^2. On the same matter, KI produced a statement from an architect, Graham McDermid[81] which calculated a new build maximum capacity of only 1800m^2 (comprising 200m^2 of retail, and 1600m^2 of office space). His broad assumptions for deriving this included his understanding of CRDP carparking requirements (including "queuing distances") and that "a two story" (sic) development "is a realistic development of the site"[82].

[131] In view of the evidence we have now considered, and our site visit, we agree that Mr Stevenson's calculation was unrealistic by a significant margin. When we compare Mr McDermid's calculation with KI's proposition that we allow for up to 3600m^2 on the sites (including for a new build), it appears to us that he may have also under-calculated what could be possible with a new build. In any event, however, KI's Revised Rule (with its proposed cap) makes this matter otiose.

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80 Transcript, p 2129, ll 32 - 42

81 Mr McDermid is a registered architect with approximately 30 years' experience in commercial, high rise, hospital, residential, industrial and other architecture. He was excused attendance at the hearing and his affidavit evidence was received by consent.

82 Affidavit of Graham McDermid on behalf of KI Commercial Limited, dated 19 August 2016, at paras 6 – 14.

[132] At the time Mr Stevenson wrote his evidence, the two rules in issue were KI's Initial Rule and the Council's Closing Rule (which, as we have noted, he authored).

[133] He expressed the opinion that KI's Initial Rule was inappropriate for achieving the related objectives[83]. As we have noted, KI subsequently replaced that with what we have termed KI's Revised Rule. In any case, on our findings on the evidence, we overwhelmingly agree with Mr Stevenson that KI's Initial Rule is inappropriate.

[134] He also explained that he no longer considered the Council's Closing Rule to be the most appropriate. That was given the significant risk it presented to the Strategic Directions and Commercial chapters' policy framework.[84]

[135] In its closing, KI criticised Mr Stevenson for this significant change of position. It argued that there had been no change in factual circumstances as would justify this and, therefore, it raised questions of credibility and reliability.[85]

[136] Again, we found that criticism unduly harsh and unfair. The Stage 1 decision (at [389]) clearly identified that the drafting of the Council's Closing Rule was unduly permissive and ambiguous and posed an undue risk for the recovery of the Central City. Self-evidently, those deficiencies of drafting were not seen by Mr Stevenson at the time he drafted the rule. That is a factual circumstance. In any case, the Code of Conduct responsibilities of experts include identifying where they have got something wrong. Our findings on this occasion, including on Mr Osborne's evidence (on which Mr Stevenson relies) confirm the findings of our Stage 1 decision concerning the deficiencies of the Council's Closing Rule. Furthermore, despite criticising Mr Stevenson for his change of position on the Council's Closing Rule, KI has not sought that we replace the Appealed Rule with it. Rather, KI's Initial Rule and its Revised Rule seek an entirely reframed and broader permitted activity regime. Clearly, Mr Stevenson is correct to reject what he originally formulated as inappropriate. We accept as valid his change of position, record that this does not detract from his credibility, and confirm that we find the Council's Closing Rule inappropriate.

83 Statement of evidence of Mark David Stevenson on behalf of Christchurch City Council, at 3.1
84 Statement of evidence of Mark David Stevenson on behalf of Christchurch City Council, at 5.7.
85 Closing submissions for KI, at para 27.

[137] In his written evidence, dated 11 August[86], Mr Stevenson did not address KI's Revised Rule and how it compares with the Appealed Rule. Instead, it addressed KI's Initial Rule and responded to that and Mr Giddens' related evidence. KI's Revised Rule came into evidence in Mr Putt's 22 August 2016 statement.[87] Mr Stevenson expressed his opinion on KI's Revised Rule and how it compared with the Appealed Rule, orally, when presenting his 'highlights package before cross-examination and Panel questioning. In essence, that was as a result of the sequential evidence exchange timetabling directions made in preparation for the hearing.

