IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2012-409-000500
[2012] NZHC 1810

BETWEEN	INDEPENDENT FISHERIES LIMITED First Applicant
AND	R S PEEBLES Second Applicant
AND	CASTLE ROCK ESTATE LIMITED Third Applicant
AND	G F CASE, M M CASE AND MGM CASE Fourth Applicants
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Applicant
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Applicant
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Respondent
AND	CANTERBURY REGIONAL COUNCIL, CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL, SELWYN DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Second Respondents

Hearing: 2, 3 and 4 July 2012

Appearances: F Cooke QC, P Joseph and P Steven for Applicants
P McCarthy and K Stephen for First Respondent
M Perpick and J Ormsby for Second Respondents
J M Appleyard and T Lowe for Christchurch International Airport Limited (Intervener)
F Barton and S Everleigh for Prestons Road Limited (Intervener)

Judgment: 24 July 2012

RESERVED JUDGMENT OF CHISHOLM J

A **The application for review is granted.**

B **The First Respondent's decisions inserting chapters 12A and 22 into the Canterbury Regional Policy Statement are set aside.**

C **His decision revoking Proposed Change 1 to that Policy Statement is also set aside.**

D **Costs are to be resolved in accordance with [211].**

REASONS

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Introduction

[1] Following the devastating Canterbury earthquake on 22 February 2011 the Canterbury Earthquake Recovery Act 2011 (CER Act) was enacted by Parliament. Section 27 of the Act relevantly provides:

> **27 Suspension of plan, etc**
>
> (1) The Minister may, by public notice, suspend, amend, or revoke the whole or any part of the following, so far as they relate to any area within greater Christchurch:
>
> (a) an RMA document:
>
> ...

By virtue of the definitions in s 4 "Minister" means the Minister for Canterbury

Earthquake Recovery and "an RMA document" includes a regional policy statement and a district plan (both proposed and operative).

[2] In October 2011 the Minister, the Honourable Gerry Brownlee, used s 27(1)(a) to amend the 1998 Canterbury Regional Policy Statement (RPS) by inserting, and making immediately operative, new chapters 12A and 22. He also revoked proposed change 1 to the RPS (PC1) which was under appeal to the Environment Court. This revocation had the effect of terminating appeals by the applicants and others to that Court. Those decisions are challenged by the applicants in this application for judicial review.

[3] The Minister also amended the district plans of Christchurch City Council and Waimakariri District Council to enable specified areas of land at Prestons Road, Halswell West and Kaiapoi to be developed for residential purposes (and limited business purposes). Again, these amendments became operative immediately upon notification. Those decisions are not challenged by the applicants.

[4] In broad terms the applicants allege that the Minister's decisions concerning the RPS were made for unauthorised purposes and were thereby unlawful. They contend that the Minister's decisions were not earthquake recovery measures. Rather, those decisions reflected that the Minister had been persuaded to act in favour of the second respondents (who are described as the UDS partners)[1] by resolving longstanding disputes concerning long term growth policies for greater Christchurch[2] which were already in the hands of the Environment Court.

[5] Those allegations are denied by the Minister. He asserts that following the earthquakes he was faced with a pressing need for land to be freed up for urban residential subdivision and a planning framework in which the current status of PC1 was causing uncertainty for developers and councils, and thereby impeding the development of land for residential purposes. The Minister was also aware that there was no prospect of the Environment Court resolving the PC1 appeals quickly and

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[1] UDS stands for Urban Development Strategy.
[2] Greater Christchurch means the districts of the Christchurch City Council, Selwyn District Council and Waimakariri District Council. It also includes the coastal marine area next to those districts.

that council officers involved in those appeals were required for earthquake recovery planning.

[6] At a more specific level the applicants allege that the decisions of the Minister concerning the RPS are tainted with illegality for one or more of the following reasons:

- The Minister's use of the power under s 27 of the Act was principally exercised for ulterior (unauthorised) purposes, and not for the purpose for which the power was conferred by s 3 of the Act;
- That the Minister's decision entails the misapplication of a statutory power insofar as the Minister's decision (particularly in relation to Chapter 12A) implements a recovery strategy measure where, on a proper interpretation of the Act, another statutory power and procedure was intended to be used for that purpose;
- That the Minister failed to consider the question raised by s 10(1) of the Act as to whether the exercise of the power was "necessary" to achieve the statutory purpose in s 3; and thus in terms of s 10(2) of the Act, in the circumstances, his decisions were not reasonable;
- That insofar as the appeals before the Environment Court were terminated as a result of the exercise by the Minister of the s 27(1) power, the Minister has deprived parties of a fundamental right of access to the courts, and has exceeded his statutory power;
- That the Minister has failed to take into account relevant considerations.

Each of these specific allegations is denied by the Minister. And, supported by the second respondents and interveners, the Minister asserts that even if the Court finds reviewable errors, relief should not be granted.

[7] It is not disputed that the decisions in issue are amenable to judicial review.

Background

[8] After the RPS became operative in 1998 it became apparent to the second respondents that it lacked specific direction as to the location, timing and form of urban growth for greater Christchurch. They were particularly concerned about ad hoc developments arising from private plan changes. In 2003 the second respondents initiated a consultative process to develop a growth strategy for greater

Christchurch. Following public consultation they decided to support a detailed strategy in the form of PC1 which was publicly notified by the Canterbury Regional Council in 2007.

PC1

[9] Amongst other things PC1 identified urban limits through to 2041. It specified the sequencing of new greenfield land for residential development and directed that urban development was not to occur outside the specified urban limits applying from time to time. A long standing policy of precluding noise sensitive uses within a 50 dBA Ldn contour around the Christchurch international airport was also supported. The relevant territorial authorities were required to amend their district plans to reflect these matters.

[10] By the time submissions for PC1 closed in March 2008, around 700 submissions (the PC1 submissions) had been lodged. These included submissions from landowners (including the applicants) who sought to either have their land included within the urban limits or to amend provisions relating to the sequencing of greenfield land for development. Although Christchurch International Airport Limited generally supported PC1, it lodged a submission seeking the inclusion of updated air noise contours.

Judicial review proceedings in 2008

[11] In June 2008 the Regional Council's decision to appoint its own councillors to hear and determine the PC1 submissions was challenged in judicial review proceedings: *National Investments Limited v Canterbury Regional Council.*[3] National Investments Limited contended that the submissions arising from PC1 should be heard by independent commissioners because the UDS partners had entered into an agreement which the applicant believed had effectively predetermined PC1.

