IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-517
[2015] NZHC 3000

BETWEEN	KI COMMERCIAL LIMITED Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent

Hearing: 19 November 2015

Appearances: D Pedley for Appellant
JGA Winchester for Respondent

Judgment: 27 November 2015

JUDGMENT OF MANDER J

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[1] Natural hazards in Christchurch have been exacerbated and brought into sharp focus by the Canterbury earthquake sequence that occurred in 2010-2011. The steep basalt cliffs and boulders of the Port Hills and Banks Peninsula region are at further risk of mass movement, rock fall and cliff collapse during, and in the aftermath of, significant earthquakes.[1]

[2] The Christchurch City Council (the Council) is presently engaged in changing its district plan. An Independent Hearings Panel (the panel) was appointed to make decisions on behalf of the Council in relation to the proposed Christchurch Replacement District Plan (the proposed plan).[2] As part of that process proper account is required to be taken of natural hazards, including rock fall, cliff collapse and mass movement.

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1 *Re Christchurch Replacement District Plan (Decision 6: Natural Hazards)* Christchurch City Council Independent Hearings Panel, 17 July 2015 [*Independent Hearing Commissioners' Decision*] at [8].

2 The functions and powers of the panel are set out in the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, promulgated under the Canterbury Earthquake Recovery Act 2011.

[3] The proposed plan designates certain natural hazard areas, including those prone to cliff collapse. These types of natural hazard areas are described as cliff collapse management areas (CCMAs).

[4] The appellant, KI Commercial Ltd (KIC), has an interest in two properties which were included in designated CCMAs under the proposed plan. KIC has appealed an aspect of the panel's decision declining to implement a site specific certification regime in relation to properties within CCMAs.[3] Site specific certification is a process by which area-wide hazard assessments may be revised in relation to specific sites, upon the furnishing of evidence that the hazard risk for that site is lower than that for the area generally.

Background

[5] The panel's decision concerns the Council's notified chapter on Natural Hazards which is intended to form part of a comprehensive framework of controls on the use, development and subdivision of land under the proposed plan.

[6] When the natural hazards chapter of the proposed plan was notified it identified a number of slope stability hazard management areas in various locations. These areas were more specifically described as hazard areas relating to rock fall, cliff collapse and mass movement. They were delineated on maps which formed part of the proposed plan and were subject to rules restricting and/or prohibiting activities in the identified areas.

[7] The designation of these areas was based on area-wide assessments and modelling by Geological and Nuclear Sciences Ltd (GNS) to predict what was described as the Annual Individual Fatality Risk (AIFR) associated with potential natural hazards. Where the risk was assessed as being above a tolerable threshold, the hazard area was identified and included in the proposed plan.

[8] Shortly before the commencement of the panel's hearings, it issued a minute identifying issues regarding the proposed plan in respect of which the panel sought

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3 At [240]-[244].

assistance. This followed facilitated conferencing of expert witnesses and the preparation of evidence. One topic raised by the panel was the possible use of a certification process for permitted activities in regard to certain natural hazards. The panel sought submissions and evidence about the viability and appropriateness of having a permitted activity regime involving certification for rock fall, flooding and any other natural hazard category.

[9] The geotechnical experts who participated in the expert caucusing prior to the commencement of the hearings agreed that area-wide mapping and modelling may not always be sufficient to determine risk on a site specific basis. In a memorandum summarising their expert discussion, the experts agreed the opportunity to undertake individual site assessment must be provided for in the plan.

[10] KIC lodged a submission on the proposed plan opposing the inclusion of its two properties in a CCMA. It commissioned site specific assessments for each of its properties to evaluate the nature of the hazard that existed and the risk it presented. Written evidence was filed from a geotechnical engineer instructed by KIC.

[11] In respect of one property, situated on Heberden Avenue, the site specific risk assessment concluded that the AIFR for this property was lower than the Council's threshold for CCMA designation, and the property should therefore be removed from the hazard area. This assessment was reviewed on behalf of the Council by its expert, who agreed. That evidence and recommendation was accepted by the panel, and the Heberden Avenue property was listed as one of a number of properties in a schedule to the panel's decision excluded from the CCMA.

