IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-1004
[2017] NZHC 1076

BETWEEN	KI COMMERCIAL LIMITED Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent

Hearing: 22 February 2017

Appearances: J E Hodder QC and D O Pedley for Appellant
J G A Winchester and C J McCallum for Respondent

Judgment: 23 May 2017

JUDGMENT OF DUNNINGHAM J

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[1] The suburb of Addington sits just outside the Christchurch CBD. Historically, it housed industrial activities and workers' cottages, but, more recently, it has seen the emergence of retail and office activity. This gained particular momentum when office tenants relocated from the CBD to Addington in the aftermath of the Canterbury earthquakes.

[2] KI Commercial Limited (KIC) owns two properties in a small side street in Addington. They contain utilitarian buildings that were originally built in the 1940s and 1950s. Before the earthquakes, they housed a range of commercial tenants. The buildings suffered damage in the Canterbury earthquakes and are still in the process of being repaired. They have not been re-tenanted.

[3] The Independent Hearing Panel (the Panel) was established to prepare the replacement district plan for Christchurch the (CRDP). It reached a decision on zoning rules for the relevant part of Addington, which would constrain the uses KIC

could put its buildings to, compared with the uses permitted prior to the earthquakes.[1]

[4] KIC appealed that decision and, by consent, the appeal was allowed and the matter referred back to the Panel to consider whether to allow a site-specific exception to the zone rules to address the specific issues KIC was facing.[2] In Decision 42, issued on 9 September 2016, the Panel rejected KIC's request for a site-specific exception to the zone rules. It is this decision which has prompted the current appeal.

[5] KIC's only right to challenge the Panel's decision is on the basis of an error in law in the Panel's decision.[3] KIC alleges nine errors of law.

[6] The issues for me to determine are whether:

(a) any one or more of the errors of law alleged are established; and

(b) if an error of law is established, what is the appropriate course of action is; that is, does this Court make a decision, or does it refer it back to the Panel?

Background

[7] The legal framework in which this appeal is being considered is unique to the greater Christchurch area and was implemented in response to the 2010-2011 Canterbury earthquakes. Following these earthquakes, the Canterbury Earthquake Recovery Act 2011 (CERA) was enacted. Its stated purposes include enabling and providing for the recovery of the greater Christchurch area from the impacts of the Canterbury earthquakes, and facilitating and directing the planning, rebuilding and recovery of affected communities.[4]

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1 Initially in Decision 11 issued on 18 December 2015.
2 *KI Commercial Ltd v Christchurch City Council* [2016] NZHC 1218.
3 Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, cl 19.
4 Canterbury Earthquake Recovery Act 2011, s 3.

[8] Section 71 of CERA authorised the making of Orders in Council which were necessary or expedient for the purposes of CERA and specified that the Orders could modify various listed enactments, including the Resource Management Act 1991 (RMA).

[9] The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (the 2014 Order) was made under s 71. It required:

(a) the Christchurch City Council (the Council) to develop a replacement district plan and to prepare proposals for that within 37 working days of the commencement of the 2014 Order;[5] and

(b) that a hearings panel be established to hear submissions and make decisions on a proposed replacement district plan.[6]

[10] The Panel has a range of obligations under the 2014 Order. These include:

(a) to establish an appropriate and fair procedure for its hearings;[7]

(b) to proceed with relative urgency in hearing the proposals and making its decisions, with an express requirement to complete its decision-making process no later than 16 December 2016;[8]

(c) to undertake a further evaluation of each proposal prepared by the Council in accordance with s 32AA of the RMA and to report on that evaluation in its decision;[9] and

(d) to apply ss 74-77D of the RMA (which relate to preparation of district plans) as if it was the Council.[10]

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5 Clause 6.
6 Clause 8(1).
7 Clause 10 and schedule 3, cl 4(3)(d).
8 Clause 12.
9 Clause 14(4)(a).
10 Clause 14(4)(b).

[11] As KIC's submissions observe, while the 2014 Order modifies the application of RMA processes,[11] it does not erode the RMA's purpose of sustainable management, which includes enabling people and communities to provide for their social, economic and cultural wellbeing.

[12] The Panel is also required to be satisfied that the CRDP will give effect to identified policy statements, including the Canterbury Regional Policy Statement 2013 (CRPS). As the Panel identified, Chapter 6 of the CRPS, entitled Recovery and Rebuilding of Greater Christchurch, has particular influence. This chapter was included in the CRPS according to directions in the Land Use Recovery Plan for Greater Christchurch prepared under CERA.

[13] It is not necessary for the purpose of this decision to go into the history of Chapter 6 or of the CRPS more generally. It is sufficient to say that it reflected a desire by local authorities in the greater Christchurch area to reverse the existing permissive approach to commercial retail development throughout the city. The CRPS introduced a form of centres-based approach, whereby commercial retail developments were restricted to specified locations across the city, called Key Activity Centres. The centres-based approach found in the CRPS underpinned the proposals notified by the Council for Chapter 15 - Commercial, and Chapter 16 - Industrial of the CRDP.

[14] As a result of hearing submissions on these two proposed chapters, the Panel issued Decision 11 on 18 December 2015. This decision directly affected KIC's land by implementing rules which would constrain KIC's use of that land when compared with what it could lawfully undertake on the land before its buildings were damaged by the earthquakes. Specifically, Decision 11 meant that offices, retail and commercial services were not permitted activities in the Commercial Mixed Use (CMU) zone for Addington, unless they were already occurring or consented at the date of Decision 11 (the existing activity condition).

[15] This decision was reflected in r 15.7.2.1 which specified that "retail activity", "commercial services" and "office activity" were permitted activities in the CMU

[11] Clause 4.

zone where these were "in an existing building" or a building consented for retail/commercial services/office activity at the date of the decision (the Appealed Rule). Because KIC's buildings were not in use at the date of the Panel's decision, and had not been in use since they sustained earthquake damage, they did not fall within the exception for existing activities, and KIC would have to seek resource consent as a discretionary activity to undertake office, retail or commercial activity in its buildings.

[16] The Panel's decision was in a large part directed by the desire to implement a centres-based approach, in line with chapter 6 of the CRPS. While KIC accepts that a centres-based approach is directed by the CRPS, and by the objectives adopted by the Panel for the CRDP, it argues this is not a fixed obligation and did not mandate the outcome which the Panel chose for the zone rules affecting KIC's property.

[17] KIC appealed Decision 11 on the basis that the Panel had erred in failing to consider the costs to KIC's interests from the addition of the existing activity condition to the Council's proposal for this part of the CRDP.