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[3] *National Investments Limited v Canterbury Regional Council* HC Christchurch CIV-2008-409-001280.

[12] The judicial review proceeding was settled on the basis that the Regional Council would appoint independent commissioners to hear and recommend decisions on the PC1 submissions. A consent order made in this Court on 31 October 2008 included an acknowledgement by the Regional Council that:

> ...
>
> 2. ...upon receiving...recommendations from [the] independent commissioners, Environment Canterbury must either:
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> (a) accept those recommendations; or
>
> (b) (i) withdraw PC1 in its entirety; or
>
> (ii) appoint a new panel of commissioners to rehear the submissions; and
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> ...

In due course three independent commissioners were appointed to hear the submissions and make recommendations to the Regional Council.

Hearings before the independent commissioners

[13] Hearings were conducted by the commissioners between April and September 2009. By that time there had been four variations to PC1 and those variations had attracted further submissions. As required by the consent order the commissioners' recommendations were adopted by the Regional Council in December 2009 (the Regional Council's decision).

[14] In broad terms the Regional Council's decision upheld the approach signalled by PC1 concerning the use of urban limits. In some cases, however, new greenfield areas for residential development resulted in changes to the location of the urban limits. "Special Treatment Areas" involving land owned by some of the applicants were also identified and Christchurch City Council was directed to investigate an appropriate zoning for the land within those areas (which were now within the urban limits). Although the use of a 50 dBA Ldn contour around the airport was upheld, there was provision for growth within that contour at Kaiapoi.

Appeals to the Environment Court

[15] The Regional Council's decision attracted approximately 50 appeals to the Environment Court. These included appeals by five of the applicants and the sixth applicant joined the appeals under s 274 of the Resource Management Act 1991 (RMA). Appeals were also lodged by Christchurch City Council, Waimakariri District Council and Christchurch International Airport Limited.

[16] Initially the first phase of these appeals was to be heard by the Environment Court in June 2011. But that hearing was adjourned for two months as a result of the earthquakes. Later requests by the UDS partners for further adjournments were refused.

[17] I pause at this stage to briefly outline the consequences of the Canterbury earthquakes.

[18] Although the earthquake in September 2010 caused considerable damage at Kaiapoi, it did not give rise to widespread RMA issues for greater Christchurch. That changed with the earthquake in February 2011 when the need for residential development became urgent, particularly as the result of the creation of residential red zones in the city. This was accentuated by two further significant earthquakes on 13 June 2011.

[19] The Government announced that it was prepared to make offers to purchase properties in the residential red zone, with such offers remaining open for nine months after receipt of the offer. As a result there was significant pressure from people wishing to relocate. Given the timeframe required for preparing bare land for development and erecting houses, land had to be made available for residential development as quickly as possible. Heavy demands were also being made on the time of council officers who were involved in drafting the earthquake Recovery Strategy required under the CER Act.

[20] Now I return to the appeals before the Environment Court. As time went by the UDS partners (second respondents) were able to reach agreement with some of

the appellants, including Prestons Road Limited, an intervener in this proceeding. The Prestons Road settlement meant that around 200 ha would come within the urban limits and be available for residential development. However, the settlements were opposed by some appellants and, while the Environment Court was not critical of the attempt to resolve matters, it declined to endorse the settlements at that time.

[21] It also transpired that the Regional Council did not intend to defend its decision, and this attracted strident criticism from some appellants. In an interim decision delivered by the Environment Court on 28 July 2011,[4] the Court observed:

> [37] ...CRC [Canterbury Regional Council] appears to be abdicating from its responsibilities as the local authority which decided the change...being appealed [PC1]. While the court accepts that, especially in relation to a policy statement or plan...a local authority may change its position after releasing its decision, it must do so in a fair and transparent way...

The Court went on to observe that the UDS partners' approach raised a number of concerns including possible unfairness to other appellants and persons not before the Court. It also commented that there had been no visible attempt to ensure fairness and that the Regional Council and UDS partners "seem to have tried to keep the process secret".[5]

[22] Ultimately the second phase of the appeal process was set down for hearing over the period November 2011 – March 2012. The UDS partners sought an adjournment on several grounds, including the likelihood that the draft Recovery Strategy that had been released would overrule PC1 and that council resources were required for earthquake recovery purposes. An adjournment was refused by the Environment Court in September 2011.

[23] The UDS partners then sought judicial review of the Environment Court's decision refusing an adjournment: *Canterbury Regional Council v The Environment Court of New Zealand.*[6] Other parties sought to join the review, both for and against. Before this application could be considered by the Court the Minister notified his decision revoking PC1. A notice of discontinuance was then filed.

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[4] *MHR Group Ltd & Ors v Canterbury Regional Council* [2011] NZEnvC 215.
[5] Ibid, at [39].
[6] *Canterbury Regional Council v The Environment Court of New Zealand* HC Christchurch CIV-2011-409-001953.

Minister's decisions

[24] Before discussing the Minister's decisions it is helpful to outline some events leading up to those decisions.

Background events

[25] As a result of the Regional Council's decision land owned by the fourth applicants (the Case family) came within a Special Treatment Area. In May 2011 the family's lawyers wrote to the Minister indicating that they understood the Minister might be turning his attention to the status of PC1. The letter put the Case family's position to the Minister and sought a meeting. Later representatives of the family met with CERA officials. The outcome conveyed to the family by the Minister was that, "whilst CERA is investigating options to accelerate developments to aid recovery, your client could usefully progress planning approval issues that would otherwise be required".

[26] The Minister also deposes that he met with Mr Dormer, a director of the first applicant (Independent Fisheries Limited). Among the topics discussed was the first applicant's desire to carry out a residential development on its land near the airport (which, as a result of the Regional Council's decision, was also within a Special Treatment Area). Mr Dormer also raised issues with the Minister on several other occasions at social functions. The Minister did not feel able to offer any individual assistance to Independent Fisheries Limited.

[27] There were also meetings between officials of the Canterbury Earthquake Recovery Authority (CERA) and representatives of the UDS partners. A letter from CERA dated 29 July 2011 indicates that there had been a number of discussions before that time about the possibility of interventions using CER Act powers. Key immediate interventions recorded in the letter included the use of s 27 of the CER Act to zone land for new housing and to amend the urban limit line within PC1 "to reflect the UDS partners' preferred position".

[28] During a meeting between CERA and the UDS partners liaison group on 28 September 2011, a request was made for the UDS partners to provide a revised PC1, taking into account the Canterbury earthquakes. A draft document was subsequently supplied to CERA by the UDS partners.