[138] At the commencement of cross-examination, counsel for KI challenged Mr Stevenson on this, asking why he had not instead filed rebuttal evidence to Mr Putt's evidence on this. The chair intervened to point out that an expert's Code of Conduct responsibilities include responding to evidence seen or heard for the first time. He then granted a recess to allow counsel to confer with Mr Putt before resuming cross-examination.[88]

[139] In his oral evidence, Mr Stevenson specifically addressed the implications of KI's Revised Rule and, in particular its proposed cap on retail, commercial services and office activities.

[140] He said he was not aware of any special circumstances or context that would justify that relief for the sites and not for other vacant sites or buildings in the CMU context outside a centre.[89] He agreed with Mr Putt that the buildings at the sites were physical resources capable of being adapted to different uses over time. As to the matter of flexibility, he disagreed with Mr Putt's view that the resources would be wasted if KI's Revised Rule were not included in the CMU zone. He considered there was already sufficient flexibility in the range of other specified permitted activities for the sites, including forms of retail activity.[90] In terms of costs and benefits, he questioned how KI's Revised Rule would support the Addington Neighbourhood Centre or recovery of the CBD. Those matters aside, he observed that KI's evidence was directed to benefits and costs for KI, but that Mr Osborne's evidence indicated that enabling commercial activity to be directed away from "the more appropriate locations" would not be consistent with the uncontested CRDP objectives.[91]

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86 Statement of evidence of Mark Stevenson, on behalf of the Council, dated 11 August 2016
87 Statement of evidence of Brian Putt, on behalf of KI, dated 22 August 2016
88 Transcript, - 2149, ll 36 – 46, p2150, p 2151, ll 1 - 25
89 Transcript, p 2148, ll 42 - 46
90 Transcript, p 2149, ll 1 - 6
91 Transcript, p 2149, ll 8 - 16

[141] Mr Stevenson acknowledged that KI's slowness in re-establishing and re-tenanting the buildings was a factor to consider, but he did not consider that factor put KI into a unique position. However, he was not able to back that with any empirical analysis he had undertaken.[92]

[142] On the matter of precedent risk, he considered any site specific rule ought to be backed by a related site-specific policy.[93] On the matter of flexibility and the design intentions of the CMU zone, he agreed it was developed initially to cater for what was not anticipated by the Notified Version and a better fit than either CC or IG zoning.[94] Without changing his position on the matter of the inappropriateness of a site specific rule, he agreed that, were we to include such a rule, an associated explanation of its genesis could assist in managing the precedent risk.[95] Also on the same basis, he agreed that any such rule should include explicit reference to "existing". Related to that, he considered reference to 3,600m^2 to be inappropriate as it did not relate to the existing buildings. On the same basis, he considered anything allowing for incremental addition to the existing buildings was not appropriate.

[143] In a relative sense, he considered the Appealed Rule more appropriate than KI's Revised Version (or any variation of it that included any subdivision of the 3,600m^2 cap amongst particular activities).[96]

[144] He said that, even if the effects of KI's Revised Rule proved to be limited, including the rule in the CRDP would give rise to a disconnect with the related centres-based policy framework.[97]

[145] We found Mr Stevenson's evaluation of these matters reliably based on the expert evidence, the Panel's related Stage 1 decision findings, and his proper interpretation of the relevant objectives (and related policies). His evidence informs our overall finding that KI's Revised Rule is inappropriate for achieving the related objectives.

92 Transcript, p 2158, ll 14 – 46, p 2159, ll 1-5
93 Transcript, p 2163, ll 19 - 25
94 Transcript, p 2163, ll 30 – 46, p 2164, ll 1 - 11
95 Transcript, p 2165, ll 16 - 39
96 Transcript, p 2165, ll 41 - 46, p 2166, p2168, ll 1 - 13
97 Transcript, p 2154, ll 9 – 37.

