Independent Hearings Panel

Christchurch Replacement District Plan

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RE: The Christchurch Replacement District Plan: Proposal 21 – Special Purpose Recovery (Flat Land) Zone

1. In September 2015 the New Zealand Human Rights Commission ("Commission") filed a submission on Chapter 21.11 which sets out the proposed rules for a Specific Purpose (Flat Land Recovery) Zone. In that submission the Commission advocated for an "individual and targeted approach to the affected red zone residents". The Commission did not request to be heard in that submission.

2. Since September the Commission has been monitoring the development of the proposal and the evidence filed by both the Christchurch City Council ("CCC") and the Canterbury Earthquake Recovery Authority ("CERA"). In light of these developments and the Commission's ongoing work in the red zone there are a number of significant issues that the Commission wishes to draw to the attention of the Hearings Panel ("Panel") to aid its deliberations. In particular, this letter sets out relevant principles from international human rights law and assesses the proposal against those principles.

3. Acknowledging that Hearing preparation is well advanced the Commission respectfully requests the Panel consider allowing it to appear to make submissions on the applicable human rights obligations.

The Red Zone

4. The Commission has undertaken a survey of red zone residents. Three hundred and thirty residents remain living in the red zone. Of those who responded to the Commission's survey:

    - 84% said they were still living in the red zone by choice;
    - 81% hoped for long term or permanent residence in the red zone; and

- 93% of those living in the red zone at the time of the September 2010 earthquake had insurance.

The full findings of this research will be publicly available in March 2016.

5. The relocations from the residential red zone in Canterbury have been held to be involuntary. The Supreme Court stated in *Quake Outcasts v Minister for Canterbury Earthquake Recovery*[1] ("Quake Outcasts") that:[2]

> *It is true that the Crown did not use its powers of compulsory acquisition under the Act. However, it is unrealistic to describe the transactions that occurred as voluntary. The inhabitants of the red zones had no realistic alternative but to leave, given the damage to infrastructure and the clear message from the government that new infrastructure would not be installed and that existing infrastructure may not be maintained and that compulsory powers of acquisition could be used.*

6. It is also important to note that the continued delays and uncertainty for those who remain in the red zone have severely impacted on their health and wellbeing. Any ongoing uncertainty can be expected to exacerbate the ongoing negative impact of the Crown's actions in relation to the red zone.

Quake Outcasts v Minister for Canterbury Earthquake Recovery

7. The Supreme Court found in *Quake Outcasts* that the decision to establish the residential red zone in Christchurch was unlawfully made – in that it was made outside the ambit of the Canterbury Earthquake Recovery Act 2011. The Court stated:[3]

> *The whole scheme of the Canterbury Earthquake Recovery Act, its purposes and its legislative history support the view that decisions of the magnitude of those made in June 2011 on recovery measures should have been made under the Act and in particular through the Recovery Plan processes. They were not. That the June 2011 decisions were made outside of the Act undermined the safeguards, community participation and reviews mandated by the Act.*

8. The Court went on to conclude that:[4]

> *While we have held that the June 2011 red zone measure should have been introduced under a Recovery Pan, it is obviously now too late for this to occur. In practical terms, a declaration as the unlawfulness of the June 2011 decisions would not serve any useful purpose and none is made.*

9. The Crown itself has also recognised that the red zone has no legal status.[5] In light of the Supreme Court decision it is inappropriate to use the red zone as an arbitrary proxy in decision making.

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1 [2015] NZSC 27
2 Ibid at [140]
3 Ibid at [146]
4 Ibid at [205]

Human rights law

10. The rights most obviously engaged by the proposal are the rights to home and property. The Commission notes however that compliance with human rights obligations should not be approached as a form of 'checklist' that considers each right in isolation, as "all human rights are universal, indivisible, interdependent and interrelated."[6] As time has passed, for example, the on-going uncertainty for those left in the red zones has shown to be impacting on other rights, such as the right to health, both mental and physical.

Right to home

11. Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which New Zealand is a party, prohibits arbitrary interference with a person's home. It requires any interference to be justified as reasonable, proportionate and consistent with the Covenant.[7]

12. Article 17 of the ICCPR provides:

> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks*

13. The Court of Appeal noted the importance of this right in *Winther v Housing New Zealand*.[8]

14. The European Court of Human Rights describes this right as "of central importance to the individual's identity, self determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community".[9] The Court confirmed that the importance of this right to the individual must be taken into account when considering the margin of appreciation allowed to national authorities,[10] and stressed the importance of procedural safeguards and a fair process for affected individuals when assessing whether an interference is justified:[11]

> *The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when [interfering with the right] remained within its margin of appreciation. In particular, the Court must examine whether the decision making process leading to measures of interference was fair and such as to afford*

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5 2010/11 Financial Review of CERA and EQC – Transcript of question, Parliament. Question by Lianne Dalziel. Answer by Smith, "The red zoning has no legal status, so you are correct."