[29] On 30 September 2011 CERA officials provided the Minister with briefing papers in relation to the possibility of residential development at Kaiapoi within the 50 dBA Ldn noise contour. These papers noted that negotiations between the airport company and the greater Christchurch local authorities had resulted in a compromise whereby the airport company had agreed to an exception for residential development in north-eastern Kaiapoi provided the importance of the 50 dBA Ldn contour was recognised in planning documents.

[30] Having discussed the possibility of adding a special chapter to the RPS dealing with the issue of the noise contour, the briefing papers stated:

> 19 It would also be possible to just change the Waimakariri District Plan and enable the subdivisions but this would not achieve the strengthening of the 50 dBA Ldn air noise corridor in the rest of greater Christchurch, and so would be opposed by CIAL [the airport company].

It was recommended to the Minister that a change be made to the RPS by adding a short chapter specifically dealing with the noise contour and supporting this with an amendment to the Waimakariri District plan.

[31] Further briefing papers dated 7 October 2011 were supplied to the Minister with reference to the proposed chapter 12A. These papers noted that PC1 was developed as a result of the local authorities in Canterbury working together to identify areas for urban growth and that the change was presently before the Environment Court. The papers commented that PC1 did not take into account either agreements reached since the appeals were filed or the Canterbury earthquakes. It recorded that CERA staff had worked with the staff of local authorities to prepare a revised draft chapter 12A which incorporated those matters.

[32] After stating that it was within the Minister's powers under s 27 to add chapter 12A and to suspend or revoke PC1 "so as to avoid any confusion and

probably stop the present Environment Court proceedings", the briefing papers continue:

> 5 Exercising your powers under section 27 of the CER Act is in accordance with many of the purposes of the CER Act, but there is a risk that arguments could be made that public participation has been curtailed and that the subject matter is focused on growth as opposed to recovery. It is noted, however, that as the RPS can be overridden by a Recovery Plan dealing with land use issues and further changes can be made using section 27 powers, that these concerns can be addressed. Further to assist with the infrastructure recovery there needs to be long term planning including potential growth.

Later the Minister is given three options: "do nothing"; suspend PC1 "until the High Court has concluded whether the decision not to adjourn was correctly made or not"; or revoke PC1.

[33] With reference to the last alternative of revoking PC1 the Minister was briefed:

> 29 ...This would mean that there is no document before the Environment Court and so it should follow that the Environment Court no longer has any jurisdiction to consider the appeals. This will, however, raise concerns about the Executive's involvement in Court proceedings and misuse of power which could in turn result in judicial review of the revocation.

The briefing paper recommended that, given the complicated circumstances, the Minister should suspend PC1 "and see how the Court proceedings play out".

Minister's decision on 8 October 2011

[34] On 8 October 2011 the Minister gave public notice that, pursuant to s 27(1)(a) of the CER Act, he was amending the RPS by inserting chapter 22. The stated objective was to provide for and manage urban growth within greater Christchurch while protecting:

> (a) the safe and efficient operation, use, future growth and development of Christchurch international airport; and

(b) the health, wellbeing and amenity of the people through avoiding noise sensitive activities within the 50 dBA Ldn air noise contour.

That objective was supported by two policies: the first provided for residential development at Kaiapoi inside the 50 dBA Ldn noise corridor to offset the displacement of residential activities at Kaiapoi (from the earthquakes); the second was to avoid noise sensitive activities within the air noise corridor except as provided for in the first policy.

Minister's decision on 17 October 2011

[35] On 17 October 2011 the Minister gave public notice that the RPS was further amended by inserting chapter 12A. In broad terms this chapter gave effect to the relief sought by the UDS partners in their appeals to the Environment Court. It also reversed the changes arising from the Regional Council's decision, including changes supported by the applicants.

Changes to district plans

[36] By public notices on 1 November 2011 the Minister directed changes to the Christchurch and Waimakariri district plans.

[37] The changes to the city plan created residential zones at Prestons Road and Halswell West. The change to the Waimakariri plan zoned specified land within the 50 dBA Ldn contour at Kaiapoi for residential purposes pursuant to an exemption contained in chapter 22 of the RPS. It was stated that this exemption was specifically provided to reflect the displacement of existing dwellings at Kaiapoi within the 50 dBA Ldn noise contour.

Requests for reconsideration

[38] Early in November 2011 lawyers for the first applicant wrote to the Minister seeking reconsideration of his decisions adding the two new chapters to the RPS. The letter sought redress in the form of revocation of the 50 dBA Ldn noise corridor

and the substitution of a 55 dBA Ldn contour. It also sought reinstatement of a greenfield area that had been included in PC1 before it was deleted by variation 4. After receiving a briefing paper the Minister declined the request.

[39] Later in November 2011 two directors of the sixth applicant wrote to the Minister seeking his intervention to enable further residential development at Clearwater. Again the matter was considered by CERA officials and the Minister ultimately replied that he was not prepared to intervene.

[40] The Minister's affidavit also indicates that there were other approaches to CERA officials about changing the urban limit line.

Minister's affidavit

[41] For the applicants Mr Cooke QC questioned the weight that should be given to parts of the Minister's affidavit. This was based on *Abbott v Coroners Court of New Plymouth*[7] in which Randerson J expressed concerns about a Coroner's affidavit when considering an application for judicial review of the Coroner's decision. The Judge noted that it is well established that judicial review proceedings generally proceed on the basis of the evidence before the decision maker at the time of the decision.[8]

[42] I agree with Mr McCarthy that that decision is distinguishable and that in the present context the relevant authority is *Kellian v Minister of Fisheries.*[9] In that case the Court of Appeal stressed the value of decision makers explaining their reasons when their decisions are challenged. It also indicated that when those reasons are provided they should be given "real weight".[10] Any such reasons must, of course, apply at the time the decision was made. It is not an opportunity to come up with new reasons after the event.

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[7] *Abbott v Coroners Court of New Plymouth* HC New Plymouth CIV-2004-443-660, 20 April 2005.
[8] Ibid, at [22].
[9] *Kellian v Minister of Fisheries* CA 150/02, 26 September 2002.
[10] Ibid, at [8].