[18] By consent, this Court allowed KIC's appeal of Decision 11.[12] The decision was remitted back to the Panel for reconsideration of the relevant parts of Decision 11, with a direction that KIC be provided with an opportunity to make further submissions and provide further evidence on its interest in relation to its properties.[13] At the hearing KIC sought to modify the effect of the Appealed Rule by including a further exception which would allow, as a permitted activity, "office activity, commercial services and/or retail activity at 9 and 11-13 Bernard Street, Addington…up to a maximum gross floor area of 3,600 m² across both properties" ("the KIC Rule").[14]

[19] However, the Panel sought and then accepted evidence from the Council's expert witnesses which directly challenged the relief sought by KIC. In Decision 42,

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12 *KI Commercial Ltd v Christchurch City Council*, above n 2.

13 At [21].

14 The floor area limitation was added to KIC's proposal at the hearing in July, which is why KIC refers to it as its "Revised Rule".

the Panel confirmed its initial conclusion and retained the Appealed Rule with the existing activity condition in the CMU rules. That has led to this appeal.

Grounds of Appeal

[20] There are nine grounds of appeal. They are, as follows:

1.1 failing to identify and address the limited question before it, following the High Court judgment of 8 June 2016 [2016] NZHC 1218, namely whether the "KI Revised Rule" would reflect better than the "Appealed Rule" both the general benefits and costs previously assessed in Decision 11 and the impact on KI not previously assessed in Decision 11, in the context of the objectives of the Resource Management Act 1991, the Canterbury Earthquake Recovery Act 2011 (including the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014) and Chapter 15 of the Plan;

1.2 misinterpreting the scope for flexibility within the RMA, the Order's statement of expectations and the Plan's Chapter 15 objectives for the recognition of investment in recovery from earthquake damage which readily allowed for the adoption of the KI Revised Rule given the evidence of material prejudice to KI, and consequently adopting an erroneously strict interpretation of the principle of supporting the "centres network" contemplated in and/or required by Chapter 15.

1.3 misinterpreting the nature of the proposed KI Revised Rule, in particular that it was both site specific (including by reference to neighbouring sites' activities) and specific to KI's circumstances of having invested substantially in rebuilding on its sites to recover from earthquake damage and being in transition to commercial development of the sites when Decision 11 was made, and thus involved minimal risk of precedent effect.

1.4 permitting or requiring Council witnesses to give evidence which was:

a. contrary to the agreement reached between KI and the Council and which was in part reflected in the determination of the earlier appeal; and

b. in material part, contrary to the evidence previously before the Panel.

1.5 declining to grant the adjournment requested by KI to address the unanticipated further evidence from Council witnesses, and providing a constrained period for rebuttal evidence.

1.6 reaching the untenable conclusion that the proposed KI Revised Rule would of itself create a material risk to the Chapter 15 objective of redevelopment of the City Centre, in the absence of any credible

evidence that the incremental impact of the proposed permitted activities for the Appellant's created any such risk.

1.7 concluding that, under the Appealed Rule, KI would have a meaningful opportunity to obtain a resource consent with similar scope as would be provided for under the KI Revised Rule when the Panel's strict approach to protection of the "centres network" would undermine any such consent application.

1.8 misinterpreting the point of reference in the Plan's Objective 15.1 for "existing" activities as being the date of Decision 11 rather than the dates preceding the occurrence of the earthquake damage.

1.9 assessing adversely the additional evidence relied on by KI, by reason of the errors set out in 1-8, above.

Legal principles relating to error of law

[21] Clause 19 of the 2014 Order only allows an appeal of a decision of the Panel on a question of law.

[22] The parties accept that an error of law includes circumstances where the decision-maker:

(a) misdirects itself on the relevant statutory provisions and its role;

(b) overlooks a relevant matter or takes account of an irrelevant matter;

(c) reaches an untenable conclusion of the facts;[15] or

(d) breaches the rules of natural justice.[16]

[23] The Council submits that a large number of the grounds of appeal do not raise genuine questions of law. In particular, it submits that:

(a) grounds 1.1, 1.2, 1.3, 1.7, 1.8 and 1.9 raise issues of weight and merit rather than question of law; and

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15 *Edwards v Bairstow* [1956] AC 14; [1955] 3 All ER 98.

16 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]-[27]; *Ancare v Wyatt* (NZ) Ltd [2009] NZCA 211 at [46]-[48]; *Vodafone NZ Ltd v Telecom NZ Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]-[57].

(b) grounds 1.4 and 1.5 raise procedural matters that are not properly within the Court's jurisdiction on appeal and do not involve questions of law.

[24] It is well-recognised that the question of the weight to be given to relevant considerations is not for reconsideration by the High Court as a point of law. If the decision reached was a permissible option on the evidence then it can not be revisited as a point of law.[17]

[25] In response, counsel for KIC accepts that the "merits" of the various submissions were for the Panel to determine and cannot be revisited on an appeal of a question of law. However, Mr Hodder QC emphasised that there was a nuanced boundary between matters which may initially seem to be questions of merit and those which were questions of law. For example, it was important that the decision-maker "address itself to the proper processes and the right questions". Where it does not do that, it runs the risk of "derailing the process, engaging with irrelevancies and undermining the decision made", which is well recognised as an error of law.

[26] I accept those propositions as correct. The issue is whether such errors were made by the Panel. That is best considered, not in the abstract, but by addressing respective submissions in relation to the particular grounds of the appeal identified as discussed below.

Question 1 – alleged failure to address the limited question for Decision 42

KIC's position

[27] KIC asserts that the High Court's judgment of 8 June 2016 only remitted a limited question back to the Panel. In KIC's notice of appeal it expressed this as whether the KIC Rule would "reflect better than the Appealed Rule, both the general benefits and costs previously assessed in Decision 11, and the impact on [KIC] not previously assessed in Decision 11, in the context of the objectives of [the RMA,

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[17] *Bryson and Three Foot Six*, above n 16, at [27] (referring to Lord Donaldson MR in *Piggot Brothers and Co Ltd v Jackson* [1992] ICR 85 at 92).

CERA, the 2014 Order and Chapter 15 of the CRDP]". However, in submissions, it suggested the question was even more confined, being simply "Could a site-specific exception to the existing activity condition properly be made for KIC's land as per the KIC proposal?"

