

**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 Stage 3 of the Christchurch Replacement District Plan

**CLOSING SUBMISSIONS FOR THE CROWN ON THE SPECIFIC PURPOSE
(FLAT LAND RECOVERY) ZONE PROPOSAL 21.11**

Dated: 18 December 2015

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1. INTRODUCTION

- 1.1 These closing submissions address the following matters that arose during the hearing:
- (a) clarification of a proposed amendment to the Central City Zoning Planning Map;
 - (b) background to the establishment of the residential red zone and planning response;
 - (c) key aspects of the Greater Christchurch Regeneration Bill ("**Bill**");
 - (d) the Special Purpose (Flat Land Recovery) Zone ("**FLRZ**") zoning and boundary;
 - (e) provisions applying to the FLRZ; and
 - (f) application of human rights.

2. PROPOSED RE-ZONING TO CENTRAL CITY RESIDENTIAL

- 2.1 As explained in the Crown's opening submissions,¹ the evidence of Ms Whyte,² and Mr Eman³ a small portion of land was notified as part of the FLRZ but should, for consistency with the Christchurch Central Recovery Plan, Te Mahere 'Maraka Ōtautahi' ("**CCRP**") be zoned Central City Residential Zone.⁴
- 2.2 This area of land is bordered by Oxford Terrace, Willow Street and Bangor Street, as shown on the Central City Zoning Planning Map and shown as Attachment E to Ms Whyte's evidence. For clarity, the border of that area is shown in dark black outline in **Attachment A**.
- 2.3 For the reasons set out in the Crown's opening submissions, the Crown continues to submit that the relief sought is within the scope of the Crown's broad submission point seeking consistency with the Central City Proposal.⁵ No party has raised any objection to this change.

¹ Opening submissions of the Crown at paragraphs 2.1-2.4. Those submissions note that, under section 23(1) of the Canterbury Earthquake Recovery Act 2011 the Hearings Panel must not make a decision or recommendation that is inconsistent with the CCRP.

² Ms Whyte's evidence in chief, paragraph 6.40 and paragraphs 8 and 9 of Attachment A to that evidence.

³ Mr Eman's rebuttal evidence, paragraph 6.1.

⁴ Mr Eman's rebuttal evidence, paragraph 6.1.

⁵ Opening submissions of the Crown at paragraphs 2.2 and 2.3.

2.4 It is submitted that, as this land was notified as part of the FLRZ, and this hearing precedes the Central City hearing, the rezoning should occur under this decision, with the appropriate objectives, policies and rules applying to that area to be determined in the Central City hearing.

3. BACKGROUND TO RESIDENTIAL RED ZONE AND PLANNING RESPONSE

3.1 As set out in the evidence of Ms Jacka for the Crown in the Stage 1 Natural Hazards Proposal, the residential red zone was established following the 22 February 2011 earthquakes. On 23 June 2011 Ministers with a power to act agreed that red zones should be declared in areas where:⁶

- "(a) there is area-wide land damage, thereby implying the need for some sort of area-wide solutions; and*
- (b) an engineering solution to remediate the land damage would:*
 - (i) be uncertain in terms of detail design, its success and its possible commencement, given the on-going seismic activity;*
 - (ii) be disruptive for landowners, as the commencement date is uncertain (both in terms of confidence in the land settling sufficiently to begin remediation and the need to sequence the many areas where remediation would be required), and the length of time that they would need to be out of their homes to allow remediation to occur and new homes built;*
 - (iii) not be timely, for example, there is also substantial replacement of infrastructure required and/or the land level need to be significantly lifted; effectively requiring work equivalent to the development of a new subdivision, and would probably lead to significant social dislocation for those communities in the short-to-medium term; and*
 - (iv) not be cost-effective - the cost of remediation is greater than the value of the land; and*
- (c) the health and well-being of residents is at risk from remaining in the area for prolonged periods."*

3.2 As Ms Jacka's evidence explains:⁷

"These decisions did not purport to alter the permitted uses of the land under legislation such as the RMA or the Building Act. It was always anticipated that long term any changes to the permitted uses in high hazard areas would be managed through the normal RMA processes by CCC."

⁶ Statement of Evidence Ms Jacka for the Crown – Natural Hazards Stage 1, paragraph 6.4, referencing CAB Min (11) 24/15 and CAB Min (11) 30/18; Cabinet Paper "Land damage from the Canterbury Earthquakes". Ms Jacka's evidence is available at <http://www.chchplan.ihp.govt.nz/hearing/chapter-5-natural-hazards/> under "Submitter evidence".

⁷ Ibid, paragraph 3.7.