[12] In relation to KIC's second property on Cannon Hill Crescent, the expert's assessment did not support its removal from the CCMA.

[13] On 18 June 2015, after the completion of the hearings, the panel issued a minute inviting submissions and comments in relation to a draft policy and rule which provided for a certification regime proposed to be included as part of the plan in respect of natural hazards. In its subsequent decision, the panel recognised the limitations of area-wide modelling, as highlighted in the experts' joint statement, and

accepted the notified version of the proposed plan was inadequate in recognising that limitation. A certification mechanism would allow for individual site assessment of risks associated with a particular property.

[14] The certification regime put forward for comment by the panel in its June minute would allow a property owner affected by a hazard area designation to commission a report from a suitably qualified expert in relation to the AIFR associated with the particular property. That assessment was required to be undertaken in accordance with the accepted methodology applied in determining the hazard areas, and peer reviewed by a Council appointed expert. If the report and peer review confirmed the AIFR to be below the threshold for inclusion in the hazard management area, the Council would be required to issue a certificate, effectively allowing activities on the site previously prohibited as a result of its inclusion. Planning maps would be required to be regularly updated to reflect the current site specific information.

[15] However, the draft policy and rule which the panel sought comment about related only to rock fall management areas. The certification regime being proposed was limited to that particular natural hazard. In its subsequent decision, the panel only approved a certification mechanism in respect of rock fall hazards. It does not have application to CCMAs.

[16] In response to the panel's June minute, KIC submitted the certification regime should be extended to apply to CCMAs. Its interest in such an extension arose from the inclusion of its Cannon Hill property in the CCMA, and its hope that the restrictions which applied in respect of that property may in the future be removed, if expert assessment demonstrated the AIFR fell below the threshold for its inclusion, presumably after some on site engineering initiatives to remove or mitigate the risk of cliff collapse.

[17] The panel rejected KIC's submission. The panel observed that, on the expert evidence it had considered, it did not have a sound basis to include CCMAs in the certification regime.

The panel's decision regarding a certification regime

[18] After approving the provisions relating to site specific assessments and a certification regime for rock fall hazard areas, the panel set out its reasoning for limiting the certification process to that type of natural hazard. Specifically, the panel explained why it had not applied the certification regime to all categories of slope instability hazard. The panel's reasoning is succinct and can be set out in full:

> [240] As we have noted in our discussion of the expert evidence, those who undertook expert conferencing reached a consensus, expressed in the Slope Instability Experts' Joint Statement, that "the area-wide mapping and modelling is not always sufficient to determine risk on a site-specific basis. The opportunity to undertake individual site assessment must be provided for in the plan".
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> [241] The Slope Instability Experts' Joint Statement recommendation, on its face, applies to all categories of slope instability hazard. The evidence satisfies us that it is appropriate to implement the recommendation for the rock fall management areas but not for the mass movement and cliff collapse areas.
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> [242] Specifically, the only adjustments to slope instability hazard mapping boundaries for specific submitter properties that CCC experts recommended to us, following site-specific ground truthing, were within the rock fall management areas. Further, the methodology those experts have applied in making those adjustment recommendations (of which Dr Massey was a co-author) was specific to rock fall hazards. For rock fall areas, the acknowledged limitations of the area-wide modelling make it important that provision is made for what the experts have jointly recommended.
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> [243] By contrast, the only example where experts argued for release from a hazard area other than for rock fall, was 8 Balmoral Lane, Redcliffs (within CCMA1 and CCMA2). We explain later why we have not accepted the recommendations of Mr Bell and Mr Charters about that property.
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> [244] As such, the evidence only supports having a means for moderating land use restrictions for the two rock fall management areas.

[19] The parties are agreed the panel erred in its statement that the only adjustments to slope instability hazard mapping boundaries which the Council's experts recommended following site specific assessment, were within the rock fall management areas. A schedule to the panel's decision provides a table identifying submitters and their properties, in respect of which relief was granted by the panel after site specific assessment, and resulted in the properties being removed from the slope stability hazard areas. The Council acknowledged that the schedule includes six properties, including KIC's Heberden Avenue property, which, because of site

specific evidence, resulted in their removal from CCMAs.[4] KIC submitted this error was material and gives rise to a question of law.

