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

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STATEMENT OF THE NEW ZEALAND HUMAN RIGHTS COMMISSION

PROPOSAL 21.11: SPECIFIC PURPOSE (FLAT LAND RECOVERY) ZONE

Dated the 11th day of December 2015

New Zealand Human Rights Commission

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1. INTRODUCTION

1.1 My name is Michael White. I am a Senior Legal Adviser at the New Zealand Human Rights Commission. I have held this position since 2009. The Commission is New Zealand's National Human Rights Institution ("NHRI"). Margaret MacDonald, who is with me, has together with Chief Commissioner David Rutherford led the Commission's work on the human rights aspects of the recovery from the Canterbury Quakes. Chief Commissioner Rutherford sends his apologies for not being able to attend the hearing today due to a last minute family matter.

1.2 Human rights standards are relevant to the way in which people are able to move on with their lives following a natural disaster and to how they can participate in decisions that affect them.

1.3 New Zealand has acknowledged the human rights implications of the government's response to the earthquakes in its statements to the various United Nations supervisory bodies, and confirmed its commitment to respect and protect those rights

1.4 For example, the government stated in the recent second Universal Periodic Review to the United Nations Human Rights Council that "ensuring any human rights impacts of the Canterbury Earthquake are accounted for in the on-going decisions around the rebuild" was a "key priority" for New Zealand.[1]

1.5 Similarly, the closing remarks by the Minister of Justice to the UNHCR at the presentation of the UPR on 27 January 2014 included the following:[2]

The more than 11,000 earthquakes presented challenges in restoring people's dignity and fundamental rights as recognised under New Zealand's human rights legislation and international obligations. The Canterbury Earthquake Recovery Authority was established in response to the earthquakes. The Government's Recovery Strategy has

[1] New Zealand's Universal Periodic Report: *National report submitted in accordance with paragraph 5 of the annex to the Human Rights Council resolution 16/21, New Zealand* A/HRC/WG.6/18/NZL/1, 8 November 2013 at [4].
[2] New Zealand's 2nd Universal Periodic Review: Minister's Closing Remarks 27 January 2014 at pages 3 – 4.

provisions for economic, social, and cultural recovery as well as for the built and natural environment.

2. SCOPE

2.1 This statement relates to the Specific Purpose (Flat Land Recovery) Zone. In particular it addresses the following matters:

(a) the circumstances surrounding the red zone;

(b) the lawfulness of the proposed zone; and

(c) the relevant international human rights principles and their application.

2.3 In preparing this statement the Commission has considered Proposal 21.11 as notified, the evidence filed on behalf of the Canterbury Earthquake Recovery Authority ("CERA") and the evidence filed on behalf of the Christchurch City Council ("Council") including the revised version of the proposal appended to Mr Eman's evidence.

2.4 This Statement also draws directly on the Commission's ongoing work in relation to the Canterbury recovery. This includes direct interactions with many of the people affected by the red zoning and by the various deadlines and statements made in relation to red zone.

2.5 The Commission filed a written submission in September 2015. On 2 December 2015 the Commission wrote to the Hearings Panel providing additional information. This statement should be read alongside these earlier documents.

3. EXECUTIVE SUMMARY

3.1 The decision to establish the residential red zone has been held by the Supreme Court not to have been lawfully made. It has no legal status and does not alter permitted uses of land under other legislation. However, that is exactly what Chapter 21.11 is doing – using the red zone that was not lawfully made as a proxy to change Resource Management Act zoning.

3.2 Furthermore it is important to recall that the relocations from the residential red zone in Canterbury have been held to be involuntary. It was the Crown's actions that created an environment that in many

respects was considered to be uninhabitable, leaving residents with what Justice Pankhurst described as a “Hobson’s choice.”

3.3 It has been acknowledged that decisions about the future use of the red zone will be made under the Red Zone Recovery Programme. This is the proper mechanism to determine the appropriate use of red zone land.

3.4 In a similar vein to the circumstances around the offers, imposing a greater level of restriction on building and development than the Operative Plan provisions at this stage can be seen as a signal to the very small number of property owners in the red zone that remaining is not a priority.

3.5 In these circumstances it is inappropriate for the Council to exacerbate things further by again pre-empting the real decision – made under the recovery principles and with full community participation – on what should happen with this land and those who have elected to remain under the guise of a change to planning designations.

3.6 International human rights law requires any decision by the Crown which interferes with rights to be necessary, reasonable and proportionate. The proposal - as amended - engages the rights of red zone residents. The rights most obviously engaged 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."[3] 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.

3.7 The evidence presented to the Panel by both the Crown and the Council has shown that many of the factors requiring a special purpose zone can be managed through existing mechanisms. The evidence has also shown that in many cases there is no discernible difference between the status of red zone land and adjacent green zone land. Using the red zone as a proxy creates an arbitrary distinction between such properties.