- 3.3 Following the matters raised by the Supreme Court in its judgment released in March 2015, the Crown made new offers to owners of vacant, insured commercial and uninsured improved red zone properties in accordance with the *Residential Red Zone Offer Recovery Plan*, July 2015 ("**RRZ Offer Recovery Plan**"). The RRZ Offer Recovery Plan did not affect interim or future uses of the red zone, or district plan zoning and provisions.⁸
- 3.4 The other higher order planning documents, which are discussed at Appendix A to Ms Whyte's evidence, support the establishment of an interim zone while the future use of the red zone is being determined under a separate policy, planning and consultation process.⁹ As explained in Ms Whyte's evidence:¹⁰

*"The RRZ Programme is referenced in the Recovery Strategy for Greater Christchurch, Mahere Haumanutanga o Waitaha ("**Recovery Strategy**") and the Land Use Recovery Plan Te Mahere Whakahaumanu Tāone ("**LURP**"). Through the RRZ Programme, it is identified that further work will be undertaken to determine the options for the future use of the "Residential Red Zone". This programme or its successor is occurring under a separate process and timeframe to the Replacement Plan process."*

- 3.5 The *Greater Christchurch Earthquake Recovery: Transition to Regeneration, Transition Recovery Plan* October 2015 ("**Transition Recovery Plan**") states that a new Crown-Council entity called Regenerate Christchurch will "oversee the long term development and enhancement of ... Christchurch's red zone",¹¹ and that:¹²

"Regenerate Christchurch has a role in developing plans and strategies for the regeneration areas in its scope (for example for the future use of the Christchurch residential red zone)."

- 3.6 The Bill establishes Regenerate Christchurch, an entity controlled by the Crown and Council to lead regeneration in defined areas of Christchurch. Those areas include the residential red zone.¹³ Key aspects of the Bill are outlined below.

4. KEY ASPECTS OF THE BILL

- 4.1 The purpose of the Bill is to provide a new legal framework to support the

⁸ RRZ Offer Recovery Plan, p 4.

⁹ See RRZ Offer Recovery Plan p 4, noting that the Minister expressly excluded these matters from the Gazetted RRZ Offer Recovery Plan. The LURP does not cover the red zone because "future use of land in the areas known as the residential red zone will be addressed through the Residential Red Zone Programme". (LURP p 8).

¹⁰ Evidence in chief of Ms Whyte, paragraph 5.8.

¹¹ Transition Recovery Plan, p 10.

¹² Transition Recovery Plan, p 12.

¹³ See Schedule 4 to the Bill "Regenerate Christchurch area" which includes the Christchurch residential red zone areas.

regeneration of Christchurch over the next five years. New legislation is needed to recognise the shift in focus from recovering from the Canterbury earthquakes in the Canterbury Earthquake Recovery Act 2011 ("**CER Act**") to regeneration.¹⁴ The Bill repeals the CER Act on the cusp of 17/18 April 2016.¹⁵

4.2 The Bill provides for the Minister to approve the development, amendment or revocation of Regeneration Plans.¹⁶ Regeneration Plans are very similar to Recovery Plans under the CER Act in their implementation. However, the Bill ensures there is greater consultation with strategic partners and others than the consultation requirements specified in the CER Act. Regeneration Plans can be proposed and developed by a strategic partner, Regenerate Christchurch, the Minister or a responsible entity.¹⁷

4.3 The effects of Regeneration Plans and Recovery Plans include the following:

- (a) persons exercising functions under the Resource Management Act 1991 ("**RMA**"), must not make a decision or recommendation inconsistent with a Regeneration Plan or Recovery Plan (this includes the preparation, change, variation, or review of an RMA document under Schedule 1);¹⁸
- (b) if a Regeneration Plan or Recovery Plan directs so, a council must amend an RMA document;¹⁹ and
- (c) certain documents (including long term plans, and regional land transport plans) must not be inconsistent with a Regeneration Plan or Recovery Plan.²⁰

4.4 The Minister may suspend, amend or revoke RMA documents, plans or policies under the Local Government Act 2002, regional land transport plans conservation and reserve plans and strategies, and bylaws.²¹

¹⁴ Explanatory Note to the Bill.

¹⁵ Clauses 2 and 111 of the Bill.

¹⁶ See clauses 21 and 29 of the Bill. Clause 4 of the Bill provides: "**Minister** means, in relation to any provision of this Act, the Minister of the Crown who, with the authority of the Prime Minister, is for the time being responsible for the administration of that provision."

¹⁷ Clause 12 of the Bill specifies who can develop Regeneration Plans. Clause 4 of the Bill contains the following definitions: "**responsible entity** means a council organisation, a chief executive of a department of the Public Service, an instrument of the Crown, or a Crown entity" and "**strategic partners** means Canterbury Regional Council, Christchurch City Council, Selwyn District Council, Te Rūnanga o Ngāi Tahu, and Waimakariri District Council".

¹⁸ Clause 31 of the Bill.