Closing submissions and our determination of the most appropriate rule

[146] Given the position reached by the close of the hearing, and the Panel's s 32AA responsibilities, the chair sought counsel's views on whether it would assist for the Panel to issue a Minute on drafting matters as an indication of the Panel's preliminary thinking subject to closing submissions. This suggestion was welcomed and two Minutes were issued for those purposes. The first, dated 25 August 2016, outlined a possible draft rule ('25 August draft rule') noting that this reflected the Panel's preliminary view from evidence and submissions, but subject to closing submissions. The second, dated 30 August 2016, reiterated that the draft rule did not necessarily represent the Panel's view on the most appropriate rule. It specifically recorded that was the case both for what the draft rule specified regarding GFA and other numbers and whether the Appealed Rule was the most appropriate for achieving related objectives.

[147] KI presented its initial position in a memorandum of counsel filed on 30 August 2016 ('30 August memorandum')[98]. According to the timetabling directions, the Council filed its closing submissions on 31 August[99], and KI completed its response in its closing submissions of 5 September 2016[100].

[148] As we have noted at [27], s 32AA refers to 'other reasonably practicable options for achieving the objectives'. KI's closing submissions described this as effectively requiring us to examine whether KI's proposed relief (including its "various iterations") is the most appropriate, compared to the Appealed Rule, for giving effect to related objectives.[101] We take KI's reference to its "various iterations" to be KI's Initial Rule, KI's Revised Rule (including its overall cap of 3600m^2 GFA) and KI's proposed changes to the 25 August draft rule (to which we return shortly). On that understanding, we accept that KI has accurately described the range of our evaluation in a practical sense (although we would add in the Council's Closing Rule which, along with KI's Initial Rule, was discarded by both parties). We have undertaken our evaluation on the basis that these are the available alternatives.

98 Memorandum of counsel for KI Commercial Limited, dated 30 August 2016.
99 Closing submissions on behalf of the Council, dated 31 August 2016
100 Closing submissions on behalf of KI, dated 5 September 2016
101 Closing submissions on behalf of KI, dated 5 September 2016, at paras 14, 15

[149] KI's closing submissions on the matter of economic costs and benefits did not refer at all to the evidence of its own rebuttal witness on these matters, Mr Thompson. Rather, the submissions focussed on the evidence of the Council's witness, Mr Osborne, and KI's valuation witness, Mr Sellars.

[150] It submitted that Mr Osborne could not substantiate his opinion on the risk that KI's proposed relief would pose for the CBD through redirection of demand from other centres. As for Mr Osborne's evidence that no one had assessed how KI's proposed relief could affect the CBD, KI submitted that Mr Osborne had "overlooked" the evidence of Mr Sellars "which presents a much finer grained assessment of the potential impacts on the CBD and centres" than "the high-level analysis completed by Mr Osbourne" [*sic*].[102]

[151] We do not accept that Mr Osborne overlooked Mr Sellars' evidence. As we have noted at [80], he considered and responded to it, in some detail (as Mr Sellars did to Mr Osborne's evidence).

[152] Nor do we accept that KI's characterisation of Mr Sellars' evidence as "a finer grained assessment of the potential impacts on the CBD and centres" and Mr Osborne's analysis as 'high-level". As we note at [34], Mr Osborne co-authored the Property Economics Report referred to in the Stage 1 decision and which underpinned the Council's s 32 RMA Report on the Notified Version. As we have recorded, that was an extensive analysis drawing from modelling and other detailed assessment and his experience. As we have also noted, he also conceded that one of the underpinnings of his opinion (land value in the CBD) could change. As we have recorded, we find both Mr Sellars and Mr Osborne credible witnesses. However, a factor that leads us to prefer the opinion of Mr Osborne is that it is underpinned by his extensive analysis, to which we have referred.

[153] KI submitted that answers that Mr Osborne gave to Dr Mitchell (concerning the analogy of "death by a thousand cuts") revealed that his fundamental concern was about the precedent risk of KI's proposed relief, rather than its impact on the CBD *per se*.

[154] We do not accept that is a fair description of Mr Osborne's evidence. As we explain at [88]–[94], we find Mr Osborne's evidence to demonstrate that precedent risk is not the only

102 Closing submissions on behalf of KI, dated 5 September 2016, at para 21.

important consideration for the Panel. The other is as to the unassessed potential risk presented by KI's proposed relief for the CBD.