[43] With reference to his decision to add chapter 22 to the RPS and exempt part of Kaiapoi from the effect of the 50 dBA Ldn air noise contour, the Minister deposes:

> 31. I considered it necessary to use my section 27 powers to add a new Chapter 22 to the RPS because it would settle throughout greater Christchurch where the contour line was and its effect. Following the earthquakes it was essential that people knew clearly what activities, and so what development, were allowed to take place near the airport. Given the importance of the airport to Canterbury I considered its continuing operations had to be protected from "reverse sensitivity" claims, and that a 50 dBA Ldn noise contour was appropriate since that noise level had been used for decades. However, approximately 25% of Kaiapoi had been significantly affected by the earthquake. Much of the township was already within the noise contour and I thought it was necessary to free up land in the immediate vicinity to enable residential development to occur to accommodate those displaced in the township and also from the Residential Red Zones further afield.
>
> 32. I was aware that the Waimakariri District Council was stretched with the demands following the earthquakes and that my decision would assist to provide certainty and free staff resources to assist with earthquake recovery work instead of arguing over residential development boundaries.
>
> 33. I was advised that if the whole of Kaiapoi was exempted from the effect of the contour line further subdivision in the south-west could be developed, adding more residential sections and, while I understood Christchurch City Council and Christchurch International Airport Ltd would not necessarily be supportive of that decision, although Christchurch International Airport Limited said they would not object if the decision was made, I considered exempting the whole of Kaiapoi was the right decision.

The Minister goes on to say that in his view the situation in Kaiapoi was different from that in Christchurch where there were significant areas of land available for development outside the noise contour.

[44] In relation to the decision to incorporate chapter 12A into the RPS the Minister states in his affidavit:

> 38. I wish to highlight several aspects of the paper. As I have noted, I was aware generally and from the discussions I had with Mr Dormer and with Prof. Peter Skelton, one of Environment Canterbury's Commissioners, that Environment Canterbury was seeking a change to its operative RPS by adding a new chapter 12A through PC1.

39. I knew PC1 had been considered by the hearing commissioners who had recommended some changes and that the document had been appealed to the Environment Court by a number of disappointed parties. I also knew that negotiations had resolved a number of issues with developers and consent memoranda had been filed with the Environment Court. In particular, I was aware that the argument about the legality of having an urban limit line at all had been resolved. The parties may not have been in agreement about where the line was to be placed, but I understood that the concept of an urban limit line was accepted as a valid tool. In general I also understood that there was no real disagreement to the area that PC1 proposed to be within the line; the issue was what else should or could be included.

40. I also understood that the UDS Partners had sought adjournments of the Environment Court proceedings which had been unsuccessful and that that decision was the subject of judicial review proceedings.

41. I was surprised and concerned that the Environment Court did not grant adjournments as requested in May and September 2011 because of the level of uncertainty that the on-going litigation caused for developers and the local councils. By then it was apparent there was potentially considerable overlap between PC1 and the draft Recovery Strategy, which I am required to consider and approve. Even if the Recovery Strategy was not going to deal with projected growth, residential density and provision of infrastructure, the proposed Recovery Plans were another vehicle which could do that.

42. I was concerned the Environment Court proceeding was delaying the implementation of the earlier negotiated agreements which had resulted in draft consent orders being filed with the Court and would have allowed development to proceed. This was delaying the planning, rebuilding and recovery of greater Christchurch as sought by the CER Act. I was not at all confident the Environment Court process would result in an overall plan which could be implemented quickly. I could see the appeal processes stretching out for a very long time indeed.

43. I considered it extremely unhelpful that the very council officers who were required to contribute to the Environment Court hearing were the ones that should have been focussed on recovery planning. I knew that the procedural hearings for the appeals were held in Queenstown, as the Environment Court considered that none of the hearing venues available in Christchurch were satisfactory, and that it was uncertain whether the Environment Court planned to hold further hearings of the appeals in Queenstown as well. Having to travel to Queenstown on a regular basis for these hearings would have further compromised the councils' officers' ability to contribute to the region's recovery.

44. It was obvious, but confirmed from the Case family correspondence and my discussions with Mr Dormer, that as a result of my decision there would be perceived disadvantages to those who were attempting to have their properties included within the urban limit line through the appeal processes.

45. Giving effect to the proposed urban limit in PC1 did not, however, mean the limit could not be changed at a later date. PC1 itself contemplated this if there was a change of circumstances and I understood there was an ability to use the section 27 powers to make further changes if necessary.

...

48. Having considered the advice I received and for the reasons outlined in this affidavit I was in no doubt that the use of my section 27 powers to provide a specific chapter within the RPS to deal with the development of Greater Christchurch was necessary and was consistent with the relevant purposes of the CER Act. In my view the work already done by the UDS Partners to plan for urban development and the extensive consultation involved in that process were a useful starting point to provide certainty following the earthquakes. I also understood officials at CERA had been working with the UDS Partners staff to incorporate those agreements reached as part of the appeal process relating to developments at Prestons, Hills/Mills, Lincoln Land and Memorial Avenue and to make a number of additions to take into account matters following the earthquakes. What emerged was something beyond the UDS Partners' version of PC1.

49. In many ways, the inclusion of a new Chapter 12A based on the amended PC1 was a neat solution to assist to resolve the problems confronting the greater Christchurch area at that time.

50. I was faced with the prospect of significant numbers of people being unable to find appropriate accommodation in the region. That was not going to assist the recovery. I had to create a situation where there were sufficient opportunities for significant numbers of the local population to move to appropriate housing within the locality. That would not occur if there was rampant land inflation due to a restriction on supply. Along with those economic recovery factors, the social consequences would be terrible if people in the "Residential Red Zone" were not able to move. These were issues I did not feel the local authorities were capable of overcoming without assistance.

51. A further consideration was the obvious fact that CERA and the CER Act will expire in 2016. I was conscious that my decisions would need to be broadly acceptable to the UDS Partners, who will inherit those decisions and I wanted to put in place a document that was consistent with the work already done on infrastructure planning, traffic management and the like. It was, in my view, important that the UDS Partners were able and willing to work with the planning structures they would eventually inherit.

52. Other than in the general terms, I did not take into account any information about the specific circumstances of individual property developers, and others, who might be affected, one way or another, by the inclusion of a new Chapter 12A based on PC1 as amended. I was, as I have noted, aware from the correspondence on behalf of the Case family and my discussions with Mr Dormer that my

decision would impact to the disadvantage of some. Any concern that some parties may have lost the ability to continue an appeal which might theoretically have resulted in them gaining an ability to improve their position was discounted by the compelling need to provide the Councils, infrastructure providers and developers with certainty so that the pressing need for residential development to occur in appropriate places would not be delayed.