[28] KIC said that the Panel did not appreciate that, as a consequence of this Court's orders of 8 June 2016, it was required to make a decision that was limited to addressing KIC's interests in relation to its properties and the necessity of subjecting those to the existing activity condition of the appealed rule. KIC says the Panel transformed the limited question before it into a much wider and abstract question about "precedent risk" and "potential risk … for the CBD".

[29] KIC also says the Panel was wrong to embark on a consideration of "precedent risk" as in this case there was no material precedent risk because:

(a) the activity is limited to the KIC land;

(b) there is a maximum gross floor area (3600 m²);

(c) there are separate limits on office activity (1200 m² GFA) and retail and/or commercial services (2600 m² GFA); and

(d) retail activity is limited to the ground floor or a connected mezzanine.

[30] KIC's criticism of the Panel's decision on these issues is that the Panel did not confine itself to the limited issue of what extent (if any) the exception sought by KIC for its land would undermine the broad "centres-based" approach or framework. Instead, the Panel addressed a high level and abstract question about overall risks to the intensification and recovery of the Christchurch CBD. For example, KIC points to the key conclusion of the Panel at [94] of the Panel's decision, where the Panel says "… it would be imprudent to dismiss the potential for B and C grade space to assist CBD intensification and recovery, in the future, simply by reason of the present lack of competition from the CBD in the offer of such space". In KIC's submission, the Panel erroneously asked itself the same question as it did in Decision

11 and produced the same answer in Decision 42. Because it failed to address just the risk of the relevant site-specific KIC proposal, KIC says the Panel erred in law.

The Council's position

[31] The Council, however, notes that even KIC acknowledges that the question has to be addressed in the wider context of the objectives of the identified legislation and Chapter 15 of the CRDP.[18] The Panel set out what it understood it was directed to consider and the Council says this was accepted by KIC at the hearing. None of that reveals an error in terms of the context for the Panel's assessment, nor is any error in that regard expressly identified in KIC's submissions.

[32] To the extent that KIC considers the Panel transformed the question into a wider one of precedent risk and potential risk of the CBD, KIC essentially has to say there was no material precedent risk and that is, in reality, a conclusion on the evidence and the merits of the case. The Council says it is clear the Panel did consider the evidence as to the costs and benefits of the different rules as they related to KIC's land. However, given the settled objectives and policies in the CRDP, precedent risk and potential risks to the CBD still had to be considered. Indeed the Council says that the "risk of ad hoc commercial development [outside the CBD] to the primacy of the central city was a permissible (and indeed central) consideration".

[33] Because a key issue for the Panel was whether the site-specific exception for KIC achieved the objectives of the CRDP, the Panel was correct to identify that its frame of reference must be broader than simply considering costs and benefits to KIC and should include an evaluation of risks in the broader sense. Indeed, consideration of risk is a mandatory consideration under s 32(1)(c) of the RMA. Importantly, the Council says, the risk that implementing KIC's proposal could encourage other site-specific exceptions was acknowledged and conceded by KIC's own planning expert.

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[18] Noting that neither the RMA nor CERA have objectives and nor does the Order.

Discussion

[34] I accept that if the Panel misdirected itself as to the issue to be addressed at the resumed hearing, that would constitute an error of law. However, I do not accept that the effect of the High Court's decision was to confine the issues the Panel could consider in the way contended for by KIC. The High Court's decision necessarily recorded the agreed position reached by the parties, which was to allow a rehearing where KIC had a proper opportunity to "comment on how the Panel's decision affects its interests in relation to KIC's properties". However, that did not alter the statutory context in which the Panel was required to evaluate that further evidence. Indeed, the High Court decision made express reference to the fact that the further evaluation "must examine the benefits and costs anticipated from implementing the changes, along with the other matters referred to in s 32(1) to (4) of the RMA".[19] The Panel, too, expressly rejected KIC's submission that it was limited to considering the interests of KIC, in the further hearing on the Appealed Rule.[20]

[35] The question for the Panel was not, as KIC's submissions suggest, whether the exception sought by KIC would "undermine" the broad centres-based approach or framework of the CRDP, but whether the rule was the most appropriate way to achieve such objectives and policies.[21] The Panel correctly identified that it had to consider the proposed zone rules for KIC's property in the broader statutory context, not just in light of costs and benefits to KIC.

[36] To the extent that the Panel then went on and evaluated the evidence and found that a site-specific exception as proposed by KIC would not better achieve the objectives and policies of the CRDP than the Appealed Rule, that was a decision for it, as a specialist tribunal, to determine.

[37] Accordingly, I do not accept that the Panel erred by addressing the wrong question in Decision 42.

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19 At [15].
20 Decision 42, at [21].
21 Resource Management Act 1991, s 32(1) and s 76(1)(b).

Question 2 – flexibility of Centres-based approach

KIC's position

[38] The next issue raised by the appellant is whether the Panel erred in Decision 42 by misinterpreting the scope for flexibility available to it. KIC makes the obvious point that the RMA creates a framework which permits flexibility in specific decision-making exercises. The purpose of the RMA, as articulated in s 5, involves weighing up and reconciling competing considerations and this necessarily involves "nuance and flexibility".

[39] Furthermore, the 2014 Order required the Panel to have regard to the "principle of supporting Key Activity Centres and the Central City", which KIC says imported flexibility as the term "principle" is less prescriptive than terms such as "requirement" or "imperative". Similarly, KIC says the CRDP's Chapter 15 objectives feature the language of flexibility. These objectives include:

(a) creating a framework that supports commercial centres;[22]

(b) focusing commercial activity within a network of centres;[23]

(c) giving primacy to the Central City and Key Activity Centres;[24]

(d) recognising existing commercial activities, but avoiding the development or expansion of office parks and/or mixed use areas.[25]

[40] In any event, no matter how firmly stated the objectives are, that is not the end of the analysis. The Panel still needed to re-analyse the proposal under s 32AA and recognise and account for the variable means of achieving the objectives.

[41] In KIC's view, the Panel placed too much emphasis on its view that the CRDP was "deliberately firm in its approach to where commercial activity is to be

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22 Objective 15.1.1(a).
23 Objective 15.1.2(a).
24 Objective 15.1.2(a)(iv).
25 Objective 15.1.3.a.

encouraged"[26] and assumed that the proper place for flexibility was provided by the discretionary activity rule for the CMU zone, which would require KIC to seek a resource consent to depart from that rule. As a consequence, and as reflected in the tenor and result of Decision 42, the Panel erroneously misconstrued and constrained the discretion lawfully available to it to accommodate the KIC proposal in the CRDP. Thus the Panel failed to consider it properly.