[155] On the matter of precedent risk, KI point out that Mr Osborne had not assessed how many others may be in KI's position and submit that "therefore [he] could not say how widespread this issue might be".[103] However, the fact that Mr Osborne has not undertaken such an assessment does not make this risk any less significant.

[156] KI's own evidence did not present any such assessment and its closing acknowledged that it was "not aware of other specific landowners that have a direct interest in this matter". However, KI then sought to downplay this by its argument as to "fairness". It submitted that, as a matter of "fairness", if others "are able to demonstrate the same or similar circumstances to those faced by [KI], the Plan should provide a reasonable opportunity for those persons to protect their interests for the overall benefit of the Christchurch economy and its recovery". [104] It went on to submit that the Panel could achieve this by making changes to the CRDP's objectives, policies and other relevant rules.[105] This construct on the matter would appear to draw from the answer Mr Putt gave to the Panel on the matter of precedent risk, as we record at [124]. In essence, Mr Putt conceded a precedent risk with KI's Revised Rule but argued that there was a positive case to liberalise the CRDP by plan change.

[157] In presenting that closing argument, KI demonstrates a reasonably close alignment to the view that Mr Stevenson presented, namely that any rule akin to what KI pursued should be accompanied by changes to the policy of the CMU zone. Significantly, for our purposes, they serve to further illustrate the inappropriateness of KI's Revised Rule for achieving relevant objectives.

[158] Turning to the Appealed Rule, we find KI's closing submissions overstate its consequences for the sites in saying that it would 'effectively preclude" re-establishment of commercial activities that KI has in mind. That is because KI's submission ignores the fact that the default activity class is discretionary which, as Mr Osborne correctly understood, provides opportunity for assessment of related effects on the CBD and centres.

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103 Closing submissions on behalf of KI, dated 5 September 2016, at para 21.
104 Closing submissions on behalf of KI, dated 5 September 2016, at para 45.
105 Closing submissions on behalf of KI, dated 5 September 2016, at paras 42 and 43.

[159] However, we accept that the Appealed Rule's reference to 'existing' in relation to retail activity, commercial services, and office activity would effectively result in KI not enjoying permitted activity status for any re-establishment it would seek to make of those activities at the sites. That is a consequence of KI having discontinued those activities for the considerable period of time since they ceased in the aftermath of the earthquakes. Nevertheless, as we have noted at [62]–[64], we recognise that the Appealed Rule would impose at least some transaction costs on KI and a risk of loss of development opportunity at the sites (i.e. if any future resource consent application it makes is declined).

[160] We are satisfied on the basis of our findings, however, that the Appealed Rule properly achieves the related objectives. On the basis of those findings:

(a) We agree with Mr Stevenson that KI's Initial Rule, KI's Revised Rule and the Council's Closing Version Rule are all inappropriate for achieving the related CRDP objectives.

(b) We reject KI's submission that we should revisit those objectives, or related policies or other rules.

(c) We find that the Appealed Rule is the most appropriate for the CMU zone as a whole. We also find that the Appealed Rule is appropriate also for the sites. That is particularly in the sense that the Appealed Rule seeks to provide an exception limited to what is in existence at the relevant time, namely the date of the Panel's decision.

[161] The only remaining question is whether the Appealed Rule could be replaced by either the 25 August draft rule or any variation of it, specific to the sites, and that would give KI greater investment opportunity and still give effect to the related objectives. We identify two relevant risks for our evaluation of that question:

(a) The risk presented by the absence of any reliable modelling or related assessment of the effects of the 25 August draft rule or any variation of; and

(b) The precedent risk, arising from others seeking the same or similar further development opportunity on other sites, at Addington and elsewhere within the CMU zone.