The appeal

[20] Under the Canterbury Earthquake (Christchurch District Plan) Order 2014, an appeal against a decision of the panel is limited to a question of law.[5] The parties are agreed the approach to be taken to the appeal is the same as would otherwise be taken on an appeal from a decision of the Environment Court.[6]

[21] The principles to be applied are well known, and were summarised by French J in *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council*:[7]

> **Scope of an appeal under s 299**
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> [33] An appeal to this Court under s 299 is an appeal limited to questions of law.
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> [34] Appellate intervention is therefore only justified if the Environment Court can be shown to have:
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> (i) applied a wrong legal test; or
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> (ii) came to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
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> (iii) taken into account matters which it should not have taken into account; or,
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> (iv) failed to take into account matters which it should have taken into account.
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> [35] The question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.
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> [36] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense it materially affected the result of the Environment Court's decision.

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4 In relation to one property, 90 Avoca Valley Road, Heathcote Valley, the panel's decision and associated direction was for the CCMAs to be amended.

5 Canterbury Earthquake (Christchurch District Plan) Order 2014, cl 19.

6 Resource Management Act 1991, s 299.

7 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 (footnotes omitted).

[22] It follows therefore that the appeal requires KIC to identify an error of law in the panel's decision and satisfy me that such error was material, in the sense that it materially affected the result of the panel's decision.[8]

[23] The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, nor will it delve into questions of planning and resource management policy.[9] The weight to be attached to policy questions in evidence before it is for the tribunal to determine and is not able to be reconsidered as a point of law.[10]

Is there a question of law?

KIC's argument

[24] KIC submitted the panel failed to take into account matters which it should have taken into account in making its decision regarding the ambit of the certification regime. Specifically, the panel failed to take into account the expert evidence that recommended the removal of CCMAs from properties based on site specific assessment.

[25] KIC acknowledged the panel engaged with the issue of whether a certification regime should apply to other hazard areas in addition to rock fall hazards. Further, it accepted the weight to be given to the evidence regarding that issue is for the panel to assess. However, it submitted the corollary of its error that there were no submitter properties where Council experts had recommended changes to the hazard area boundaries of CCMAs after site specific "ground truthing", meant the panel failed to take into account matters which it should have taken into account. The failure to do so gave rise to an error of law.

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8 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

9 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 (FCA); *Russell v Manukau City Council* [1996] NZRMA 35 (HC).

10 *Stark v Auckland Regional Council* [1994] 3 NZLR 614 (HC); *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

Council's argument

[26] The Council acknowledged the error made by the panel. However, it submitted the incorrect statement did not amount to an error of law. It argued the matters alleged not to have been taken into account had, in fact, been considered and relied upon by the panel to support a number of conclusions in its decision, and that it was necessary to look at the decision as a whole rather than narrowly focus on the identified paragraphs as KIC has done. In that regard, the Council referred to the panel's agreement to the changes to the hazard lines as set out in the schedule to its decision. It sought to categorise KIC's criticism of the panel as one of failing to place specific reliance upon, or acknowledging the existence of evidence, when, in the Council's submission, as a matter of fact, the panel did have such evidence and did have regard to that evidence albeit for a different purpose, namely the shifting or removal of hazard lines.

[27] The Council submitted the panel had made a mistake of fact which did not raise a question of law. This was not a case of there being no evidence to support the conclusion it reached but rather one of the sufficiency of evidence. The error cannot therefore amount to a point of law.[11]

Decision on error of law

[28] The question the panel posed for itself was whether the certification regime should be extended to include CCMAs. The panel acknowledged that the experts in their slope instability experts' joint statement had reached a consensus that the opportunity to undertake individual site assessment must be provided for in the plan, and that this recommendation applied to all categories of slope instability hazard. The panel then articulated why it was only prepared to follow that recommendation in respect of rock fall management areas and not for mass movement and cliff collapse areas.