¹⁹ Clause 32 of the Bill.

²⁰ Clause 34 of the Bill (this is similar to section 27 of the CER Act).

²¹ Clause 42 of the Bill. This answers Sir John Hansen's questions as to whether the Bill has similar provisions to bring provisions directly into plans: Transcript p 116/1-5.

- 4.5 The Bill provides that the Minister, in making decisions relating to Regeneration Plans, must seek the views of strategic partners²² and Regenerate Christchurch and have particular regard to their views. The Bill also provides requirements for public input into the development of Regeneration Plans.
- 4.6 Three Recovery Plans continued by the Bill are specified in the definition of "*Recovery Plan*".²³ It is also likely that the Transition Recovery Plan will be added as a fourth Recovery Plan.²⁴

Timeframes and next steps

- 4.7 No expert was able to answer Ms Huria's question as to how long the interim nature of the FLRZ zoning will be,²⁵ and as that process is still to be determined it is presently unknown. However, there is a clearly signalled path forward for the future decisions affecting the FLRZ.
- 4.8 Ms Whyte's evidence was that, first there would be key decisions "*in relation to land use, hazards, rehabilitation, roading, ...then provisions appropriate to the outcome reached at that point would ... be implemented through either ...a Regeneration Plan...or a through a plan change.*"²⁶
- 4.9 If the Minister decides to proceed with the development, amendment or revocation of a Regeneration Plan or Recovery Plan, the Minister is required to publicly notify the proposal and invite members of the public to make written comment.²⁷
- 4.10 If the FLRZ provisions were to be amended by way of a plan change, Ms Whyte's evidence is that such a plan change would be notified, with there being a "*high level of interest*" in a plan change implementing a new zone, with a "*good process*" taking between nine months and several years²⁸ (ie, if there are appeals to higher courts).
- 4.11 At the hearing, Mr Daysh queried the timeframes surrounding the Bill.²⁹ Submissions on the Bill closed 4 December. The Bill is currently with the

²² Namely the Canterbury Regional Council, Christchurch City Council, Selwyn District Council, Te Rūnanga o Ngāi Tahu, and Waimakariri District Council.

²³ Namely the CCRP, the LURP and the RRZ Offer Recovery Plan.

²⁴ The explanatory note to the Bill states: "*It is intended that 2 more Recovery Plans, currently being developed under the CER Act, will also be added to the definition of Recovery Plan at a later stage if they are approved under that Act. Those 2 Recovery Plans are the Lyttleton Port Recovery Plan and the Transition Recovery Plan.*" The Transition Recovery Plan has now been approved under the CERA Act.

²⁵ Transcript p 131/30-33 (Mr Eman's response); p 109/15-20 (Ms Whyte's response).

²⁶ Transcript p 109/40-45.

²⁷ Clause 39 of the Bill.

²⁸ Transcript p 110/20-25.

²⁹ Transcript p 111/1-30.

Local Government and Environment Select Committee, having been on the agenda for the Committee's meetings on 11 and 12 December 2015.

- 4.12 Once the Select Committee has tabled its report (no later than 25 February 2016), the Bill will go on the Order Paper for its second reading. Parliament resumes on 9 February 2016, but the first possible date for a second reading of the Bill would be 1 March 2016.³⁰

5. SPECIFIC PURPOSE ZONING AND BOUNDARY

- 5.1 Submitters and the Human Rights Commission ("**HRC**") questioned the necessity of establishing the FLRZ as a specific purpose zone, or whether an alternative residential zoning is more appropriate. The hearing also discussed whether properties around the edge of the FLRZ should be rezoned. These are discussed in turn below.

Appropriateness of a specific purpose zone

- 5.2 The only relief sought in the HRC's submission was "*that the Council undertakes a survey or carries out individual consultation with the red zone residents to ascertain their views about the proposed chapter 21.11.*"³¹ The relief the HRC now seeks, which appears to be a form of spot zoning or carve out of outer-lying properties, moves significantly beyond that.
- 5.3 To the extent that the HRC argued that the Supreme Court found that the red zone was unlawfully established, thereby precluding the establishment of a specific purpose zone in the Replacement Plan, the Crown submits that the Supreme Court decision was made in a different context. The Supreme Court decision³² concerned the legality of identifying the red zone and offers to residential red zone property owners. In determining the appeal the Supreme Court considered the Government's decisions against the requirements of the CER Act for the Minister's exercise of powers.³³ It did not deal with land use issues under the RMA as put in a question to Mr White from Sir John Hansen.³⁴
- 5.4 It is submitted that the statutory framework that the Hearings Panel operates under has a different focus. That framework, based on the RMA, is that the

³⁰ Depending on what other Parliamentary business there is.

³¹ Submission 3286, letter from David Rutherford, Chief Commissioner to the Council, 3 September 2015, p 3.