[162] In its 30 August memorandum, KI proposed amendments to the 25 August draft rule ('KI's 30 August revision'), as follows (additions underlined, deletions ~~struck through~~):

15.7.2.1 Permitted Activities

Activity		**Activity Specific Standards**
P28	At 9 & 11-13 Bernard Street, Addington (CB29B/221 and CB29B/220) (the 'site') retail activity, commercial services and/or office activity that ~~satisfies both of the following:~~ ~~a. The activity is an activity that was undertaken in an existing building on the site on 21 February 2011 or after that date and before [*insert date of Panel's KI decision*]; and~~ b. ~~The activity~~ is undertaken in an existing building on the site. For the purposes of P28: "Existing building" includes all rebuilt, reinstated or modified buildings or parts of a building on the site demolished after the 22 February 2011 and which are within the circumference of building footprint shown on the plan in Annexure [*insert CRDP Annexure number, with Annexure going into Chapter 16*] *Note: See Independent Hearings Panel Decision [xxx], dated [xxx] for background to this rule*	a. A maximum gross floor area (GFA) across the site of 3600m^2 comprising: i. Up to a maximum of 12~~0~~00m^2 GFA for office activity; ii. Up to a maximum of 2600m^2 GFA for retail and/or commercial services activity~~, which shall be located at ground floor level only~~; and b. Retail activity shall be located at ground floor level only, or on a mezzanine floor accessed from the ground floor. This standard does not apply to commercial services or office activity.

[163] In relation to these changes, it also supplied an associated plan and sought that we clarify that activities of the type and scale they seek be allowed anywhere on the site (within "the proposed building circumference").

[164] KI explained that it sought a rule without clause (a) because it was concerned that it could be interpreted to limit future activities to only those specific activities of the exact type, mix, and/or scale that existed on that date. It submitted that the italicised note at the bottom of this column would be sufficient to alert readers to "understand why this site specific rule has been drafted in this manner to reflect the range of activities that existed in the buildings prior to this

date"[106]. It sought the other changes shown in part to give it greater ability to rebuild on the sites "in the event that the existing buildings are demolished as a consequence of a disaster beyond its control, such as fire or earthquake". Without this it said it would have "ongoing insurance issues" and this would have a consequential impact on value.[107]

[165] We find that these modifications would make the 25 August draft rule even further at odds with Objective 15.1.3 and, in particular, its reference to 'the existing nature, scale and extent' of commercial activities within the CMU zone. Retention of the italicised note does not remediate that, as it is just an alert to readers as opposed to being a means of regulating activities. As to KI's proposals to allow greater ability to rebuild in the event of any future natural disaster, it not assist us to understand why such future risks would not be sufficiently covered by existing use rights, under s 10, RMA. Nor did Mr Keung assist us on the specifics of why KI's insurance arrangements are such as would render KI's position so exceptional.

[166] The Council's closing submissions emphasised the Council's neutrality on any relief that might be granted to KI and that it would abide the Panel's decision. Without traversing the evidence, the submissions point out that the Council's experts had sought to assist the Panel within their expertise, and on their understanding of the settled objectives and policies. However, the Council expressed caution as to whether KI's 30 August revision would strike an appropriate balance between providing for what KI sought and the costs and benefits for other resource users and the wider community.

[167] As for the 25 August draft rule, it suggested that clauses (a) and (b) and the related definition of 'existing building' could be deleted entirely. However, that was on the basis that such changes would not result in the draft rule being "any more inconsistent with the policy framework".[108] Relating to that, the Council submitted that[109]:

> there is currently no policy basis for the [25 August draft rule] (or any amendments to it) and, if any policy is considered necessary, it would need to be carefully crafted so as not to create the basis for a precedent.

106 KI's 30 August Memorandum, at paras 23 – 26.
107 KI's 30 August Memorandum, at 20 – 22.
108 Closing submissions on behalf of the Council, at Appendix A.
109 Closing submissions on behalf of the Council, at para 9.

