

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV:

IN THE MATTER OF

Canterbury Earthquake Recovery Act 2011, the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, and the Resource Management Act 1991

AND

IN THE MATTER

of an appeal under clause 19 of the Order in relation to a decision of the Independent Hearings Panel on the Commercial and Industrial Chapter (Stage 1) of the Proposed Christchurch Replacement District Plan

BETWEEN

KI COMMERCIAL LIMITED

Appellant

AND

CHRISTCHURCH CITY COUNCIL a local authority constituted under the Local Government Act 2002

Respondent

NOTICE OF APPEAL ON BEHALF OF KI COMMERCIAL LIMITED

15 February 2016

Adderley Head

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To: The Registrar of the High Court at Christchurch

And to: Christchurch City Council

TAKE NOTICE that KI Commercial Limited (**the Appellant**) hereby appeals against the decision of the Independent Hearings Panel (**the Panel**) on behalf of the Christchurch City Council (**the Council**) on the Commercial (Part) and Industrial Chapter (Part) Stage 1 decision of the Proposed Christchurch Replacement District Plan (**the Plan**), notified by the Council on the 15 January 2016 (**the Decision**).

The Appellant lodged a submission in respect of the Plan relating to matters with which this appeal is concerned.

DECISION APPEALED AGAINST

- 1 The Appellant appeals against that part of the Decision that amends the permitted activity Rule 15.7.2.1 to further restrict commercial services, office activity and retail activity in the Commercial Mixed Use zone.

ERRORS OF LAW

- 2 The Panel erred in law by:
 - (a) incorrectly concluding that the interests of the Appellant would not be unduly jeopardised by the Decision and failing to take into account the significant impact of the change to Rule 15.7.2.1 on the interests of the Appellant and the other similarly affected property owners;
 - (b) making a significant change to Rule 15.7.2.1 when the provisions were not in contention between any of the parties and there was no direct evidence before the Panel on the risks to the Central City caused by the agreed version of the provisions for the Commercial Mixed Use zone.

- (c) failing to undertake a proper analysis under section 32AA of the Resource Management Act by failing to consider the costs of the amendments to Rule 15.7.2.1.
- 3 These error of law materially affected the Panel's decision to amend rule 15.7.2.1 and further restrict commercial services, office activity and retail activity in the Addington area.

QUESTIONS OF LAW

- 4 The Appellant alleges these errors give rise to the following questions of law:
 - (a) Whether the Panel failed to take into account matters which it should have taken into account when making the Decision, including in particular the costs associated with the amendment to Rule 15.7.2.1.
 - (b) Whether the Panel came to a conclusion that was not available to it or which it could not reasonably have come to on the evidence / submissions provided.

GROUND OF APPEAL

- 5 The Appellant has an interest in two separate properties at 9 and 11-13 Bernard Street, Addington, which were zoned Business 4 under the Operative Christchurch City Plan. These sites contain existing buildings that were previously used for a range of commercial activities.
- 6 When the Plan was notified, it was proposed to zone these properties and the surrounding area Industrial General. The Appellant lodged a submission on the Plan seeking to change the zoning of their properties and the wider Addington area from Industrial General to Commercial Core. The key reason for this submission was to ensure that the rezoning better reflected the commercial activities that were already occurring in the area and enabled the continued growth and development of Addington.

- 7 Throughout the course of the hearing, the Council amended its position to support the following outcome:
- (a) The majority of the Addington area (including the submitter's properties) would be zoned Commercial Mixed Use; and
 - (b) The rules for the Commercial Mixed Use zone would permit a wide range of activities, including the use of existing buildings for offices, retail and commercial services.
- 8 In recognition of these changes, the Appellant confirmed at the hearing that the Council's proposal for Commercial Mixed Use zoning took account of the Appellant's interests and that 75 per cent of its long-term future plans would be covered by this zone. However, this confirmation was based on the proposed zoning and rule package proposed by the Council at that time, which critically included the ability to use existing buildings for offices, retail and commercial services under Rule 15.7.2.1.
- 9 Notwithstanding the above, the Panel decided that it was appropriate to make a significant amendment Rule 15.7.2.1. The effect of this amendment was that the permitted activity rule only applies to existing and/or consented commercial services, office and retail at the date of the decision. It does not enable these activities to be commenced or re-established in existing buildings where those activities are not currently occurring.
- 10 The reasoning given for this change was that the rule promoted by the Council was "*unduly permissive*" and would "*give rise to an undue risk of adverse impact on the recovery of the Central City, and also inappropriate dilute the centres based approach*" (paragraph 390 of the Decision).
- 11 In reaching this conclusion, the Appellant considers that the Panel made an error of law for the following reasons:
- (a) There was no evidence before the Panel that raised any concern with Rule 15.7.2.1 or which suggested that this rule

would adversely impact on the recovery of the Central City or dilute the centres based approach.

- (b) There was no evidence about the number or nature of existing buildings that could potentially be used for commercial services, offices and retail in the Commercial Mixed Use zone.
 - (c) The evidence on behalf the Council supported the use of existing buildings for commercial services, offices and retail, and was provided in a context that supported the recovery of the Central City and the centres based approach.
 - (d) The Panel did not consider the significant costs that this change would impose on affected property owners such as the Appellant. This fails to meet the fundamental requirements of s32AA of the Resource Management Act 1991 to evaluate costs, benefits and risks.
 - (e) The Decision contradicts the Panel's findings at paragraph 386, where it relied on the fact that the Commercial Mixed Use zone would not unduly jeopardise the Appellant's position. By making this change to the agreed provisions, the Appellant will be significantly prejudiced as it removes the ability to utilise its existing buildings for commercial services, offices and retail as a permitted activity.
- 12 To expand on this last point, the buildings on the Appellant's site were damaged in the Canterbury earthquakes and have been undergoing a comprehensive programme of strengthening and refurbishment since this time. However, due to the extent of work required, the previous activities had not been re-established as at the date of the Decision and are not currently occurring.
- 13 Under the Panel's decision, there would be no ability to re-establish those activities and to utilise the existing buildings for commercial services, offices or retail as a permitted activity. This is a significant change to the previous planning regime under the Business 4 zoning and is highly prejudicial to the Appellant's interests.

14 In summary, the Panel did not have any direct evidence to support their conclusion that the agreed version of Rule 15.7.2.1 would pose an undue risk to the Central City and failed to consider the costs of the Decision for affected property owners such as the Appellant. These errors of law have materially affected the Panel's decision to amend Rule 15.7.2.1 in the manner that it did. If the Panel had proper regard to the above matters, it could not have reasonably come to the same conclusion.

RELIEF SOUGHT

15 The Appellant seeks the following relief:

- (a) that the appeal is allowed;
- (b) that the High Court correct the Decision and amend the provisions of the Plan so that existing buildings in the Commercial Mixed Use zone can be used for commercial services, offices and retail as a permitted activity;
- (c) as an alternative to (b), that the matter be referred back to the Panel for reconsideration in light of the findings arising out of resolution of this appeal;
- (d) such further and other relief as may be appropriate to address the Appellant's concerns;
- (e) the costs of and incidental to these proceedings.

Dated this 15th day of February 2016



David Pedley
Counsel for the K I Commercial Limited

This document is filed by **David Owen Pedley**, solicitor for the Appellant of the firm Adderley Head. The address for service of the Appellant is the offices of Adderley Head at 15 Worcester Boulevard, Christchurch.

Documents for service may be left at that address for service or may be:

- posted to the solicitor at PO Box 16, Christchurch 8140; or
- emailed to the solicitor at david.pedley@adderleyhead.co.nz