Council position

[42] The Council considers that this ground of appeal raises issues of weight and merit, rather than a question of law. The only question of law that might arise here is whether the Panel's interpretation of the CRDP's provisions was one that was reasonably open to it. The weighting that is given to all relevant matters, that is, to the purpose of the RMA, the superior planning documents such as the CRPS, the objectives of the CRDP and the policies and methods of the CRDP are then for the decision-maker to address.

[43] In any event, KIC does not correctly state the position when it says "objectives and policies connote high level and broad statements which necessarily involve some degree of flexibility". The Court of Appeal and Supreme Court have held that a policy is a "course of action" and the content of a policy may be either flexible or inflexible, broad or narrow.[27] Here the relevant CRDP provisions adopt a firm and explicit framework regarding a centres-based approach and what mattered was whether it was a "permissible option" for the Panel in this case to consider that the objectives were "deliberately firm" in directing where commercial activity should be encouraged.[28] It would only be an error of law if the decision-maker's construction of the relevant objectives was one that was "simply not available" to the decision-maker.

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26 Decision 42, at [116].

27 *Auckland RC v North Shore CC* [1995] 3 NZLR 18; [1995] NZRMA 424 (CA) and *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; [2014] 1 NZLR 593.

28 See *Vodafone NZ Ltd v Telecom NZ Ltd*, above n 16 at [27] where Blanchard J referred to Lord Donaldson MR's point in *Piggot Brothers and Co Ltd v Jackson*, above n 17, that "what matters is whether the decision under appeal was a permissible option".

[44] In the present case, it was clearly open to the Panel to hold the objectives of the CRDP were "deliberately firm" and to place great weight on them because:

(a) the Panel was the author of the relevant objectives and it would be difficult to conclude that the Panel's interpretation of them was "simply not available to it"; and

(b) KIC itself says that the Panel's interpretation of the relevant objectives "may be valid to a limited degree".

Discussion

[45] On this issue, I must be satisfied that the Panel misunderstood the extent to which the relevant objectives of Chapter 15 of the CRDP constrained the Panel's decision, before I can hold there has been an error of law. If the Panel has understood the objectives and applied them in a way that is available to it when making the decision on the Appealed Rule, then it will not have erred in law.

[46] I consider that the Panel accurately identified the issue for the hearing, which was to determine "the most appropriate permitted activity regime for retail, commercial services and office activities on the sites for inclusion in Rule 15.7.2.1".[29]

[47] The Panel also clearly appreciated it had flexibility as to how to achieve the relevant objectives of the CRDP. Indeed, the Panel held that "the proper range of options we should consider [are] broader than simply between the Appealed Rule and the KI Revised Rule. That is, s 32AA directs that we identify and examine 'other reasonably practical options for achieving the objectives'".[30] The Panel then went on to consider whether any other variation of the rule would be more appropriate than the Appealed Rule.[31] This observation contradicts KIC's submission that the Panel misunderstood the scope for flexibility available to it.

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29 At [24].
30 At [27].
31 At [161].

[48] Furthermore, the Panel accepted KIC's submission that "flexibility is inherently driven from the purpose of the RMA".[32] However, it held in this case that although the language of s 5 is "intentionally flexible in allowing for the proper weighting of matters in context" does not mean that "the plain wording of the objectives must be read with a gloss to accord them a flexibility that provides for the extent of usage sought by [KIC]".[33]

[49] It is clear to me that the Panel's decision to retain the Appealed Rule and reject the KIC Rule, was driven by the Panel's interpretation of the objectives, including the proper meaning of the term "existing" in Objective 15.1.3. It did not misunderstand the degree of flexibility available to it. Furthermore, the Panel expressly acknowledged that it did not read the objectives as "foreclosing" the CMU zone being used for commercial activities beyond those permitted. This was why the Panel decided that affording discretionary activity status to new commercial activity, rather than permitted activity status, was the appropriate method for implementing the objectives, as this provided some flexibility for new development where it could show it was consistent with the RMA.

[50] In summary, I consider the Panel members clearly, and repeatedly, turned their minds to all relevant matters, including the overriding purpose of the RMA. They also expressly acknowledged and understood they had flexibility as to how to respond to the competing considerations, and concluded the objectives of the CRDP were better achieved by retaining the Appealed Rule and deferring any departure from that to consideration in the resource consent process. That conclusion was not reached because of a misunderstanding as to the degree of flexibility available to it.

[51] The second alleged error of law is therefore not established.

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[32] At [107].
[33] At [108].

Question 3 – site-specific KIC proposal

KIC's position

[52] As KIC acknowledges, there is an evident overlap between question 1 and this third question of law. In question 1, KIC contended that the Panel asked itself the wrong question because it erroneously reverted to the entire topic of precedent, including the risk that other parties might seek similar development opportunities on other sites at Addington or elsewhere in the CMU zone, without recognising that this was a site-specific proposal.

[53] In this ground of appeal, KIC again asserts that the Panel erred because it failed to recognise this was a site-specific appeal and introduced at a time when the balance of the CRDP provisions were largely settled, so it was unlikely to prompt similar site-specific applications. This was reinforced by the fact that the 2014 Order greatly constrains the ability to request a change to the CRDP and ensures that the Panel itself has oversight of that process, including deciding whether or not to accept the request.[34] Because the 2014 Order is to remain in force until 30 June 2021,[35] KIC submits there is an effective moratorium on material change requests until that date because they must be referred to the Panel and be accepted by it in order to proceed.

[54] KIC again points to the significant constraints which define the KIC proposal, saying it is "self-evident" that this area of Addington would not be transformed in some unprecedented way by what KIC proposes. Because KIC's position is fact specific, and reflects its need to rebuild post earthquake, this distinguishes its proposal from others, removing or reducing precedent risk. Indeed, KIC says, allowing it would facilitate the "very recovery that is the broad objective of the CERA and the 2014 Order".

The Council's position

[55] The Council's response is that this ground of appeal raises issues of weight and merit rather than a question of law, and much of the Council's response to this

[34] Clause 21(1).
[35] Clause 2(a).

has already been outlined in its response to questions 1 and 2. The issue of whether there was a risk of precedent effect, and the weight to be accorded to it, was squarely a matter for the Panel rather than this Court. In any event, as already noted, KIC's own witness accepted and acknowledged a risk of a precedent effect.