[168] As such, we do not read this suggestion from the Council as, in any sense, an endorsement of KI's position. In any case, we are overwhelming satisfied in view of our findings that the most appropriate rule for achieving the related objectives is the Appealed Rule. Our reasons are as follows:

(a) The relevant objectives clearly give priority to wider community wellbeing matters, including economic wellbeing and clearly emphasise the primacy of and the importance of supporting the intensification, success and vitality of the centres network (including the CBD), in view of the critical importance of the centres to the local economy);

(b) The objectives are also clear that this includes some flexibility for what can be done within CMU zones, including at Addington, but importantly explicitly to the extent of recognising the nature, scale and extent of commercial activities that existed at the date Objective 15.1.3 came into effect, following the Panel's Stage 1 decision.

(c) Rules that permit activities remove any associated means of assessing the extent of any risk, if any, that permitted activities may present for achievement of relevant objectives. It follows that we must be reasonably satisfied of that on the evidence before us.

(d) KI had opportunity to, but did not, present any credible evidence to enable us to properly assess that for any of its proposed rules (including its KI's 30 August revision of the 25 August draft rule). Nor did it assist the Council's experts to undertake any such assessment in their evidence. In particular, KI's approach throughout was to maintain flexibility on what it could pursue on the sites under a permitted activity rule, rather than clearly identifying the nature, scale and extent of the retail, commercial services and office activities it sought to be permitted. In essence, it left us not knowing on the evidence presented whether and to what extent its preferred permitted activities could impact on the priorities expressed in the objectives (and, hence, whether they could be safely addressed by activity specific standards).

(e) We agree with Mr Osborne and Mr Stevenson that we cannot ignore this in the absence of also electing to change the objectives and related policies. We find the latter option entirely inappropriate on all the evidence before us (and note that KI did not volunteer any specific drafting for such wider changes).

(f) In those circumstances, we also agree with Mr Osborne that the most appropriate activity class for these additional activities sought to be undertaken by KI is the existing default discretionary activity rule (assuming non-complying would not be triggered). That is because this activity class is designed to allow for this evidential gap to be filled by proper assessment of the specific activities KI may pursue, including with regard to the relevant objectives (and related policies).

(g) Related to these findings, nor did KI (or the Council) provide us with sufficient confidence as to the precedent risk of granting a site specific regime for what it could pursue as a permitted activity on its sites. Indeed, as we have noted, KI's planning witness, Mr Putt, acknowledged this risk and both he and KI proposed that it may be best addressed by changing the related policy for the CMU zone. We explicitly reject that as inappropriate, for the reasons we have stated.

(h) Despite all our efforts, we have not been able to identify any alternative rule that would allow greater investment opportunity for KI in relation to the sites and yet be more appropriate than the Appealed Rule in achieving the relevant objectives.

(i) We have explicitly taken account of the consequences that our confirmation of the Appealed Rule has for KI's investment in the sites. As we have recorded, that includes at least the additional transaction cost of seeking resource consent (and an attendant risk of consent decline). However, for the reasons we have given, we find those risks are not as severe as KI has argued. In particular, we find that KI does not stand apart from any other resource user in having to bear the related transaction costs for securing consent and the risk of consent decline. We find those costs and associated a necessary dimension of ensuring that the Strategic and other objectives of the CRDP are achieved. In any case, we find those risks are entirely overwhelmed by the economic costs and risks that, on KI's own evidence,

could well ensue from our granting KI's relief (i.e. under any of its preferred iterations).

CONCLUSION

[169] For all of those reasons, we confirm the Appealed Rule unchanged.

For the Hearings Panel:

Environment Judge John Hassan
Chair

Ms Sarah Dawson
Panel Member

Dr Phil Mitchell
Panel Member

Ms Jane Huria
Panel Member

SCHEDULE 1

The Appealed Rule

15.7.2.1 Permitted activities …

	Activity	Activity specific standards
P2	Existing retail activity in an existing building, or Existing consented retail activity and associated building; at the DATE OF DECISION	Nil
P9	Existing commercial services in an existing building, or Existing consented commercial services and associated building; as at the DATE OF DECISION	Nil
P10	Existing office activity in an existing building, or Existing consented office activity and associated building; as at the DATE OF DECISION	Nil