53. I also understood my decision was not necessarily going to be final. As the Recovery Strategy and future Recovery Plans are developed it is likely Chapter 12A will be reviewed and could change. Given the uncertainty about population movements in greater Christchurch I was not too concerned about the accuracy of the population projections in Chapter 12A as I knew these would be looked at again. Although I expected movement out of Christchurch after the earthquakes, and for more people to move into Christchurch during the rebuild, the numbers involved were hard to estimate. It was, therefore, easier to adopt what had already been drafted and consulted on rather than trying to update such figures during a time of great uncertainty.

54. I also made it clear to the UDS Partners that if individual cases of merit were presented to me I could potentially use my section 27 powers to amend the urban limit line to assist with the recovery. This is a point not lost on Mr Dormer, Mr Pebbles, the Case family and the representatives of Clearwater all of whom have approached me and/or CERA officials requesting a rezoning of their respective lands.

55. There was one aspect of the 7 October 2011 paper with which I did not agree. That was the recommendation I use my powers to suspend PC1. In my view suspension was not appropriate. It would still have left the appeal process in a sort of "suspended animation" and that would have been confusing for the various participants. There was also some doubt about what suspension would mean in practice. I was very keen that there be no doubt that the appeal process, and the time commitment by Council staff and others, had been brought to an end.

This part of the Minister's affidavit concludes by indicating that as a result of these matters he did not accept the recommendation made to him and instead elected to revoke PC1.

CER Act

[45] Although the CER Act contains 93 sections, the summary that follows will be confined to the parts of the Act that are directly relevant to the grounds of review before the Court.

Introduction

[46] After the earthquake on 4 September 2010 the Canterbury Earthquake Response and Recovery Act 2010 was enacted. But it was inevitable that more extensive legislation would be required after the earthquake on 22 February 2011, and the Canterbury Earthquake Recovery Bill was introduced into the House on 12 April 2011.

[47] The House instructed the Local Government and Environment Committee to hear evidence and report again by 14 April 2011. In its report the Committee said:

> The bill sets out a series of purposes that will guide decision-making by the Minister for Canterbury Earthquake Recovery and CERA, ensuring that there is adequate statutory power to enable community participation while promoting the focused, expedited, and timely recovery of greater Christchurch and its communities. Specifically, the bill provides for an overarching Long-Term Recovery Strategy to be developed by CERA in collaboration with stakeholders, as well as more specific Recovery Plans...
>
> ...
>
> All the submitters supported the need for the legislation recognising that extraordinary powers are necessary because of the extraordinary circumstances following the earthquakes...The Minister noted that the powers can only be used within the purposes of the bill, which [focuses] solely on the scope of earthquake recovery...
>
> ...
>
> At every step of this legislative process we have had assurances, including from the Minister, that this is enabling legislation, and that he intends to ensure maximum community involvement in the rebuilding of Canterbury. We intend to hold him, and others, to these assurances.

[48] On the second reading of the Bill on 14 April 2011 the Minister told the House:[11]

> ...I sincerely think that having a structure that allows rapid decision-making that can give effect to decisions that the community is on board with is exactly what is required here. That does require the taking of powers that are somewhat extraordinary...
>
> This bill is an enabling framework setting out a range of powers that may need to be exercised during the recovery process. It does have significant checks and balances on the use of those powers, and the most clear check

[11] (14 April 2011) 671 NZPD 18129.

> and balance is the requirement that all of those powers must be exercised in the recovery process and cannot step outside of that. What we have recognised with this bill is the need to restore social, economic, cultural, and environmental well-being in Greater Christchurch. Further, it recognises a need to facilitate, coordinate, and direct the planning, rebuilding, and recovery of Greater Christchurch, and it places importance on community participation in the planning of the recovery while balancing that against the need for timely, focused, and coordinated recovery processes.

The Bill also went through a third reading the same day and the Act came into force on 19 April 2011.

Purposes of the Act

[49] The purposes of the Act are directly relevant to the first ground of review which alleges that the Minister did not exercise his powers concerning the RPS for proper purposes. Section 3 provides:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:
>
> (d) to enable a focused, timely, and expedited recovery:
>
> (e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:
>
> (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
>
> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:
>
> (h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

...

The remaining purpose, which is to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010, has no direct relevance.

[50] In the context of this proceeding the s 3 purposes need to be read in conjunction with s 10, particularly s 10(1). Section 10 provides:

> **10 Powers to be exercised for purposes of this Act**
>
> (1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.
>
> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.
>
> (3) The chief executive may from time to time, either generally or particularly, delegate to any employee of, or person seconded to, CERA any of the functions or powers of the chief executive under this Act or any other Act, including functions or powers delegated to the chief executive under any Act.

According to the applicants the Minister failed to comply with subs (1)[12] and his decisions concerning the RPS were not reasonably necessary in terms of subs (2).[13]

Community forum

[51] Part 2 of the Act describes functions and powers to assist recovery and rebuilding. Subpart 1 of that Part provides for input into decision making by a community forum:[14]

> **6 Community forum**
>
> (1) The Minister must arrange for a community forum to be held for the purpose of providing him or her with information or advice in relation to the operation of this Act.
>
> (2) The Minister must invite at least 20 persons who are suitably qualified to participate in the forum.

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[12] First ground of review.
[13] Third ground of review.
[14] There is also provision for a cross-party forum.

(3) The Minister must ensure that the forum meets at least 6 times a year.

(4) The Minister and the chief executive must have regard to any information or advice he or she is given by the forum.

The applicants allege that the Minister should have involved the community before making his decisions on the RPS.[15]

Development and implementation of planning instruments

[52] Under this heading Subpart 3 of the Act provides for three matters: Recovery Strategy; Recovery Plans; and "Provisions affecting councils and others" which includes s 27. This Subpart of the Act is relevant to the second ground of review and I now outline the three matters covered by it.

(a) Recovery Strategy

[53] Section 11 provides for development of the Recovery Strategy:

11 Chief executive to develop Recovery Strategy for Minister's consideration

(1) The chief executive must develop a Recovery Strategy and submit the document to the Minister for his or her consideration.

(2) The Governor-General may, by Order in Council made on the recommendation of the Minister, approve a Recovery Strategy.

(3) The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address—

(a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:

(b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:

(c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:

[15] Second ground of review.

(d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.

(4) The Recovery Strategy must be developed in consultation with Christchurch City Council, Environment Canterbury, Selwyn District Council, Waimakariri District Council, Te Runanga o Ngai Tahu, and any other persons or organisations that the Minister considers appropriate.

A draft Recovery Strategy has to be publicly notified so that members of the public can make written comments. It must include one or more public hearings at which members of the public can appear and be heard, and it must be developed within nine months of the Act coming into force: ss 12 and 13.