³² *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27.

³³ The Supreme Court (by majority) found that that the zoning and purchasing decisions were made outside the CER Act because they should have been made under a Recovery Strategy or a Recovery Plan (Ibid, paragraphs 191-194.)

³⁴ Transcript p 180/35-40.

Replacement Plan provisions applying to the FLRZ:³⁵

- (a) are the most appropriate way to achieve the purpose of the RMA and to implement the Strategic Directions Objectives;
- (b) give effect to the Canterbury Regional Policy Statement ("**RPS**");
- (c) are not inconsistent with:
 - (i) the Recovery Strategy;
 - (ii) the CCRP;
 - (iii) the LURP;
 - (iv) the Transition Recovery Plan; and
 - (v) the Residential Red Zone Offer Recovery Plan, July 2015 ("**RRZ Recovery Plan**"); and
- (d) have particular regard to the Statement of Expectations.³⁶

5.5 The higher order documents:

- (a) identify that the future long-term use of the land will be considered in future planning processes.³⁷ It is important that this zoning, and the types of activities enabled under it, do not foreclose options under those processes; and
- (b) require efficient and effective infrastructure and land use development.³⁸

5.6 It is submitted that the establishment of a specific purpose zone is the most appropriate way to achieve the purpose of the RMA and reflect the higher order documents³⁹ because it enables a specific planning approach to be

³⁵ Only those documents which the Crown considers relevant to Proposal 21.11 are listed. See otherwise the decision of the Hearings Panel on strategic directions and strategic outcomes (and relevant definitions) dated 26 February 2015 ("**Strategic Directions decision**").

³⁶ See paragraphs 42 and 43 of the Strategic Directions decision.

³⁷ Recovery Strategy, p 40 states: "*Future long-term use of red zone land will be considered once a substantial proportion of red zone land has been transferred to the Crown. CERA, on behalf of the Crown, will lead an assessment of future options for land use. The assessment will consider hazard risk, opportunities for economic return, natural features and ecology of the land and adjacent waterways. It will also consider any community input required as part of the process and look for consistency with urban growth policies for greater Christchurch.*" In the Transition Recovery Plan it is stated that a new Crown-Council entity called Regenerate Christchurch will "*oversee the long term development and enhancement of ... Christchurch's red zone*", and that: "*Regenerate Christchurch has a role in developing plans and strategies for the regeneration areas in its scope (for example for the future use of the Christchurch residential red zone).*"

³⁸ See Objective 6.2.1(9), Policy 6.2.3(2) and Policy 6.3.5 of the RPS. Under cross examination Mr Eman agreed that "*efficient and effective integration of infrastructure and land use development is a key theme of chapter 6 of the RPS.*" Transcript p 126/35-40.

³⁹ As summarised in Attachment A to the evidence in chief of Ms Whyte. Note too Vision 5.1 (at page 11) of the Recovery Strategy that reads as relevant "*Develop resilient, cost effective, accessible and integrated*

taken for the unique situation in this area following the earthquakes.⁴⁰ While the FLRZ boundary matches that of the FLRZ, both Mr Eman and Ms Whyte support the establishment of a specific purpose zone, having regard to particular circumstances of the area and applying resource management considerations.⁴¹ These circumstances include:

- (a) the **infrastructure constraints** of the area, and approach to managing those constraints, as detailed in the evidence of Mr Rouse.⁴² In the hearing Mr Rouse explained:⁴³

"I think the network is sufficiently damaged that it is not forming part of the servicing for a large number of people that occupy properties in the Red Zone. So in terms of wastewater, there are a number of properties that have onsite storage tanks, so their discharge would be into the tank and then a truck goes around and empties the tanks out on a regular basis, and that has contributed to the high servicing costs..."

- (b) the **wide range of land management activities** being undertaken in the area, for example demolition and/or removal of existing buildings, and hazard management or mitigation works, both proposed to be permitted activities as set out in the evidence of Mr Clark.

- (c) the **existing environment**. The "*reality on the ground*", as Mr McNamara submitted, is "*that by far the majority of the land is vacant and in Crown ownership and this provides a unique opportunity for long term planning and potentially comprehensive redevelopment.*"⁴⁴

The Crown agrees with that submission. As noted by Ms Whyte, the land is not managed or serviced in the same way as other residential land within Christchurch City and its current existing environment is not residential in character.⁴⁵ Rather, it is characterised by large open tracts of land, with some 87 privately owned properties dispersed across the zone (of a total 5,992 properties).⁴⁶ Mr Eman's evidence is

infrastructure, buildings, housing and transport network – by 5.1 coordinating and prioritising infrastructure investment that effectively contributes to the economy and community during recovery and into the future."

⁴⁰ For example when determining non-complying activities, tailored policies enable the decision-maker to consider the particular constraints of the area, and the potential risks of natural hazards.