[3] World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action UN Doc A/ CONF.157/23,12July1993 (at5)(endorsedbyGeneralAssemblyResoht:ot48/121).

3.8 With only a very small number of privately owned properties remaining in the red zone the proposal appears to go well beyond what is necessary. Furthermore in the absence of individual property assessments, the proposal - even as amended - is a disproportionate response. There is clearly an alternative, namely maintaining standard residential zoning in the interim and progressing any decision regarding the future use of the red zone land through the proper process – the Red Zone Recovery programme.

3.9 From a human rights perspective it is incumbent on decision makers to respect human rights and to ensure that any decision impacts on those rights as little as possible. Where there is a reasonable alternative available to decision makers which does not impact on rights that alternative should always be preferred.

3.10 The Commission believes that maintaining standard residential zoning is such an alternative. It would achieve the Council's aim while impacting less on the rights of red zone residents. This is because any risks to residents, future development and the Council can be mitigated through existing processes.

3.11 The continued delays and uncertainty for those who remain in the red zone have severely impacted on their health and wellbeing. Any ongoing uncertainty - by imposing a special zone with inferences about the future land use - can be expected to exacerbate the negative impact of the Crown's actions in relation to the red zone. The Commission urges the Council to do the right thing and follow the proper and lawful process and maintain standard residential zoning in the interim.

4. THE FLAT LAND RECOVERY ZONE

4.1 The Flat Land Recovery Zone consists of the residential red zone flat lands in Christchurch. It excludes the residential red zone flat lands in the Waimakariri District.

4.2 In June and July this year the New Zealand Red Cross and the Commission visited 385 properties in the red zone which had been identified as potentially occupied. One hundred and thirty properties were deemed to be occupied. Two hundred and forty eight were unoccupied. Of those unoccupied, 10 were vacant land, 45 were

unoccupied houses, and 193 were demolished houses or presumed demolished houses.[4]

4.3 The Commission has also undertaken a survey of red zone residents. Approximately 330 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 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.

4.4 The Commission has also met with banks and insurance companies to discuss how they view mortgages and insurance relating to red zone properties. The Commission was informed that they are continuing to lend and to insure and are taking an individualised approach to their customers in the red zone.

4.5 The Commission understood that both central and local government had likewise committed to taking an individualised approach to all decisions affecting red zone residents.

Residential red zone: understanding the circumstances

4.5 Ms Jacka suggests in her evidence that the purpose of the red zone was to identify where the Crown intended to provide an offer to purchase property.[5] While this may be one way of categorising part of the intent, the Commission considers that it is important to understand the wider circumstances of the red zone decisions and offers and their impact on the residents of Canterbury. The Supreme Court in *Quake Outcasts v Minister for Canterbury Earthquake Recovery*[6] ("Quake Outcasts") agreed that the offers had to be seen in the wider circumstances of the Canterbury recovery.

[4] Houses were presumed demolished where no information was provided or they could not physically be found.
[5] Statement of Evidence Ms Jacka for the Crown – Natural Hazards Stage 1, paragraph 8.11.
[6] [2016] 1 NZLR 1.

4.6 The Crown made an offer to purchase the property of people in the red zone for the full 2007 rateable valuation if their properties were insured. Owners of properties which were uninsured or consisted of vacant land were offered only half the 2007 rateable value of the land, and nothing for any improvements, including homes. Owners of commercial properties were offered half the 2007 rateable value of the land and half of the rateable value for any improvements (if the improvements had been insured).

4.7 At the same time the Council indicated that it was unlikely to install any new services in the red zone and utilities may be discontinued. The effect was that many people believed it would no longer be viable for them to continue living in the red zone and they would find it difficult – if not impossible – to sell their property to a purchaser other than the Crown.

4.8 As a result, owners of property within the red zone, particularly those who were uninsured or owned vacant land, found themselves at a considerable disadvantage economically, with severe social impacts, and under pressure to sell to the Crown on the Crown's terms.

4.9 Mr Clark in his evidence refers to the Crown having voluntarily acquired properties in the red zone. If the inference is that the owners of properties voluntarily sold their properties. The Commission agrees with the Supreme Court that it is unrealistic to call the sales voluntary. In the circumstances the offers and subsequent relocations from the residential red zone in Canterbury must be viewed as involuntary. The Supreme Court stated in *Quake Outcasts* that:[7]

> *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.*

[7] Ibid at [140].