[56] Whether or not the Panel had a degree of control over any future plan change request by virtue of the 2014 Order, this did not detract from the Panel's own assessment, and the concession from KIC's own expert, that there was a risk that others would then also be emboldened to package up a "unique" and site-specific proposal, that would seek an exception from, or was otherwise inconsistent with, the CRDP's objective and policy framework for commercial activity. The Council also disputes KIC's submission that the 2014 Order effectively imposes a moratorium on material plan change requests and says it was appropriate for the Panel to assess precedent risk as a material risk.

Discussion

[57] There can be no doubt the Panel understood the site-specific nature of the relief KIC sought. What is really disputed is whether the Panel was correct to conclude that it gave rise to a precedent risk, or a risk to the recovery of the CBD which was inconsistent with the objectives and policies of the CRDP. If there was an evidential basis on which the Panel could reasonably draw this conclusion, it would not have fallen into error.

[58] In this regard the Panel members fully and carefully evaluated the key evidence from KIC's witness, Mr Thomspon, and from Council's witnesses, Messrs Osborne and Stevenson. They accepted Mr Osborne's evidence that "allowing for 3,600 m² of additional retail, commercial services and/or office activities as permitted activities on these sites presents a material, albeit unquantified risk to the CBD's recovery and for the success of the CRDP's centres-based approach.[36] The Panel also acknowledged the concessions made by KIC's expert

[36] At [91].

witness on the risk of the KIC rule being used as a platform for other people asking for the same.[37]

[59] The Panel's conclusions on the risks of allowing a site-specific exception can not, therefore, be said to be without evidential support or unreasonable. Beyond that, the issue is not a question of law, but one for the Panel's informed judgment.

[60] I therefore reject the assertion that the Panel erred by misinterpreting the nature of the proposed KIC rule and the fact that it was site-specific and therefore involved no real risk of precedent effect.

Questions 4 and 5 – breaches of natural justice

[61] It is convenient to consider questions 4 and 5 together because both involve allegations of breaches of natural justice in the process of the further hearing which led to Decision 11.

[62] These allegations arise in the context of what KIC asserts was an agreement on the position the Council would adopt at the rehearing, and which it says the Council then reneged on by producing further evidence which did not support the relief sought by KIC. KIC asserts the Panel was in error in permitting the Council's evidence to be adduced, and was also in error by failing to permit an adjournment to allow KIC further time to respond to this evidence.

[63] KIC asserts the agreement reached between it and the Council was not simply to allow KIC's appeal, but also included "the Council's acquiescence to the relief sought" at the rehearing. Specifically, KIC says that the Council advised KIC that its position before the Panel upon rehearing would be that:

(a) the Council did not oppose the relief sought by KIC;

(b) the Council would abide the decision of the Panel as to whether the Panel was satisfied that the relief sought was justified in terms of the relevant statutory tests and when considered against the objectives and

[37] At [124].

policies of higher order planning documents, the strategic directions chapter, and the objectives and policies of Chapter 15; and

(c) the Council would continue to rely on its evidence and submissions presented to the Panel during the course of the hearing which preceded Decision 11.

[64] However, on 8 July 2016, an email sent on behalf of the Panel's chair requested that the Council confirm that the relief sought by KIC accorded with the RMA. The Council responded by way of memorandum dated 27 July 2016 saying that it was "not in a position based on the relevant evidence it called during the course of the hearing to make an unreserved confirmation that the relief sought by [KIC] accords with the purpose of the RMA". It did note, however, that the relief sought by KIC was "narrower in geographical extent" and therefore it could be inferred "that the level of risk to the central city is consequently lower" than identified in the first hearing. KIC said this was not expected as it considered it inherent in both the Council's pre–Decision 11 position and its subsequent agreement, that it accepted that the relief sought by KIC was consistent with the RMA.

[65] However, on 3 August 2016, the Council went further, filing a memorandum which noted that "the Council sought a view on the relief from the expert witnesses" and those witnesses did "not consider the relief sought by [KIC] is appropriate". As a consequence, the Panel issued a minute dated 4 August 2016, stating that the Council's inability to certify RMA compliance meant that a hearing was required and a timetable was promulgated which included the following direction:

> [The Council] is to file additional evidence of Messrs Stevenson and Osborne, and any other witnesses they intend to rely on...

[66] KIC says this was "an opportunity, but not a command, to file any evidence to be relied on to support a party's case". It says because the Council had "already committed itself to be a non-participant", KIC understood it was not intending to "rely on any evidence" and its prompt filing of evidence from its experts was "both unnecessary and in contradiction of the settlement agreement".

[67] When this further evidence was received, KIC filed a memorandum setting out its concerns to the Panel. KIC said:

(a) the specific relief it sought had been put to Council in the context of resolving the first High Court appeal and the Council had assured KIC that it would not oppose the relief sought;

(b) KIC had relied on this assurance accepting the settlement and returning to the Panel for rehearing;

(c) the first indication KIC had that the Council would not support the relief it sought was by memorandum dated 4 August 2016;

(d) the evidence filed for the Council was directly contrary to the agreed settlement between the parties and directly contradictory to the Council's previous position that it would not oppose the relief; and

(e) the Council's evidence went further than simply opposing KIC's specific relief but opposed any new office or retail activity outside existing centres.

[68] In response, KIC requested that the Panel issue directions requiring the Council to withdraw the evidence it had filed and for the Panel to make its decision based on the evidence filed by KIC. In the alternative, KIC requested further time to formulate its rebuttal evidence, including enabling KIC to instruct suitable experts to respond to the new matters raised by the Council's evidence.

[69] The Panel declined KIC's request to direct the withdrawal of the Council's evidence and only permitted KIC a short extension of time in which to respond to Council's position.

[70] The two alleged errors of law arising out of this sequence of events are:

(a) the Panel erred in permitting the Council to adduce evidence in contravention of the settlement agreement; and

(b) the Panel erred in law by failing to allow KIC more time to prepare rebuttal evidence.

KIC's position

[71] On the first question, KIC says the decision to permit the evidence amounted to permission to "breach the settlement agreement" and therefore was tantamount to the Panel permitting "an abuse of its processes". As a consequence, KIC did not face a rehearing of the nature it legitimately expected, but rather one in which the Council's witnesses provided evidence in opposition and which the Panel relied on in Decision 42.

[72] The decision not to allow KIC the requested additional time to brief further witnesses and respond to the Council's evidence was, in KIC's submission, to deny it the natural justice to which it was entitled. The Panel recorded that it had expected technical and/or sophisticated modelling evidence and economic projections from KIC, even though KIC had not been expecting such evidence was required given the position it thought it had reached with the Council. Furthermore, the position advanced in Council's evidence was substantively different from that presented at the Decision 11 hearing and went outside of the scope of merely opposing KIC's specific relief, but opposing matters on a broader basis to which KIC was unequipped to respond.