⁴¹ Mr Eman evidence in chief paragraph 8.2. Neither the HRC, nor any other submitter, called expert evidence to challenge this position or chose to cross-examine the experts.

⁴² Under cross examination from Mr McNamara Mr Rouse confirmed his view that "*infrastructure constraints are one of the reasons why a Special Purpose Zone, as opposed to a normal Residential Zone, are appropriate.*" Transcript p 93/10-20. Infrastructure constraints are a key reason why the rules applying to the FLRZ for residential activities are now very similar to those proposed in the Suburban Residential Zone, but are more restrictive for non-residential activities, which have greater infrastructure demands.

⁴³ Transcript p 95/5-10.

⁴⁴ Transcript, p 120/10-15.

⁴⁵ Ms Whyte evidence in chief, paragraph 6.3.

⁴⁶ Ms Whyte evidence in chief, paragraph 6.7(c).

that:⁴⁷

"the Recovery Zone is an area of land with circumstances that differ significantly from those applying in more general residential zones. It encompasses a large, largely vacant, area of land, much of which is essentially surrounded by the existing urban area. This provides relatively unique opportunities to enhance the sustainability of Christchurch."

The land is also characterised by large scale liquefaction and lateral spreading, making area-wide solutions appropriate. Mr Anderson's evidence is that:⁴⁸

"given that scale of the liquefaction effects of settlements and lateral spreading that have affected the Red Zone in my opinion these effects are likely to be more economically dealt with on an area-wide basis where large plant can be used and the constraints of dealing with property boundaries and the attendant issues can be removed".

Alternative residential zoning

- 5.7 To the extent that the HRC seeks to retain the status quo to the remaining 87 privately owned properties within the area, by some form of spot zoning,⁴⁹ the Crown submits that the status quo cannot simply be rolled over under this process. Rather, the statutory documents as set out above must be applied. There was no section 32 analysis or evidence called in support of the HRC's suggestion.
- 5.8 Also, the 87 individual properties dispersed throughout the zone cannot operate as a self-contained zone. To achieve integration of land use development and infrastructure, the Hearings Panel would need to consider evidence of the potential different configurations of infrastructure supporting such spot zoning, including to ensure that horizontal infrastructure can be efficiently and effectively provided.⁵⁰
- 5.9 Mr Tsao sought that the whole area be zoned residential.⁵¹ No section 32 analysis supports this relief which, it is submitted, ignores the factors listed above in support of a specific purpose zoning. It is also questionable what a residential zoning would achieve. Mr Tsao gave evidence that *"it would solve*

⁴⁷ Mr Eman evidence in chief, paragraph 8.2. Mr Eman's rebuttal evidence at paragraph 3.12 states of the FLRZ: *"It is such an unusual area that it is hard to categorise into any general land use type."*

⁴⁸ Mr Anderson evidence in chief, paragraph 3.4(c).

⁴⁹ Transcript p 148/35-40. The exact relief sought by the HRC is unclear. To the extent that the HRC seek a different label to be applied to the zone, but do not seek amended objectives, policies or rules, its objection is without substance. To the extent the process is claimed to be not consultative or engaging, the Crown notes that both the HRC and submitters have been involved in the Replacement District Plan process from the outset, which provides opportunity for submissions, expert evidence, to be heard, and to cross-examine witnesses.

⁵⁰ This is entirely the purpose of the future planning process.

⁵¹ Transcript p 160/30-31.

all the problems" if the Crown agreed to a land swap so that he could reroute his driveway from facing down the river onto a side street.⁵² This factor also reinforces the need for integration.

Boundaries - carve out outer-lying properties?

5.10 As Mr McNamara said:⁵³

"It is a fair question to ask whether properties around the edge should be rezoned given that the criteria used to establish a Red Zone may not be appropriate criteria to establish a Flat Land Recovery Zone, given the implications of that in terms of the range of activities available and in particular there being far less permitted activities available than in a typical Residential Zone."

5.11 Mr Rouse acknowledged that some private property owners (adjacent to a green zone) may have an infrastructure access solution that is "*more feasible than properties located smack in the middle of the Red Zone*"⁵⁴ and such connection to green zone infrastructure could be privately funded.⁵⁵

5.12 However, apart from Mr Tsao's property,⁵⁶ there is no evidence before the Hearings Panel of whether individual properties should be brought into the Residential Suburban Zone. Mr Eman considered that such consideration would require in-depth analysis of the infrastructure issues and related activities for each property.⁵⁷

5.13 The reason for this lack of analysis, it is submitted, is that such site specific issues will be considered in an integrated manner at a later stage. As explained by Mr Rouse in the hearing:⁵⁸

"There is a lot of work being done on what the future use opportunities are for the Red Zone, and it is likely that there would be new road alignments and new activities carried out in the Red Zone and new horizontal infrastructure alignments. So we have been reluctant to invest in the repair of infrastructure of current alignments because it may need an expensive relocation or realignment once future use decisions are made and the infrastructure could be in the wrong place."