4.10 The Court further noted that as a result of the Crown's actions the red zone was essentially unsuitable for residential occupation:[8]

However, the reality is that the red zone is no longer suitable for residential occupation. We accept the Human Rights Commission's argument that the red zone decisions meant that residents in the red zone were faced with either leaving their homes or remaining in what were to be effectively abandoned communities, with degenerating services and infrastructure. In light of that stark choice, Panckhurst J, in his judgment, termed this a "Hobson's choice". We agree.

4.11 The Supreme Court was referring to the fact that these were effectively abandoned communities. This was caused by the Crown acting unlawfully and precipitating the abandonment of communities without first going through the proper (and compulsory) community engagement and recovery planning processes.

4.12 It would be inappropriate for the Council to exacerbate that by again pre-empting the real decision – made under the recovery principles and with full community participation – on what should happen with this land and those who have been left behind under the guise of a change to planning designations.

4.13 In a similar vein to the circumstances around the offers, imposing a greater level of restriction on building and development than the Operative Plan provisions at this stage can be seen as a signal to that very small number of property owners in the red zone that remaining is not a priority.

4.14 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 negative impact of the Crown's actions in relation to the red zone.

[8] Ibid at [176].

Residential red zone: lawfulness

4.15 The section 32 Report that accompanied the Notified Proposal described the Flat Land Recovery Zone as:[9]

This zone applies to the Canterbury Earthquake Recovery Authority (CERA) 'Red Zone' areas on the flat which were identified by the Crown where rebuilding may not occur in the short-to-medium term.

4.16 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:[10]

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.

4.14 The Court went on to conclude that:[11]

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.

4.15 The Crown itself has also recognised that the red zone has no legal status.[12] The evidence of Ms Jacka recognises that the residential red zone has no legal status and does not change the Resource Management Act zoning of the property. Ms Jacka states that the Government's decisions "did not purport to alter the permitted uses of

[9] Section 32 Chapter 21 Specific Purpose Zones Section 2.8 (page 5) Notified 25 July 2015.
[10] Supra note 2 at [146].
[11] Ibid at [205].
[12] 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."

the land under legislation such as the RMA and the Building Act."[13] However, that is exactly what Chapter 21.11 is doing – using the unlawful red zone as a proxy to change Resource Management Act zoning.

5 HUMAN RIGHTS LAW

5.1 New Zealand's international obligations require the government to respect and protect the human rights of the people directly affected by the red zone decisions. As acknowledged in New Zealand's National Report to the Universal Periodic Review:[14]

In keeping with its constitutional structure, New Zealand meets its international obligations not only through legislation but also through judicial decisions and government policy and practice.

5.2 The rights most obviously engaged by the proposal are the rights to home and property.

Right to home

5.3 The sanctity of the home and family has long been recognised as a fundamental tenet of the law of privacy and requiring careful protection from intrusion by the State. In 1765 British Parliamentarian William Pitt explained that:[15]

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter - but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.

5.4 Courts continue to recognise the importance of protection from intrusion by the State in relation to property matters. In 2009 the Supreme Court of Victoria confirmed that legislation - in that case the Transfer of Land Act 1958 - must be interpreted in a manner that does not curtail the protection of a person's home from

[13] At 5.8.

[14] *National report submitted in accordance with paragraph 5 of the annex to the Human Rights Council resolution 16/21, New Zealand* A/HRC/WG.6/18/NZL/1, 8 November 2013 at [12].

[15] Brougham, *Statesmen in the Time of George III,* First Series (1845). See also *Entick v Carrington*, 1558-1774 All E.R. Rep.

arbitrary interference. [16]

5.5 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.[17]

5.6 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

5.7 The Court of Appeal noted the importance of this right in *Winther v Housing New Zealand*.[18]

5.8 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*".[19] 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,[20] and stressed the importance of procedural safeguards and a fair process for affected individuals when assessing whether an interference is justified:[21]

The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when

[16] *Nolan v MBF Investments Pty Ltd* [2009] VSC 244.
[17] United Nations Human Rights Committee, General Comment No 16. See also for example *Toonen v Australia* No. 488/92, U.N. Doc CCPF. / C / 50 / D / 488 / 1992 (1.99 \ at [8.3]).
[18] *Winther v Housing New Zealand* [2010] NZCA 601; [2011] 1 NZLR 843 at [74].
[19] *Connors v United Kingdom,* (2004) 16 BHRC 639 at [52].
[20] *Gilllow v United Kingdom*, **(**1989) 11 EHRR 335 at [55].
[21] *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].

[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 due respect to the interests safeguarded to the individual by Article 8[22] *[of the European Convention for the protection of human rights and fundamental freedoms.]*

5.9 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.[23] Obviously, only unlawful or arbitrary interference will contravene the right.

5.10 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.