[73] In short, KIC alleges a breach of its right to natural justice in denying it a reasonable opportunity to respond to the Council's new case against it and that was a material error of law.[38]

Council position

[74] The Council responds to this submission in a number of ways. First, it says it does not consider itself to have acted in contravention of any settlement agreement with KIC. The Council never acquiesced to the substance or merits of the relief and its position always was that it would be for KIC to convince the Panel of its merits and that it was justified in terms of the statutory tests and settled objectives of the

[38] *Ancare v Wyeth (NZ) Ltd*, above n 16, at [46]-[48].

CRDP. Furthermore, the Panel dealt with these issues comprehensively in its minute dated 16 August 2016, where the Panel considered that whether or not there was an agreement with the Council, it was of "no relevance to what [the Panel must decide].

[75] In terms of the requested adjournment, given the strict timetable imposed on the Panel by the 2014 Order for completion of its decision, it was necessary to maintain the scheduled hearing date. However, the Panel addressed KIC's concerns by modifing the timetable directions to afford more time to file rebuttal evidence. Had KIC considered the Panel's position to be incorrect or was it concerned about prejudice to its position, it had legal options open to it, including appealing or seeking a judicial review before the High Court at the time. However, it did not exercise those options.

Discussion

[76] The issues raised by KIC must be considered in context and, in particular, in light of the public process which is engaged when decisions are made under the RMA. As Judge Jackson said in *Canterbury Regional Council v Christchurch City Council*, "differently from most civil litigation, proceedings under the RMA are not simply about the rights of a small number of parties, but about people and communities and future generations".[39]

[77] Even if the Council had represented to KIC that it would "abide the decision of the Panel" and would not present evidence to oppose that, the issue here is whether the Panel was required by law to accept that position. Unlike a Judge in civil proceedings, the Panel's function is not to settle disputes between private parties. It is to draft a plan which incorporates the most appropriate provisions for implementing the CRPS and, ultimately, the purpose of the RMA. In doing that, the Panel is not constrained by the submissions it hears. Instead, as was said by Woolford J in *Newbury Holdings Ltd*, it is "entitled, in fact is obliged, to reach its own conclusion on such matters irrespective of the position adopted by the parties to

[39] *Canterbury Regional Council v Christchurch City Council* [2000] NZRMA 512 at [24].

the proceedings before it".[40] Indeed, the Panel would have been in derogation of its obligations under the 2014 Order if it had not done so.

[78] As the Panel itself explained its obligations:[41]

(a) it must be satisfied that, the relevant provisions will assist the Council to carry out its functions for the purposes of giving effect to the RMA;[42]

(b) it must exercise its role in the preparation of the CRDP in accordance with the provisions of Part 2, RMA, and any applicable regulations;[43]

(c) it must be satisfied that the CRDP will give effect to applicable national policy statements, the NZCPS and the CRPS;[44]

(d) it must be satisfied that the CRDP will meet the RMA's requirements for alignment with other RMA policy and planning instruments; and

(e) its capacity to change a proposal prepared by the Council is not limited by the scope of submissions made on the proposal.[45]

[79] Given the Panel's role is not confined or constrained by the issues submitters raise, there could never be an expectation that the parties' positions would confine the Panel's enquiries. Furthermore, and consistent with that inquisitorial role, the Panel has a number of powers to seek such further information or advice as it requires. For example, under cl 6 of Schedule 3 the Panel can direct the Council to produce briefs of evidence, including expert evidence and, under cl 8, the Panel may require the Council, or may commission a consultant or other person, to report on:

(a) any submissions;

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40 *Newbury Holdings Ltd & TR Group Ltd v Auckland Council* [2013] NZHC 1172 at [26].
41 As summarised from Decision 1 – Strategic Directions and Strategic Outcomes at [27].
42 RMA, s 74(1) and 31.
43 Section 74.
44 Section 75(3).
45 Clause 13(2)(b), 2014 Order.

(b) any matters arising from the hearing; or

(c) any other matter that it considers necessary for the purpose of the decision to be made by the Panel.

[80] Furthermore, the Council also has positive obligations to assist the Panel arising out of cl 1 of Schedule 3 of the 2014 Order. These include a mandatory obligation to assist the Panel, including to give evidence, to provide a response to submissions or deal with issues raised by submissions, and to provide any other relevant information requested by the Panel.

[81] Thus, any position the Council and KIC reached could not constrain the Panel from requiring the Council to certify that the relief sought by KIC accorded with the RMA and, when the Council advised it was not in a position to do that unreservedly, to call on Council's planner and other expert witnesses who had given evidence to address the issues raised by the KIC Rule.

[82] In light of this statutory framework, there could be no legitimate expectation by KIC that the Council could refuse to respond to the Panel's request, or refuse to make its expert witnesses available to give their independent views on the merits of the proposal, despite any position of neutrality previously indicated by the Council. More importantly though, there could be no reasonable expectation that the Panel would not seek to satisfy itself that the KIC Rule was the most appropriate plan provision for the CRDP rules given its legal obligations. There was, therefore, no error of law in seeking and hearing such evidence.

[83] The second issue is whether KIC was wrongly denied a proper opportunity to give evidence in support of its proposal, particularly as it says it was taken by surprise by Council's evidence.

[84] Again, I do not consider the circumstances raised issues of procedural unfairness which would warrant setting the decision aside. The sole issue to be determined at the hearing was the appropriate permitted activity rule to apply to KIC's properties. Regardless of the Council's position, KIC must have been aware it

had a positive obligation to present sufficient evidence to the Panel to satisfy it that it should alter the Appealed Rule and replace it with the KIC Rule, or some version of it which was more palatable to KIC. The Council's evidence did not create that obligation. KIC already knew that the Panel had endorsed the Appealed Rule as most appropriate rule in its Decision 11. Thus, whether or not evidence was given to support the Appealed Rule, adequate evidence had to be presented by KIC to address the Panel's concerns and persuade it that the KIC Rule was a more appropriate rule.

[85] Furthermore, the only reason there was to be a hearing was because the Council had advised that its experts could not unreservedly support the KIC position as according with the purpose of the RMA. KIC was therefore on notice that its position was contested from the outset, and that it would have to advance it at the hearing with appropriate supporting evidence.

