

BEFORE THE CHRISTCHURCH REPLACEMENT DISTRICT PLAN HEARINGS PANEL

IN THE MATTER of the Resource Management Act 1991 and the
Canterbury Earthquake (Christchurch Replacement
District Plan) Order 2014

AND the Specific Purpose (Flat Land Recovery) Zone of the
Christchurch Replacement District Plan

SUPPLEMENTARY MEMORANDUM OF THE HUMAN RIGHTS COMMISSION

PROPOSAL 21.11: SPECIFIC PURPOSE (FLAT LAND RECOVERY) ZONE

Dated the 21st day of December 2015

New Zealand Human Rights Commission

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1. INTRODUCTION

- 1.1 The Panel invited¹ the Commission to file a memorandum relating to the extent to which the Supreme Court dealt with land use issues in *Quake Outcasts v Minister for Canterbury Earthquake Recovery*² (*Quake Outcasts*).
- 1.2 In addition to the land use issue this memorandum provides the Panel with further information on two matters that the Commission believes are central to its decision making in relation to proposal 21.11, namely:
 - a) the application of human rights ; and
 - b) the Crown and Council's commitment to an individualised approach for red zone residents.

2. LAND USE ISSUES

- 2.1 The Supreme Court in *Quake Outcasts* did not deal directly with land use issues.
- 2.2 However, in the High Court Justice Pankhurst did address these matters and made direct reference to the Resource Management Act (RMA) framework:³

[63] The RMA governs how property owners may use their land. Section 9 provides a negative definition, that no-one may use land in a manner that contravenes a national standard, or a regional or district rule. Most important in this instance is the district plan, which prescribes conditions for the use and development of residential sections by reference to zoning. The applicants' land was zoned residential, but subject to different building criteria depending upon the permitted intensity of residential development. The property owners had the right to establish and live in their homes subject to compliance with the plan.

[64] It is the function of the City Council under section 31 of the RMA to manage and control "the effects of the use, development or protection of land and associated natural and physical resources ...". In doing so, the Council before bringing down or changing a plan is required to make an evaluation of "alternatives, benefits and costs". Hence, as Elias CJ has stated:

The district plan is key to the (RMA's) purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. People and communities can order their lives under it with some assurance. (emphasis added)

¹ Transcript at 181

² [2016] 1 NZLR 1

³ *Fowler Development Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2014] 2 NZLR 54

That was no longer so in the red zone.

(Emphasis added)

3. APPLICATION OF HUMAN RIGHTS

- 3.1 The Court of Appeal has confirmed that legislation should be interpreted consistently with international treaty obligations unless Parliament has expressly overridden/abrogated an obligation in the domestic instrument.⁴
- 3.2 This principle was further affirmed in New Zealand's recent reply to the Human Rights Committee's list of issues to be taken up in the consideration of the 5th periodic report (considering New Zealand's obligations under the International Covenant on Civil and Political Rights).⁵

*Certain Covenant rights are not directly reflected in the Bill of Rights Act but are given effect by other legislation and by common law. For example, the Privacy Act 1993, together with the common law tort of privacy, provides for rights of personal privacy (although these are also in part addressed through the right against unreasonable search and seizure). Similarly, the Children, Young Persons and their Families Act 1989, the Care of Children Act 2004 and other related legislation give effect to the rights of families and children. **These legislative provisions are complemented by the well-established principle of New Zealand law that, wherever possible, legislation is to be interpreted consistently with the Covenant and other international human rights obligations.***

(Emphasis added)

- 3.3 Notwithstanding the fact that the RMA is a precise framework for controlling environmental effects across private land, it does not expressly override any human rights obligations. It is therefore incumbent on decision makers to implement the RMA framework consistently with these obligations.
- 3.4 When considering what rights are engaged the Commission refers the Panel to the decision of Justice Pankhurst in *Quake Outcasts* for guidance:

[65] As the submission of the HRC emphasises New Zealand's international obligations are also relevant in this context. New Zealand has ratified the Universal Declaration of Human Rights, together with the two main treaties the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 17 of the former provides:

⁴ *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA)

⁵ Reply to the list of issues to be taken up in connection with the consideration of the fifth periodic report of New Zealand CCPR/C/NZL/Q/5/Add.1 5 January 2010 at page 1.

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.*

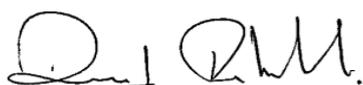
The use and enjoyment of one's home is a fundamental human right. In my view the creation of the red zone comprised an interference with that right. Whether that interference was arbitrary and unlawful depends on whether the red zone decision had to be made pursuant to the Act, a question to which I now turn.

(Emphasis added)

4. AN INDIVIDUALISED APPROACH FOR RED ZONE RESIDENTS

- 4.1 Chapter 21.11 deals with the Flat Land Recovery Zone – which consists of the residential red zone flat lands in Christchurch. The proposal for this area is based on area wide assumptions.
- 4.2 In Quake Outcasts the majority of the Supreme Court considered that the different treatment for those who were uninsured was disproportionate and unreasonable **“as there had been no consideration of the individual circumstances of the affected persons.”**⁶ Although the Supreme Court was considering insurance matters in this case not RMA zoning, the Commission considers the same principles apply.
- 4.3 There are 87 privately owned properties remaining in the Flat Land Recovery Zone. The situation of each of these properties varies greatly and in many cases is analogous to adjacent or surrounding green zone properties. In these circumstances, using the red zone boundaries for the purposes of RMA zoning decisions will be disproportionate and unreasonable unless an individualised approach and assessment is undertaken.
- 4.3 The Commission has been consistently assured by both central and local government that they are committed to taking an individualised approach to **all** decisions affecting red zone residents.

DATED 21 December 2015



David Rutherford - Chief Commissioner

⁶ Supra note 2 at [91]