6 World Conference on Human Rights in Vienna, Vienna Declatation and Programme of Action UN Doc A/ CONF.157/23,12Ju|y1993 (at5)(endorsedbyGeneralAssemblyResoht:ot48/121).

7 United Nations Human Rights Committee, General Comment No 16:See also for example *Toonen u Australia* No. 488/92, U.N. Doc CCPF. / C / 50 / D / 488 / 1992 (1.99 \ at [8.3]).

8 *Winther v Housing New Zealand* [2010] NZCA 601; [2011] 1 NZLR 843 at [74].

9 *Connors v United Kingdom,* (2004) 16 BHRC 639 at [52].

10 *Gilllow v United Kingdom,* **(**1989) 11 EHRR 335 at [55].

11 *Connors v United Kingdom,* (2004) 16 BHRC 639 at [83]. See also *Chapman v United Kingdom* (2001) 33 EHRR 399 at [92], and by way of example *R v North & East Devon District Health Authority ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850 at [90] – [93].

due respect to the interests safeguarded to the individual by Article 8 [of the European Convention for the protection of human rights and fundamental freedoms. Art 8 of the ECHR is equivalent to art 17 ICCPR].

15. The concept of "interference" is obviously less than total negation, and includes any action that interferes with a person's enjoyment of their home. "Home" is understood as the place where a person resides or carried out his or her usual occupation.[12] Obviously, only unlawful or arbitrary interference will contravene the right.

16. The Human Rights Committee General Comment 16 confirms that "arbitrary" is a separate concept from "unlawful", and that an interference with one's home may be lawful in terms of domestic law (which itself must comply with the principles of the Covenant), but still contravene art 17 as being arbitrary.

17. The Committee in the same General Comment also confirms that "arbitrary" in this context does not mean "irrational" in the *Wednesbury* sense, but rather not in accordance with the provisions, aims and objectives of the Covenant:[13]

> *The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.*
>
> *The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.*

18. Whether an interference is "arbitrary" therefore requires an assessment of whether the interference is reasonable, proportionate and consistent with the Covenant.[14] The test is similar to that laid down in s 5 of the Bill of Rights Act.[15]

The Proposal

19. The Commission welcomes the proposed amendments to the notified plan. These changes significantly improve the realisation of property rights for those in the red zone. However, the Commission believes that there is no legitimate and lawful reason to impose a special zone. The status quo should be maintained.

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12 United Nations Human Rights Committee (1988), General Comment No. 16: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)* at [5].

13 At [3] – [4].

14 See for example *Mohammed Sahid v. New Zealand*, CCPR/C/77/D/893/1999 (11 April 2003) at [4.13], and *Toonen v Australia* No. 488/92, U.N. Doc CCPR/C/50/D/488/1992 (1994) at [8.3].

15 The approach to s 5 was recently discussed in *CPAG v AG* [2013] NZCA 402, see in particular [79] – [103].

20. As set out above international human rights law requires any decision by the Crown which interferes with the right to home to be necessary, reasonable and proportionate. The proposal potentially impacts on the rights of red zone residents - limiting permitted activities and possibly affecting values.

21. In New Zealand the test for justification under section 5 of the BORA provides some guidance as to when a limitation on rights may be justifiable. This test was set out by the Supreme Court in *R v Hansen.*[16] Any limit on a right must:[17]

    (i) serve a sufficiently important objective to justify curtailing the right;

    (ii) the limiting measure must be rationally connected to its purpose;

    (iii) impair the right or freedom no more than is reasonably necessary to achieve its purpose; and

    (iv) be in due proportion to the importance of the objective

22. The rationale for imposing a special zone appears to be infrastructure capacity. If this is the case, based on the information available, the Commission does not believe that this is a legitimate aim – cost alone cannot justify interference with fundamental rights.

23. Even if that aim were deemed to be legitimate the proposal impairs rights more than is reasonably necessary to achieve that aim.

24. Mr Eman in his evidence for CCC states:[18]

    > *...changes being made to infrastructure in the Recovery Zone may mean that [sic] some areas will not have the infrastructure capacity to cater for more intensive activities. The potential for such issues may be relatively small, considering that the adequacy of infrastructure is a matter considered in building consents, and for changes of use, under the Building Act.*

25. There is clearly an alternative – namely the status quo – which achieves CCC's aim while impacting less on the rights of red zone residents.

Yours sincerely

David Rutherford
Chief Commissioner

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16 [2007] 3 NZLR 1.
17 Ibid.
18 At 7.45