[86] There is no breach of natural justice simply because the strengths of the case that KIC knew it would have to address were greater than it anticipated. KIC was afforded the opportunity to provide evidence and be heard on the KIC Rule, and to prepare evidence in rebuttal of the Council's evidence. This, in my view, was adequate to address the principles of natural justice.

[87] Accordingly, I am satisfied that the Panel did not err in law, either by requiring the Council to present evidence when it was told the Council would abide the Panel's decision, or by refusing a further adjournment for KIC to produce more detailed evidence in support of its proposal.

Question 6 – centre city risk conclusion

KIC's position

[88] As KIC acknowledges, its submissions in relation to question 6 are closely linked to those set out in relation to question 1. I also consider they overlap with the submissions on question 3.

[89] In summary, KIC submits that, to the extent Decision 42 placed any reliance on the KIC proposal being a material risk to the redevelopment of the city centre as

distinct from a general "precedent risk", it lacked any probative evidential basis and was therefore irrational and in breach of natural justice. KIC then goes on to say that given the KIC proposal involves an explicit limit of 3,600 m² GFA, which is only 0.9 per cent of the CBD commercial floor space, "it is plainly immaterial as a direct risk to the city centre development". Furthermore, if the Panel did rely on some form of "indirect risk" to the city centre, "the merits of a single site development would inevitably be outweighed by the merits of the CBD redevelopment as a whole".

Council position

[90] Once again, the Council responds by saying this is a question of merit and weight, not a question of law. In any event, the Panel did have evidence that supported its conclusion as to the risk to the city centre, which it expressly referred to and relied on. Furthermore, the Council is critical of KIC for framing the issue "in a manner akin to a resource consent, rather than applying the correct statutory tests for plan provisions".

Discussion

[91] This ground of appeal is readily disposed of. This is not a case where the conclusion reached by the Panel was made in the absence of probative evidence or was simply irrational. The Panel methodically weighed the competing evidence and preferred that of the Council witnesses who recognised both precedent risk and risk to the redevelopment of the city centre. In particular, there is a full discussion of Mr Osborne's evidence at [88] to [91] of Decision 42, which the Panel accepted and relied on to conclude that both precedent risk and potential risk for the CBD were generated by the KIC rule.

[92] This challenge is clearly targeted to the merits of the decision and does not involve a question of law. Accordingly, it is dismissed.

Question 7 – irrelevance of any subsequent resource consent application

KIC's position

[93] The next alleged error of law is explained by KIC as being "subsidiary to the preceding questions", but it is an example of "an irrelevancy which effectively diverted the Panel from the proper questions before it".

[94] KIC argues that the Panel was wrong to take the view that the issues before it, including the potential economic impact to KIC, "were best considered on a later resource consent application". KIC says the issues were squarely before the Panel and, by giving weight to the possibility of a subsequent resource consent application, it "disregarded both KIC's status in the CRDP process and its need for early clarity on the constraints on further rebuilding plans for the KIC land". Furthermore, KIC says that:

> Given the Panel's reliance in Decision 42 on its perception of the centres network approach, precedent risk, risk to the CBD redevelopment and the rigorous requirements of the Chapter 16 Objectives, no material discount could be allowed for a later resource consent application on the economic impact on the KIC land.

The Council's position

[95] The Council in response says, first, that there is a difference between what KIC alleges in its notice of appeal, and what it says in submissions. In the notice of appeal KIC says "the Panel's strict approach to protection of the "centres network" would undermine any such consent application", whereas in submissions it simply framed the issue as the Panel having regard to an irrelevant consideration.

[96] However, the Council goes on to submit that there is no error. The Panel was simply testing the counterfactual in terms of costs and benefits in the event KIC's relief was not accepted, by comparison to other available outcomes, which included having a rule that would require a resource consent to be obtained. That is exactly what the Panel was required to do in terms of ss 32 and 32AA of the RMA. Consequently, the possibility that KIC would have to apply for resource consent (with the attendant costs and risks) to achieve more commercial usage is not

irrelevant, rather it is a mandatory consideration in terms of s 32 as a cost that would be borne by the consent applicant.

[97] Furthermore, the Council says it was not correct to say that the Panel concluded that the issues before it were best considered in a later resource consent application. Nowhere did it reach that conclusion. At most it simply recorded Mr Osborne's evidence that he would prefer that KIC's proposal was subject to the need to obtain a resource consent.

Discussion

[98] As the Panel recognised, it had to decide whether the provisions in the proposal were the most appropriate way to achieve the CRDP's objectives. This required it to identify other reasonably practicable options for achieving the objectives, and assess the efficiency and effectiveness of those alternatives in achieving the objectives.[46] One of the relevant options to consider was to afford discretionary activity status to commercial activity on the KIC sites, meaning resource consent would be required, with the attendant costs and risks that would involve.

[99] The Panel took into account the opinion of KIC's valuation expert, Mr Sellars, that if KIC's properties were not able to be used for office, retail and commercial services, this would have a negative implication for the rental and value of the properties. That opinion was accepted by the Panel, albeit with qualifications, including that it assumed that a resource consent for commercial activity would not be granted.[47]

[100] The Panel also noted that under the rule there was a range of permitted uses for KIC's buildings. These included a number of activities that appeared to "closely match descriptions that [KIC] gave in evidence of what the sites have been tenanted for in the past and what [KIC] expects could be future tenants".[48] By implication, the practical position for KIC under the Appealed Rule would not be markedly

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46 Section 32(1)(b).
47 At [57], [60] and [64].
48 At [63].

different from its pre-earthquake position. Thus, it is clear the Panel did not dismiss the costs to KIC's interests of retaining the Appealed Rule, by wrongly assuming KIC could rely on the resource consent process. The Panel accepted there were costs to KIC, but considered they were overstated, and they may not eventuate if a resource consent was obtained.

[101] Thus, rather than the possibility of a subsequent resource consent being an irrelevant consideration, I consider that option was highly relevant to the Panel's decision. While affording permitted activity status to activities with identified risks that were inconsistent with the CRDP's objectives was considered inappropriate, the fact that a specific proposal could still be advanced through the resource consent regime (if there was sufficient evidence to support it), ameliorated the rigour of the Appealed Rule and was a relevant factor for the Panel to take into account.

Question 8 – Panel's approach to existing activities

KIC's position

[102] Question 8 relates to question 2 and whether the Panel correctly interpreted objective 15.1.3 and policy 15.1.3.2 when it took a "rigid" and "literal" approach to the interpretation of what comprised "existing activities".