[29] The reason provided by the panel was based on its stated understanding that there had been no adjustment to slope instability hazard mapping boundaries for submitter properties which had been recommended by Council experts following site

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[11] *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* [2001] NZRMA 193 (HC).

specific assessment, other than properties within the rock fall management areas. The panel expressed its understanding the methodology the experts had applied in making those adjustment recommendations were specific to rock fall hazards. This situation, it stated, was in contrast to other hazard areas, and in particular CCMAs, in respect of which only a single property was identified as having been considered and which recommendations to remove it from the CCMA had not been accepted by the panel.

[30] The panel did not refer to the six other properties which, in accordance with expert opinion, including that of the Council, it had agreed to provide relief to submitters whose properties had originally been designated as being within CCMAs. The panel did not take this evidence into account when making its decision regarding the ambit of the certification regime. However, the panel's explicit approach to the issue was premised on an absence of properties where specific recommendations had been agreed to modify the property's original inclusion in a CCMA. It was on this basis that the Council expressed it conclusion that extension of the certification regime to CCMAs was inappropriate. This error related directly to the panel's understanding of the information available to it and upon which it both sought to frame the issue for its determination and based its conclusion. As a result, the panel failed to take into account matters which itself considered to be central to its determination of the ambit of the certification regime and should have been taken into account.

[31] Later in its decision, the panel expressly addressed KIC's submission made in response to its further minute seeking comment on the proposed policy and rule relating to a certification regime in respect of rock falls. KIC submitted that such a regime should be extended to include CCMAs. In rejecting that submission, the panel referred to the reasons it had already given for why it did not agree with KIC's submission that the certification regime should be extended to apply to the CCMAs. The panel considered that it did not have a sound basis for doing so on the expert evidence it had considered.

[32] This must be a reference to the panel's earlier analysis regarding whether the certification regime should be extended to apply to CCMAs. The reasons which the

panel had already given were those that related to the lack of successful modification of hazard mapping boundaries recommended by Council experts, other than for rock fall management areas. In concluding that it did not have a sound basis for making such an extension on the expert evidence considered, it is apparent the panel had not taken into account the expert evidence which it had received, recommending exclusion of identified properties in CCMAs as a result of specific individual assessments of those properties. As noted, the acceptance of those recommendations by the panel was formally recognised by it in a schedule to its decision.

[33] It follows that the panel did make an error of law when assessing the issue of whether a certification regime should extend to CCMAs. It chose to frame the issue by reference to the way in which submitter properties had achieved changes to their inclusion in hazard mapping boundaries by reference to site specific assessments recommended by Council experts. Yet it failed to have regard to those particular submitter properties which the Council experts had agreed be excluded from CCMAs and which the panel itself had approved. This was material which the panel should have weighed in the balance.

Was the error of law a material error?

[34] There remains the question whether such error was material in the sense that it materially affected the result of the panel's decision not to include CCMAs in the certification regime. The Council submitted there was other evidence that supported the panel's conclusion that the certification process should be limited to rock fall hazards, and an absence of evidence to support its extension to cliff collapse.

KIC's argument

[35] KIC does not deny that evidence was received by the panel from experts that was relevant to the issue of whether a certification regime should apply to CCMAs. However, it submitted this does not affect the materiality of the panel's error in failing to have regard to those instances where experts, and in turn the panel itself, had agreed to remove properties from CCMAs.

[36] In support of its position, reference was made to two different examples where a property's inclusion in a CCMA had been modified as a result of assessment of the particular site. After applying the accepted GNS methodology to calculate risk for cliff collapse hazards, the experts were in agreement that the threshold had not been reached for inclusion of the Heberden Avenue property owned by KIC. Another example related to a property owned by the Lyttelton Port Company where the preconditions for the application of the GNS cliff hazard model had not been established. The GNS model applies to cliffs greater than 10 metres in height, and in the Lyttelton Port Company case the cliff in question was significantly less than 10 metres. An expert's recommendation that the property be removed from the CCMA was accepted by the Council's expert and included in the schedule to the panel's decision excluding properties from inclusion within a hazard management area.