5.14 This is also reflected in the following extract from Mr Eman's section 32

⁵² Transcript p 161/25-30.

⁵³ Transcript p 120/30-35.

⁵⁴ Transcript p 91/35-31.

⁵⁵ Transcript 92/5-10.

⁵⁶ In relation to Mr Tsao's property, Mr Eman's evidence (as summarised by Mr McNamara, transcript p 120/40-45) is that damage to infrastructure and services are such that it is unlikely that infrastructure will be brought up to normal standards, and Mr Tsao's property is the only privately owned property in quite a large block, making residential zoning inappropriate.

⁵⁷ Transcript p 137/25-30.

⁵⁸ Transcript p 98/35-40.

report:⁵⁹

"Broadly the objective and policies of the Specific Purpose (Flat Land Recovery) Zone seek to address the following key resource management issue:

The future intended use, including options for long term recovery, of the flat land 'residential red zone' is uncertain and final zoning will be deferred until a comprehensive planning and consultation process ('Residential Red Zone' programme) has been completed. In the interim period, there is a need to provide for activities on the remaining privately owned properties and elements of immediate recovery activity, which consist of repair and maintenance works and land management activities, and prevent subdivision, intensification and new development that will compromise or impede options for the long term recovery and future use of the zone. Therefore, interim provisions are required to provide certainty about what land use and development is appropriate within the zone prior to the completion of the 'Residential Red Zone' and to manage any adverse effects of these activities."

5.15 The Crown submits that this detailed analysis is exactly what will occur though the longer-term planning process. This detail will enable integration of land use development and infrastructure, giving effect to the RPS.

6. PROVISIONS APPLYING TO THE FLRZ

6.1 There have been significant changes to the proposed provisions from the Proposal as notified. In particular, the planning experts agree that the revised permitted activity rules for residential activities on privately owned land in the FLRZ enables homeowners to conduct residential activities, within appropriate limits, on their properties without undermining the objective and policies of the FLRZ.⁶⁰

6.2 The single, relatively minor,⁶¹ point of difference between the planning experts is the appropriate activity status for new pre-schools, health care facilities, veterinary care facilities, education activities, places of assembly and spiritual activities ("**community facilities**") establishing in the FLRZ.

6.3 Mr Eman prefers discretionary activity status whereas Ms Whyte prefers non-complying activity status. This difference potentially affects less than half of the privately owned properties in the FLRZ not affected by the hazard overlay.⁶² Both expert planners agree that, given the potential level of intensification that may result from new community facilities, they are not

⁵⁹ Mr Eman's Updated section 32 report, p 14. This analysis is also throughout that report.

⁶⁰ Mr Eman evidence in chief paragraph 3.1 and Ms Whyte evidence in chief paragraph 6.6.

⁶¹ At the hearing Mr Eman said that the planners' differences were a more a finely balanced call one way or another, than absolute positions: Transcript p 133/10-15. Mr Tsao called it a "*non-issue*". Transcript p 156/15.

⁶² As explained by Mr Eman, for the remaining provisions there is no difference because the hazard overlay would make such developments non-complying anyway: Transcript p 141/10-15.

appropriate to be provided for as permitted or controlled activities and should be considered through a resource consent process in the FLRZ.⁶³

- 6.4 It is submitted that non-complying activity status better gives effect to the Canterbury Regional Policy Statement ("**RPS**"). As noted above, efficient and effective integration of infrastructure and land use development is a key theme of the RPS. Mr Rouse's evidence for the Crown is that new non-residential development may require significant repair or rebuild of damaged horizontal infrastructure.⁶⁴
- 6.5 Decisions relating to intensification of land uses beyond what is currently provided for under the Updated Revised Proposal⁶⁵ as permitted or restricted discretionary activities should be made with key strategic decisions on infrastructure.⁶⁶ This approach gives effect to RPS Policy 6.3.5(2) to ensure "*that the nature, timing and sequencing of new development is coordinated with the development, funding, implementation and operation of transport and other infrastructure.*"
- 6.6 Moreover, the FLRZ does not have a residential population that would necessitate new activities of this nature.⁶⁷ While there was discussion of the potential for community facilities to be used by persons outside the FLRZ,⁶⁸ under cross examination Mr Eman acknowledged that his section 32 report did not identify any shortfall of community facilities elsewhere in the city, such that supply for them in the recovery zone is necessary to meet the needs of the community.⁶⁹ Nor did Mr Eman have a feel for whether it would be likely that this type of development would be applied for.⁷⁰ Ms Whyte's opinion is that community activities are far more likely to establish outside of the FLRZ, where they are permitted activities.⁷¹ In cross examination Mr Eman agreed that these types of activities are permitted in a range of zones outside the FLRZ.⁷²
- 6.7 In response to panel questioning, Ms Whyte's evidence was that non-

⁶³ Ms Whyte evidence in chief paragraph 6.31.