[103] Objective 15.1.3 provides:

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

Policy 15.1.3.2 is to:

> Recognise the existing nature, scale and extent of retail and office activities in Addington…while limiting their future growth and development to ensure commercial activity in the city is focused within the network of commercial centres.

[104] KIC submits that the Council's witnesses asserted, and the Panel wrongly adopted, a rigid interpretation of the centres-based approach. This led the Panel to conclude:

(a) that the CRDP was "deliberately firm" and sought to "redirect commercial activities" from less appropriate locations;

(b) KIC's "more flexible approach" would be at odds with the intended statutory position whereby rules are intended to implement and achieve objectives;

(c) section 5 of the RMA did not support KIC's reading of objective 15.1.3; and

(d) the proper meaning of "existing" in objective 15.1.3 is those commercial activities that were occurring on the ground "at the time the zones came into effect".[49]

[105] KIC considers that the Panel took an "overly literal" rather than a purposive approach to the concept of "existing" contained in the relevant objectives. This led to the Panel to wrongly conclude that the word "existing" meant "at the time the zones came into effect", rather than other available interpretations which were more consistent with the framework and objectives of Chapter 15. These alternatives included that "existing" could mean activities that were occurring in the premises at the time of the Canterbury earthquakes.

[106] The KIC Rule would be allowed by an interpretation of "existing" which focused on what was occurring in the building at the time of the earthquakes. This would better promote the recovery for owners of properties which have suffered earthquake damage than an interpretation which only considers what is "existing" at the date of the Panel decision. KIC considers this misinterpretation constitutes an error of law.

The Council's position

[107] The Council refers back to the submissions it made in respect of question 2, saying the correct approach to errors based on interpretation of words in legislation or instruments also applies here. The Panel's interpretation of the meaning of

[49] At [111].

"existing" was available to it. Indeed, KIC's submissions expressly identify it as an available interpretation. There is, therefore, no error of law.

Discussion

[108] There was no scope in Decision 11 to alter the relevant objectives and policies of Chapter 15. The decision on the appropriate zone rules for KIC's properties was driven by the requirement to achieve those settled objectives and policies.[50] However, if the conclusion reached by the Panel is predicated, at least in part, on an incorrect interpretation of the objectives and policies to the CRDP, that an error of law which can be addressed on appeal in this Court.

[109] As a preliminary point I note that simply because an interpretation was "available" is not sufficient to avoid an error of law. As has been said in relation to statutory interpretation, the New Zealand Courts' approach is to: [51]

> … treat the question of statutory interpretation as having one uniquely "correct" answer – that to which the reviewing court subscribes. A decision-maker commits a reviewable error if its interpretation differs from that of the court, notwithstanding the range of meanings that a broadly couched statutory power may reasonably bear.

[110] I consider the same principle applies to interpretation of plan provisions under the RMA. If a provision has been wrongly interpreted, that is an error of law. The scope for accommodating "available alternatives" is in the application of the relevant provisions to the facts, where, as White J said in *Chorus Ltd v Commerce Commission*:[52]

> It is well-established that unless the [decision makers] application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the [decision maker], as a specialist body, to exercise judgment in carrying out the requisite "benchmarking" exercise and in weighing up the relevant facts in that context. It will therefore have erred only if there is no evidence to support the factual findings it made in reaching its determination.

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50 Resource Management Act, s 76(1).

51 Philip A Joseph *Constitutional & Administrative Law* (4th ed, Thomson Reuters, Wellington, 2014) at [22.2.2(1)]

52 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [111] and [112]

[111] In this case, I am satisfied that the Panel's interpretation of the term "existing" was correct. I start from the fact that the Panel itself drafted the relevant objectives and policies and was well placed therefore to understand the language used in their drafting and which they were intended to achieve.

[112] However, ignoring those faults, I am satisfied that the only logical interpretation of the relevant objectives and policies is to read them as reflecting the circumstances prevailing at the time the Panel was making its decision. The objective of recognising "the existing nature, scale and extent of commercial activity" within the CMU must be read as relating to a single point in time and that necessarily captures post-earthquake investment and development.[53] This is reflected in the decision itself which recognises and discusses the existing commercial development in Addington post-earthquake and seeks to strike a balance between recognising the reality of that, but halting any further development which could impact on the recovery of the CBD.

[113] In light of this interpretation the Panel then clearly spelt out its reasons for ensuring the permitted activity rule only applied to existing or consented commercial services, office and retail activities as at the date of Decision 11. It expressed concern that, given the growth of retail and office activity in Addington in the aftermath of the earthquakes and its "natural capital of close proximity to the CBD", the suburb had an ample basis for competing with the CBD, bolstered by the critical mass the earthquakes have delivered it.[54] Against that, the Panel was conscious of evidence of the flight from the CBD and the fragility of the CBD recovery without clear support from the provisions of the CRDP. It was for that reason that it held "existing" meant at the date of the Panel's decision, and it expressly incorporated that requirement in the rules for the CMU.

[114] The interpretation contended for by KIC focuses only on its own interests, when, as I have found, the task of the Panel was much broader than that. Nevertheless, the Panel obviously considered the effects of its interpretation and application of the term "existing" on KIC, and found that the risks to KIC were "not

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53 Which was the Panel's own conclusion at [111] to [113].
54 Decision 11, at [381].

as severe" as KIC had argued, and, more importantly, "those risks are entirely overwhelmed by the economic costs and risks, that, on [KIC's] own evidence, could well ensue from our granting [KIC's] relief (i.e. under any of its preferred iterations)".[55]

[115] I am satisfied therefore that there was no error in the Panel's interpretation of the term "existing" in the relevant objectives and policies and therefore, no error of law.

Question 9 – adversely assessing KI's additional evidence by reason of the above errors

[116] The final issue raised by KIC simply asserts that the Panel "adversely" assessed the additional evidence relied on by KIC by reasons of the errors set out above. Given my conclusions on each alleged error, I do not need to address this point.

Relief

[117] Given my findings that the Panel did not err in any of the ways alleged, I do not need to consider the question of whether this Court should grant relief rather than refer it back to the Panel.

Outcome

[118] For the reasons given above, the appeal is dismissed.

[119] As is the usual position, I consider costs should follow the event. If counsel cannot agree on costs then the Council may file and serve a memorandum seeking costs no later than 9 June 2017, with KIC's response to be filed and served by 23 June 2017.

[120] Costs will be determined on the papers, unless I require to hear from counsel.

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[55] At 168(i).

[121] In the event the Council's memorandum is not filed on the stipulated date, there is an order that there be no order as to costs and the file will be closed.

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