[37] KIC argued there will likely be other properties which upon site specific examination fall into the same category sitting either beneath the accepted threshold for the GNS model, or to which the model does not have application. In such instances there should be a certification regime available by which the property can be assessed and potentially removed without having to apply for a resource consent with the associated cost and delay that such a process involves.

[38] KIC submitted that, having identified an error of law, the panel's decision should be referred back to it for reconsideration unless the Council can establish beyond doubt the error did not materially affect the decision.[12] In the absence of the panel being afforded the opportunity to reassess its decision by taking into account those properties where modification of the CCMAs had resulted from site specific assessments, whether the panel would still come to the same decision cannot be answered definitively and is speculative. KIC submitted that having regard to the way the panel approached the issue and its stated rationale for rejecting an extension of the certification regime to CCMAs, it is apparent this body of information was material to the panel's decision.

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[12] *Royal Forest and Bird Protection Society (Inc) v WA Hapgood Ltd* (1987) 12 NZTPA 76 (HC).

The Council's argument

[39] The Council submitted the identified error by the panel was not material to its decision declining to extend the certification regime to CCMAs. It argued there was other evidence supporting its conclusion, and a dearth of evidence capable of supporting an extension of the certification regime to cliff collapse hazard areas. The Council submitted that while it accepted there was evidence that supported the movement or removal of the boundaries of CCMAs in individual instances, as agreed by the relevant experts, that was a separate issue from, and to be contrasted with, whether a certification regime of the type being contemplated by the panel could be applied to a hazard management area involving cliff collapse.

[40] The Council drew attention to evidence relevant to the particular nature and severity of the risk associated with cliff collapse which required a different level of regulation and which it submitted made CCMAs unsuitable for inclusion in a certification regime. In particular, the risk-based approach to assessing hazards accepted by the panel demonstrated that for CCMAs there was a materially higher AIFR risk than other land instability hazards. The Council submitted because of the nature of the hazard presented by cliff collapse, the evidence would need to have shown that the source of the risk posed could be removed and not simply mitigated.

[41] The Council emphasised that the primary evidential basis for a land instability certification regime rested on evidence provided by an expert, Dr Mark Yetton, which outlined how a certification regime would work. Notably, however, Dr Yetton's evidence was limited to a certification regime for removal of rock fall hazard risk. The Council submitted the panel had been strongly influenced by Dr Yetton's evidence, which did not extend to the inclusion of cliff collapse hazards in his proposed certification regime.

[42] The Council also referred to evidence given by another expert, Dr Ian Wright, who expressed the view there could be no changes to the slope instability hazard lines unless the hazard could be removed. The Council submitted that Drs Yetton's and Wright's evidence was clearly influential in terms of the panel's approach to removal of slope instability hazard lines. The panel accepted that unless mitigation

work removed the hazard or justified the removal of the hazard lines, the proper place for considering the effectiveness of actual or proposed mitigation work is via the resource consent process. It followed, the Council submitted, that for any subsequent change to the designation of an individual property within a CCMA, the only appropriate mechanism to obtain relief was to obtain a resource consent.

[43] By reference to acknowledgments made by KIC's expert, Mr Neil Charters, when giving his evidence before the panel, the Council submitted it was apparent that CCMAs were not amenable to a certification regime. Agreement between experts would likely involve subjective considerations and, in the absence of objective criteria, agreement between experts of itself would not provide a sound basis, or provide the necessary confidence to warrant the exclusion of an individual property from a CCMA.

[44] In summary, the Council submitted that a CCMA of itself constituted a hazard which could be effected in an earthquake and by its nature could not be removed. It therefore was not amenable to a certification regime because the hazard would always remain. The panel itself had noted that hazard and risk are different concepts. In the context of a property subject to a CCMA, in the absence of being able to totally remove the hazard, the nature of the risk presented by cliff collapse and the limited options available to remove such a risk, meant a certification regime was inappropriate. The Council submitted that, when regard was had to the available evidence before the panel, its acknowledged error in the way it approached its decision to limit the certification regime to rock fall could not be considered to have been material.