⁶⁴ Mr Rouse evidence in chief, paragraph 8.4. The Crown's reasons for non-complying activity status being the most appropriate are based on its position that a more restrictive approach should be taken for non-residential activities across the FLRZ.

⁶⁵ Namely that version of Proposal 21.11 circulated by Council prior to the hearing.

⁶⁶ Ms Whyte's evidence paragraph 6.32. Mr Eman's rebuttal evidence reinforces this view, explaining that "*No decisions have yet been made by the Council about infrastructure provision during the interim period before the future land use of the red zone is resolved.*" Mr Eman's rebuttal evidence paragraph 5.5. This statement was made in response to Mr Tsao's request for rezoning.

⁶⁷ Ms Whyte evidence in chief paragraph 6.35.

⁶⁸ Transcript p 108/15-25.

⁶⁹ Transcript p 131/20-25.

⁷⁰ Transcript p 140/23-30.

⁷¹ Transcript p 108/30-35.

⁷² Transcript p 131/10-15.

complying activity status better meets Strategic Directions Objective 3.3.11 than discretionary activity status.⁷³ That objective provides:

"3.3.11 Objective - Community facilities and education activities

- (a) *The expedited recovery and establishment of community facilities and education activities in existing and planned urban areas to meet the needs of the community; and*
- (b) *The co-location and shared use of facilities between different groups is encouraged."*

6.8 Ms Whyte's evidence is that Objective 3.3.11 applies to "existing and planned urban areas", and that objective "is better achieved through a later process that is yet to come".⁷⁴ Mr Eman agreed that the potential for shared use of the facilities was low, given the small numbers of residents, scattered throughout the zone (unless they came from outside the FLRZ).⁷⁵

6.9 In response to Mr Daysh's question as to whether non-complying activity status was enabling, in relation to Strategic Directions Objective 3.3.1, which *is enabling recovery and facilitating the future enhancement of the district*, Ms Whyte said:⁷⁶

"...it is a matter of how you expedite recovery and how you best do that, be it piecemeal in some ways through this process or be it through a wider more general process later that gets to consider all of these issues."

6.10 Ms Whyte's evidence was that, in this context, there is a balance to be struck between appropriate infrastructure and land use. In her opinion,⁷⁷ *"infrastructure would win out in my judgement over the balance between providing for new community facilities in the Flat Land Recovery Zone at this time"*.

6.11 The purpose of the proposal, as set out in Mr Eman's section 32 report, includes, for activities other than residential:⁷⁸

*"b. To enable other existing activities and their limited modification, temporary activities and elements of immediate recovery activity to be undertaken during the interim period, consisting of repair and maintenance works and land management activities **and to prevent subdivision, intensification and new development activities while minimising adverse effects on the surrounding environment.**"*
(Emphasis added)

⁷³ Transcript p 104/25-30 (question from Mr McNamara) and p 1-5/20-25 (Ms Whyte's answer).

⁷⁴ Transcript p 105/35-40.

⁷⁵ Transcript p 140/15-20. He also agreed that his section 32 analysis

⁷⁶ Transcript p 112/15-20. In cross-examination Mr Eman agreed that "non-complying activity status does not prevent activities that have minor effects" Transcript p 130/30-35.

⁷⁷ Transcript p 106/20-25.

⁷⁸ Mr Eman evidence in chief, Attachment C, p 13.

6.12 It is submitted that "*prevent*" is directive language and highly discouraging of the activity occurring.⁷⁹ Mr Eman's section 32 report provides more detail on such other new developments stating, again in a highly directive manner:⁸⁰

"subdivision, intensification and other new development activities will only be accommodated where they will not compromise options for long term recovery and future use of the zone." (Emphasis added)

6.13 It is submitted that the Crown's preference for non-complying activity status is consistent with the language used in Mr Eman's section 32 report for "*other new development activities*".

6.14 Mr Eman agreed that non-complying activity status identifies activities "*that are not normally appropriate*" within a zone.⁸¹ Mr Eman also agreed that such discouragement can reflect a vulnerable, sensitive or highly unusual environment such as the FLRZ and also activities that likely to produce significant adverse effects. During cross-examination Mr Rouse commented that in terms of sending a signal to the development community:⁸²

"I think it is fair to say that in terms of horizontal infrastructure and the implications around providing services, it might be better to send a signal that the bar is set quite high."