5.11 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:[24]

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

[22] Article 8 is equivalent to Article 17 ICCPR.
[23] 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].
[24] At [3] – [4].

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.

5.12 Whether an interference is "arbitrary" therefore requires an assessment of whether the interference is reasonable, proportionate and consistent with the Covenant.[25] The test is similar to that laid down in s 5 of the Bill of Rights Act.[26]

5.13 This test was set out by the Supreme Court in *R v Hansen.*[27] Any limit on a right must:[28]

(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

Right to Property

5.14 Article 17 of the Universal Declaration of Human Rights states that:

Everyone has the right to own property alone as well as in association with others. No-one shall be arbitrarily deprived of his property.

5.15 The right to property is not reflected in either of the two major treaties, principally as a result of the intractable differences that arose out of the ideological division between the capitalist and socialist

[25] 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].
[26] The approach to s 5 was recently discussed in *CPAG v AG* [2013] NZCA 402, see in particular [79] – [103].
[27] [2007] 3 NZLR 1.
[28] Ibid.

countries during the Cold War.[29] However, non-inclusion does not equate with denial of the right. The *travaux preparatoires*[30]note that:

"(...) no one questioned the right of the individual to own property (...) it was generally admitted that the right to own property was not absolute and there was wide agreement that the right (...) was "subject to some degree of control by the State" while "certain safeguards against abuse must be provided".

5.16 While it is accepted that the right to property can impact on the realisation of many economic and social rights such as the right to food and an adequate standard of living, it is also fundamental to civil and political rights as it is considered integral to individual autonomy and a free society.[31]

5.17 If the right to property is considered necessary to realise human rights, then it imposes certain obligations to respect, protect and fulfil the right.[32] Respecting the right requires States to refrain from arbitrarily interfering with it.

5.18 There is also a common law right to property that can be traced back to the Magna Carta[33] which became part of New Zealand law when Māori ceded sovereignty to the Crown in 1840 and is still preserved by the Imperial Laws Application Act 1988.

5.19 The right to property, however conceptualised, is not absolute. Property can be interfered with by the State provided the

[29] Annotations on the text of the draft International Covenants on Human Rights, 1/7/95 UN Doc. A/2929 , para.197, 202, 206.
[30] The *travaux preparatoiries* constitute the materials used in preparing the ultimate form of an agreement or statute, especially of an international treaty. The materials constitute a legislative history.
[31] The US Supreme Court for example, has even gone so far as to state: "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation ... is in truth , a "personal" right ...In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognised": *Lynch v Household Corp*., 405 U.S 538, 552 (1972). It is argued that if this interpretation is adopted, property rights underpin the right to self-determination found in all of the core international human rights instruments to which New Zealand is a signatory.
[32] Golay & Cismas , I. *Legal opinion: The Right to Property from a Human Rights Perspective*, Geneva Academy of International Humanitarian Law and Human Rights (2010)at 28.
[33]See also Sir William Blackstone *Commentaries on the Laws of England,* Clarendon (1765).

"interference" is not arbitrary. The non-arbitrariness component has been interpreted as meaning that any interference must be prescribed by law and in the public interest.

6. APPLYING THE PRINCIPLES

6.1 The Commission welcomes the proposed amendments as circulated to submitters on 10 December 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 on red zone properties. The status quo – in other words standard residential zoning - should be maintained.

6.2 As set out above international human rights law requires any decision by the Crown which interferes with the right to property and 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.

6.3 One 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.

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

6.5 Mr Eman in his evidence for CCC states:[34]

...changes being made to infrastructure in the Recovery Zone may mean that 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*

[34] At 7.45.

matter considered in building consents, and for changes of use, under the Building Act.

[Emphasis added]

6.6 Another rationale is the hazard risks in the red zone. However Clive Anderson states in his evidence that:[35]

- *there is land in the Recovery Zone that has similar liquefaction susceptibility to Green zone land outside the zone;*
- *in a number of cases there are likely to be engineering solutions to deal with liquefaction issues on a site by site basis; and*
- *Leaving aside the Liquefaction Management Area, there are blocks of properties (in some cases blocks involving several dozen properties) within the Recovery Zone that are not subject to any other natural hazard provisions, particularly in the suburbs of Avonside, Dallington and Richmond, and further west.*

6.7 In the absence of individual property assessments, the proposal – even as amended – is a disproportionate response. There is clearly an alternative, namely maintaining standard residential zoning in the interim and progressing any decision regarding the future use of the red zone land through the proper process – the Red Zone Recovery programme.

6.8 The Commission believes that such an approach would achieve the Council's aim while impacting less on the rights of red zone residents. This is because any risks to residents, future development and the Council can be mitigated through existing processes.

[35] Statement of Evidence of Mr Clive Anderson for the Council.