[54] As provided by s 11(2) the final step in a Recovery Strategy is an Order in Council. Before the Minister can recommend an Order in Council the draft Order must be reviewed by the Canterbury Earthquake Recovery Review Panel (the Panel) and the Minister must have regard to the recommendations of the panel: ss 72 – 74.

[55] Similar processes are involved if the Recovery Strategy is changed: s 14.

[56] The effect of the Recovery Strategy is described in s 15. No RMA document within greater Christchurch can be interpreted or applied in a way that is inconsistent with a Strategy, and in the event of any inconsistency the Strategy will prevail. It is also provided that no provision of the Strategy that is incorporated in an RMA document can be reviewed, changed, or varied under Schedule 1 of the RMA.

(b) Recovery plans

[57] Recovery Plans are provided for in ss 16 – 26, with s 16 applying to recovery plans generally:

16 Recovery Plans generally

(1) The Minister may direct 1 or more responsible entities to develop a Recovery Plan for all or part of greater Christchurch for his or her approval.

(2) The direction must specify the matters to be dealt with by the Recovery Plan, which matters may include provision, on a site-specific or wider geographic basis within greater Christchurch, for—

(a) any social, economic, cultural, or environmental matter:

(b) any particular infrastructure, work, or activity.

(3) A responsible entity may request that the Minister direct it to develop a Recovery Plan.

(4) Where the Minister directs the development of a Recovery Plan, he or she must ensure that the direction is notified in the Gazette together with a list of all other Recovery Plans being developed or in force.

Although specific provision is made in s 17 for a Recovery Plan for the Christchurch central business district, those provisions have no direct relevance in the present context.

[58] The relationship between a Recovery Plan and the Recovery Strategy is described in s 18. Although a recovery plan must be consistent with the Recovery Strategy, a Recovery Plan may be developed and approved before the Recovery Strategy is approved. But once the Recovery Strategy has been approved the Plan must be reviewed, and if necessary amended, to ensure that it is consistent with the Strategy.

[59] Under s 19(1) it is for the Minister to determine how Recovery Plans are to be developed, including any requirements as to public consultation or hearings. Subsection (2) provides:

19 Development of Recovery Plans

...

(2) In acting under subsection (1), the Minister must have regard to—

(a) the nature and scope of the Recovery Plan; and

(b) the needs of people affected by it; and

(c) the possible funding implications and the sources of funding; and

(d) the New Zealand Disability Strategy; and

(e) the need to act expeditiously; and

(f) the need to ensure that the Recovery Plan is consistent with other Recovery Plans.

...

[60] Subject to s 20, the Minister does not have a duty to consult about a Recovery Plan and nothing in s 32 or Schedule 1 of the RMA applies to the development or consideration of a Recovery Plan. However, s 20 requires a draft Recovery Plan to be publicly notified and that notification must invite members of the public to make written comments in the manner and by the date specified in the notice.

[61] Once a Recovery Plan has been approved by the Minister and notice of the issuing of the Plan has been given in the *Gazette* under s 21, it can be changed from time to time under s 22. From notification of a Recovery Plan in the *Gazette* every person exercising functions or powers under the RMA must not make a decision or recommendation that is inconsistent with the Recovery Plan in relation to matters listed in s 23(1). Councils must amend an RMA document relating to greater Christchurch if a Recovery Plan so directs: s 24.

(c) Provisions affecting Councils and others

[62] As already stated, this segment of the Act begins with s 27[16] which gives the Minister power by public notice to suspend, amend or revoke the whole or any part of an RMA document: s 27(1)(a). Under subs (2) the Minister can, subject to specified safeguards, suspend or cancel any resource consent by public notice.

Other provisions

[63] Section 48(1) empowers the Minister to direct any council to take or stop taking any action, or to make or not to make a decision. Except in limited respects there are no rights of appeal against a decision of the Minister acting under the Act: s 68. The Act expires five years after the date of its commencement: s 93(1).

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[16] The relevant part of that section is quoted at [1] above.

First ground of review – power not exercised for proper purposes

[64] The crux of this allegation is that the Minister used s 27 for unauthorised purposes.

Applicants' argument

[65] The Minister's ulterior and unauthorised purposes were:

> 74.1 The long term RMA policy objectives for the growth of greater Christchurch area promoted by Chapter 12A, and the protection of the Airport's commercial interests involved in Chapter 22, neither of which were earthquake recovery purposes as defined by s3;
>
> 74.2 The suggested certainty and stability indirectly achieved by terminating the RMA procedures for amending a Regional Policy Statement (including the appeals to the Environment Court). This was (i) only an incidental bi-product of the introduction of the chapters, (ii) was not a prescribed statutory purpose under s3, and (iii) was an objective directly contrary to the purpose of community participation in planning for earthquake recovery required by s3(b); and
>
> 74.3 The adoption of the UDS Partners' preferred version of PC1, rather than the official version adopted by Ecan after consideration of the report by the Independent Hearings Commissioners. That simply preferred the UDS Partners' litigation position, irrespective of any alleged earthquake related purposes suggested to exist through the need for long term planning; and
>
> 74.4 Conceding to the demands of CIAL[17] in return for their acceptance to the release of land at Kaiapoi to accommodate earthquake displaced residents.

Any one or more of these purposes rendered the decision to amend the RPS unlawful.

[66] A power granted for one purpose must be used for that purpose and not for some unauthorised or ulterior purpose: *Lumber Specialties Ltd v Hodgson;*[18] *Unison Networks Ltd v Commerce Commission.*[19] Mala fides does not have to be established

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[17] The airport company.
[18] *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC) at [58].
[19] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [50].

and it is no answer that the decision maker acted in the public interest, for the public good, or that the decision was justified on policy grounds.

[67] While in some situations a statute will permit a statutory power to be exercised for an ulterior purpose in addition to the authorised statutory purpose, this is not such a situation. Section 10 expressly excludes the pursuit of any purpose that is not directed at earthquake recovery and paragraphs (a) – (i) of s 3 promote measures directed *specifically* and *expeditiously* at earthquake recovery.

[68] When amending the RPS the Minister's primary or predominant purpose was not earthquake recovery. At best that purpose was subsumed within the Minister's primary purpose which was:

> ...to facilitate urban planning for and accommodation of population growth within the greater Christchurch region for the next 30 years (until 2041); to protect the Airport by a noise control corridor; and to impose the UDS Partners' preferred version of PC1 which they were seeking to advance by their litigation strategy before the Environment Court.