Decision

[45] The Council invited me to recast the issue on appeal from that contended for by KIC, namely whether the panel failed to have regard to relevant considerations, to one of whether its conclusion that certification was not suitable for CCMAs was reasonably available on the evidence. Arguably, such an approach may be an alternative means of assessing the materiality of the error, however, it would necessarily require me to embark on an entirely different exercise, involving an

assessment of what this Court considers the panel would or should have concluded on the evidence.

[46] The Council on appeal, while making strong submissions regarding the panel's likely conclusion regarding the extension of a certification regime based upon the nature of the risk presented by cliff collapse, did not confront the fact the panel had agreed, upon application of the GNS model, to specific properties being excluded from CCMAs. As was posed to counsel, the issue arises as to whether there may not be other properties presently subject to the prohibitions and restrictions of a CCMA designation which experts may agree should not be included in a CCMA.

[47] If the panel was prepared to agree to the amendment of the hazard lines to accommodate those properties on the basis of expert recommendations and after the Council's formal expert peer review, it may be there are other properties of a similar character. In the absence of the panel having considered that body of information for the purpose of making its decision about the certification regime, and notwithstanding the nature of the hazard cliff collapse presents, whether the panel would be prepared to include CCMAs to accommodate such a category of property remains moot.

[48] In directly addressing the issue of whether a certification regime should include properties subject to a CCMA classification, the panel expressly reasoned that such a course was inappropriate because any adjustments to slope instability hazard mapping boundaries, following site specific assessments which Council experts had recommended, were limited to rock fall management areas. The premise for the panel's stated rationale not to extend the certification regime is not correct. The panel chose to base its decision on that rationale, and thereby made that consideration central to its approach to the issue. It follows that the materiality of the matters which it failed to take into account was, by the way it chose to approach the issue, plain.

[49] As already acknowledged, the Council put forward substantive argument as to why, notwithstanding the way the panel articulated its decision, it could only have

concluded that extension of the certification regime would be impractical and inappropriate. However, none of those arguments were identified by the panel as being the reason why it rejected an extension of the certification regime, nor did the panel make such findings in reference to its determination of that issue.

[50] Because of the panel's rationale for rejecting an extension of the certification regime to CCMAs and the centrality of the error to its reasoning, I cannot dismiss the possibility that its decision might have been different.[13] I am not satisfied beyond doubt the error did not materially affect its decision.[14] It is for the panel to make an assessment of the merits of those arguments. It may result in the panel reaching the same conclusion, however, that is a decision for the panel, not for this Court. Furthermore, it is necessary, particularly having regard to how the panel previously chose to approach the issue, for it to consider the matters it has presently not taken into account. Those matters are for the panel to weigh and assess, together with the other evidence.

[51] Accordingly, I allow the appeal. It is uncontested the appropriate relief is for the matter to be referred back to the panel for reconsideration taking into account the evidence relating to those properties where the experts have agreed to the removal of the CCMA designation.

[52] KIC has submitted that I should direct the panel to provide an opportunity for further evidence and submissions on this issue from interested parties. The panel should provide KIC and other submitters, including the Council, with an opportunity to be heard further in relation to its reconsideration of this issue, taking into account the evidence of the individual properties that have achieved adjustments to CCMAs after site specific assessments. However, I do not consider I should impose any further requirements on the panel regarding the process it may wish to adopt in respect of this discrete issue.

[53] Accordingly, I make the following orders:

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13 *Parkinson v Waimairi District Council* (1988) 13 NZTPA 244 (HC).
14 *Royal Forest and Bird Protection Society (Inc) v WA Hapgood Ltd* (1987) 12 NZTPA 76 (HC).

(a) The appeal is allowed. The decision is remitted back to the panel to reconsider its decision in relation to this issue in light of this decision.

(b) The panel is directed to provide submitters and the Council with an opportunity to make further submissions in relation to this issue. Whether the panel wishes to receive further evidence or provide other interested parties, beyond the Council and the original submitters, with an opportunity to be heard is a matter for its assessment.

[54] If counsel are unable to agree on costs, they are to exchange and submit memoranda (not exceeding five pages) within 15 days of the delivery of this decision.

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