6.15 The Crown's position is, for the reasons set out above, that new community activities should be discouraged within the FLRZ during the interim period while longer-term planning is undertaken.⁸³ Therefore, it is submitted that non-complying activity status is the most appropriate way to achieve the purpose of the RMA and the relevant objectives during the interim period.

7. APPLICATION OF HUMAN RIGHTS

7.1 The HRC contends that the rights engaged by Proposal 21.11 are the "*rights to home and property*", which can affect other, indivisible, rights.⁸⁴ However:

- (a) The RMA specifically controls environmental effects across private land and is a complete, unequivocal statutory process for doing so. It contains specific provisions that an interest in land is deemed not to be

⁷⁹ The Shorter Oxford English Dictionary, 6th edition 2007, defines "*prevent*" as including "*Provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening.*"

⁸⁰ Mr Eman evidence in chief, Attachment C, page 17, point b.

⁸¹ Transcript p 130/15-20.

⁸² Transcript p 130/20-30. In respect of Mr Tsao's property, which was the only property addressed in detail at the hearing, the evidence of Mr Eman (at paragraph 5.7 of his rebuttal statement) is that "*Putting in upgraded road access and other services, above the minimum necessary to cater for a single house, creates increased risk and potentially considerable ongoing maintenance costs for the wider community of such vulnerable infrastructure.*"

⁸³ Transcript p 92/40-45.

⁸⁴ Transcript p 147/10-15.

taken or injuriously affected by reason of any provision in a plan, unless otherwise provided for in the RMA or that provision renders an interest in land "*incapable of reasonable use*".⁸⁵

- (b) The Updated Revised Proposal does not limit activities on land such that land is rendered incapable of reasonable use. In fact, proposed rule P1 (permitting certain residential activities) and proposed rules P12-P17 (permitting certain non-residential activities within a residential unit and market and community gardens) are equivalent to those that are proposed for the Residential Suburban Zone.⁸⁶
- (c) No specific evidence was adduced of any particular right that was abrogated by any provision in Proposal 21.11. At the hearing, Mr Tsao said that: "*And in essence we are given all the same rights, same as everyone else, outside the camp, but I am still in the camp.*"⁸⁷
- (d) The Hearings Panel must bear in mind the distinction between private property rights and RMA framework (set out in paragraph 5.3 above) when determining the Replacement Plan provisions. As noted by the High Court: "*The Resource Management Act floats, rather like oil on water, across the top of ownership rights without affecting the underlying substance*".⁸⁸
- (e) Article 17 of International Covenant on Civil and Political Rights protects *arbitrary or unlawful interference with a person's private, family, home or correspondence*. While the Court of Appeal has noted the importance of this right, the facts in the case relied on by the HRC are fundamentally different.⁸⁹

8. CONCLUSION

8.1 It is submitted that, for the reasons given in Mr Rouse's and Ms Whyte's evidence⁹⁰ and summarised above, the Updated Revised Proposal (together with the changes to community facility activity status sought by Ms Whyte):

- (a) gives effect to the RPS, particularly Objectives 6.2.1, 6.2.4 and Policy 6.3.5;

⁸⁵ See section 85(3) RMA.

⁸⁶ The HRC agreed that the Updated Revised Proposal had moved a "*a long way from the Notified Proposal*" towards "*achieving the right balance*" Transcript 148/25-30.

⁸⁷ Transcript p 162/25-30.

⁸⁸ *Coleman v Rodney District Council* 3 April 2001, AP103-SWOO, Hammond J, at paragraph 28.

⁸⁹ *Winther v Housing Corporation of New Zealand* [2011] 1 NZLR 825 at paragraph 75. That case concerned a decision by a landlord to evict a tenant based on unlawful discrimination.

⁹⁰ Ms Whyte evidence in chief, Attachment A.

- (b) is consistent with the Recovery Strategy, LURP and other Recovery Plans;
- (c) is consistent with the Statement of Expectations included in Schedule 4 to the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014; and
- (d) implements Strategic Directions Objectives 3.3.1, 3.3.2, 3.3.6, 3.3.9 and 3.3.12.

8.2 Lastly, the Crown submits that the Updated Proposal (with the changes sought by Ms Whyte) achieves the purpose of the RMA by enabling development in a manner that enables people and communities to provide for their social, economic and cultural wellbeing and safety while appropriately avoiding, remedying or mitigating adverse effects. It agrees with counsel for the Council's conclusion that:⁹¹

"Maintaining options for future land use through a Specific Purpose Zone while recognising [natural] hazard risks and infrastructure constraints is an appropriate resource management outcome which will achieve the sustainable management purpose of the Act."

DATED 18 December 2015



David Allen
Counsel for the Crown

⁹¹ Transcript p 120/10-15, Mr McNamara opening for Council.

Appendix A: Land sought to be re-zoned Central City Residential (outlined in by a thick black line)