This is illustrated by the very nature of the measures that were introduced by the Minister and the reasoning in the decision papers.

[69] Chapter 12A makes reference to the Canterbury earthquakes in an entirely perfunctory way. Within the 31 page document there are only six passing references to the earthquakes, which indicates that earthquake recovery was at best only incidental to the Minister's primary purpose of planning for urban development and population growth over the next 30 years. Earthquake recovery measures were achieved by re-zoning within the district plans. No change to the RPS was required.

[70] It is evident from chapter 12A that earthquake recovery was simply an "add on". While 7250 properties in Christchurch City and Waimakariri District were red-zoned and relocation of householders was required, chapter 12A provides for the development of 47,225 residential properties within the designated greenfield areas over a period of time well beyond the life of the CER Act.

[71] Despite its title chapter 22 is unrelated to earthquake recovery. It gives effect to a compromise deal struck between the Minister, the UDS partners and the airport

company. The collateral purpose behind the chapter is the safe and efficient operation of the airport company. That purpose is not authorised.

[72] The Minister's decision papers include acknowledgments that the substance of PC1 goes well beyond the s 3 purposes of the Act. Even the justification advanced in the discussion paper – certainty or predictability – is not included in the list of purposes set out in s 3. It is merely a by-product of the imposition of the two chapters.

[73] Applying the "materiality" or "but for" test used in *Poananga v State Services Commission*,[20] the Minister would not have made his decision to introduce changes to the RPS *but for* the desire to:

(a) introduce the long term planning policies which chapter 12A implemented;

(b) protect the airport's position which chapter 22 implemented;

(c) create greater certainty by eliminating the community participation process for determining an RPS under the RMA;

(d) prefer the UDS partners' version of chapters 12A and 22 over the version officially adopted by the Regional Council.

What is claimed to be the legitimate purpose – certainty and predictability – is only achieved by furthering the unauthorised purposes.

[74] Those purposes also conflict with s 3(b) of the Act which provides for community participation in the planning of the recovery of affected communities. The Minister "circumvented all community participation when he implemented PC1 ostensibly in the interests of long term planning". Moreover, the process leading to the decision was conducted under the "strictest secrecy and confidence".

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[20] *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 393 - 394.

First respondent's argument

[75] Parliament conferred the powers in the CER Act in order to ensure "restoration and enhancement" of greater Christchurch which involves a forward looking exercise with a long term focus. Parliament intended the powers to be effective, and it would be wrong to read them narrowly as the applicants' submission seems to imply.

[76] Any suggestion that each decision taken by the Minister must advance all of the purposes in s 3 is wrong. Decisions under the Act are unlikely to advance all purposes and sometimes they need to be balanced. This was recognised by the Minister in the second reading debate. Section 3(b) itself refers to enabling community participation "without impeding a focused, timely, and expedited recovery". Thus Parliament contemplated that community participation might not always be possible, especially where such participation could delay a timely recovery.

[77] Section 27 allowed the Minister to amend RMA documents including regional policy statements. The Minister's role under s 27 stands alongside his role in relation to the Recovery Strategy and Recovery Plans under s 11 – 26. To the extent that there is any conflict the decision under s 27 will be ineffective.

[78] Section 10(1) simply declares the law as stated in *Padfield v Minister of Agriculture Fisheries and Food*[21] and later New Zealand cases that a discretion must not be used "to frustrate the policy and objects of the Act". There is no basis for reading s 10(1) as excluding additional purposes that do not prejudice the express statutory purposes. Purposes that are not within the statute are not necessarily "invalid" or "improper" (*Attorney-General v Ireland*[22]) and an additional purpose that is consistent with the statutory purposes is not excluded by s 10(1).

[79] When including chapter 22 in the RPS the Minister was acting in accordance with the purposes of the CER Act. His briefing in relation to the Kaiapoi noise

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[21] *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 (HL) at 1032 – 1033.
[22] *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA) at [42].

contour refers to relevant purposes of the CER Act. Although the noise contour was an important element of the Minister's decision, the driving factor was the need for new housing at Kaiapoi.

[80] Similarly he was acting within the purposes of the Act when he included chapter 12A and revoked PC1. The briefing to the Minister stated the purposes of the Act that were relevant to his decision and his affidavit confirms his view that providing a chapter in the RPS to deal with the development of greater Christchurch was consistent with the relevant purposes of the Act. He also explains the need to create sufficient opportunities for housing.

[81] Plainly the Minister's decisions were in accordance with the purposes of the Act. Those decisions:

(a) extended the urban limit to incorporate particular residential developments;

(b) reflected agreements reached in the course of the Environment Court hearing, and allowed for a planning framework that the councils could implement;

(c) also reflected community participation up to this point, PC1 having been subject to public submissions before the hearing commissioners and positions on it having been stated in the Environment Court.

Contrary to the applicants' argument, there are no acknowledgements in the briefing papers that the changes would be based on any improper purposes.

[82] A coherent planning framework was needed for earthquake recovery purposes. When providing that framework the Minister needed to keep long term matters in mind. He acted within the purposes of the Act.

Discussion

[83] Not long before the CER Act was passed the Supreme Court confirmed in *Unison*[23] that people exercising public power "must act within the scope of the authority conferred by Parliament and for the purposes for which those powers were conferred". Under those circumstances the reiteration of that philosophy in s 10(1) can only be seen as significant and worthy of special attention.

[84] Section 10(1) directs in strong terms that the Minister and Chief Executive of CERA:

> ...*must ensure* that when they each exercise...their powers...under this Act *they do so in accordance with the purposes of the Act*. (Emphasis added)

No doubt the inclusion of this provision reflects the extraordinarily wide and far reaching powers conferred by the Act. The Minister was, of course, obliged to observe the clear message that it conveyed. So is this Court when reviewing the Minister's decisions.

[85] The primary issue raised by this ground of review is whether the Minister's decisions concerning the RPS were "in accordance with" the purposes of the Act. Those words were interpreted in *Chan v Lower Hutt City Corporation*[24] as meaning in "harmony and conformity" with. I adopt that interpretation and now turn to the specific purposes contained in s 3.[25]

[86] While the focus of the purposes in the individual paragraphs differs, there is an unmistakable theme of earthquake recovery. The words "recover", "recovery", or "restore" appear in all of the paragraphs except for (e) and (h) and their absence from those paragraphs is explicable by the subject matter of those paragraphs. Presumably the Minister had the theme of earthquake recovery in mind when he commented on the second reading of the Bill "all of those powers must be exercised in the recovery process and cannot step outside of that".[26] In s 4 the word

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[23] *Unison Networks Ltd v Commerce Commission*, above n 19, at [50].
[24] *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75 at 82.
[25] That section is quoted at [49] above.
[26] See [48] above.

"recovery" is defined to include "restoration and enhancement". Obviously a decision does not have to satisfy each and every purpose listed in s 3, and in some cases a balancing of purposes might be required.[27]

[87] By its very nature earthquake recovery involves a forward looking exercise. Except to the extent that the Act expires after five years, the statutory purposes do not carry any particular time frame. The fact that a decision involves a long term perspective will not necessarily mean that the decision falls outside the purposes described in s 3. Indeed, s 11(3) describes the Recovery Strategy as "an overarching, long-term" strategy for the reconstruction, rebuilding, and recovery of greater Christchurch. But an Order in Council approving a Recovery Strategy is automatically revoked on expiry of the Act by s 93(2), which illustrates that the objective of the Act is to provide for earthquake recovery, as opposed to wider or longer term purposes.

[88] When the exercise of a public power revolves around a single purpose a Court reviewing the exercise of the power might be faced with a relatively straight forward decision about whether the decision was within the purposes for which it was conferred. But where, as here, there are mixed and overlapping purposes the Court is faced with a much more difficult task.

[89] The applicants and first respondent have approached this issue from different perspectives. Relying on *Poananga* the applicants contend that the decisions will be unlawful if any material reason behind the decisions falls outside the statutory purposes. On the applicant's analysis, that is the case here. On the other hand, the first respondent takes the less stringent approach, based on *Ireland*, that an additional purpose will only render the decision invalid if it thwarts or frustrates the policy of the Act. He contends that if any purposes were outside the Act (which is denied), they were purely incidental and did not affect the validity of his decisions.

[90] When deciding the approach that should be adopted in this case the following observations of the Supreme Court in *Unison* are relevant:

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[27] Community participation under paragraph (b), on the one hand, and a focused, timely, and expedited recovery under (d), on the other, offer an obvious example.

> [53] ...A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.[28]

The Court goes on to say that ascertaining the purpose for which a power is given is an exercise in statutory interpretation and in this area the Courts are concerned with identifying the *legal limits* of the power rather than assessing the *merits* of its exercise in any case.[29]

[91] Did the Minister's decisions involving the RPS step outside the statutory purposes or compromise the policy of the CER Act? When resolving that issue it is necessary to keep s 10(1) firmly in mind. That provision does not allow the Court much latitude. It indicates that, subject perhaps to de minimis, Parliament did not intend the Minister to pursue any purposes beyond those specified in the Act.

[92] On my analysis of the evidence, particularly the Minister's affidavit, the purposes behind the decision to amend the RPS and revoke PC1 came down to:

(a) freeing up land to enable residential development for those displaced by the earthquakes;

(b) implementing agreements that had resulted in draft orders before the Environment Court;

(c) providing certainty and predictability so that residential development could proceed without delay;

(d) enabling council officers to focus on recovery planning;

(e) bringing the PC1 appeals to an end;

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[28] Both *Poananga* and *Ireland* are relied on by the Supreme Court for that proposition.
[29] *Unison Networks Ltd v Commerce Commission*, above n 19, at [54].

(f) providing a specific chapter within the RPS (chapter 12A) to deal with the development of greater Christchurch, including the extension of the urban limits; and

(g) protecting the airport from "reverse sensitivity" claims by settling where the 50 dBA Ldn contour line is and its effects (chapter 22).

These matters are not in any particular order. Obviously some of them are interlinked and overlap.

[93] There can be little argument that the purposes in (a) – (d) are within the purposes of the Act. To the extent that it freed up council staff for earthquake recovery purposes, I also accept for the purposes of this ground of review that (e) comes within the statutory purposes. But it is difficult to see how, even on the most generous interpretation of the statutory purposes, (f) and (g) could come within those purposes, especially when s 27 is the vehicle.

[94] The purpose of an RPS under s 59 of the RMA is to provide:

> ...an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

It is at the apex of the RMA hierarchy of instruments and its impact can be far reaching for subsidiary planning instruments, not to mention the community generally.

[95] Clearly chapter 12A was inserted into the RPS to achieve long term objectives and policies relating to the location, timing, and form of urban growth through to 2041. While it is true that s 79 of the RMA requires an RPS to be reviewed after 10 years, even that period is twice the life of the CER Act. On that basis alone it is extremely difficult to reconcile chapter 12A with the earthquake recovery policy of the Act, let alone the specific purposes stated in s 3.

[96] It is no answer that the Minister might in the future decide to review the chapter or that it might be overtaken by the Recovery Strategy. For the purposes of

this proceeding the chapter needs to be considered as it stands, and in light of its history. As long as chapter 12A stands there can be no privately requested plan changes that do not align with it: clause 21(3) of Schedule 1 to the RMA. So the restrictions on land development imposed by the chapter could conceivably apply for the next thirty years.

[97] Closer examination of the chapter reveals that at best earthquake recovery is an incidental purpose within a very detailed document. The stated purpose of chapter 12A is to provide for development in a way which achieves quality outcomes and takes a sustainable development approach to managing growth. The chapter sets out "the intended sub regional land use distribution for Greater Christchurch for the planning period, particularly the areas available for urban development". [30] The planning period is until 2041.

[98] Importantly for present purposes, the introduction to chapter 12A then continues:

> The provisions of Chapter 12A have been reconsidered in the light of the Canterbury earthquakes and, *with some minor amendments and noting the impacts of the earthquakes,* are an appropriate and relevant policy approach for both the short term and long term development of Greater Christchurch. Since the earthquakes there is a heightened awareness of the risks of natural hazards and the need to avoid or mitigate such risks. The provisions of Chapter 12A are in accord with such an approach. (Emphasis added)

This relatively dismissive reference to the impact of the earthquakes is maintained in the remainder of the chapter where the references to earthquake recovery are isolated and cosmetic.

[99] Mr Edmonds, a planning consultant, has sworn an affidavit on behalf of the applicants. He compares chapter 12A with PC1 after the Regional Council's decision. Amongst other things he notes that there has been no attempt to alter the growth patterns to account for the earthquakes. He also confirms that changes to the location of urban limits included in the Regional Council's decision have been deleted, as have the Special Treatment Areas. Thus, one of the effects of the chapter

[30] Introduction to Chapter 12A at p1.

is to neutralise the recommendations of the independent commissioners that were adopted in the Regional Council's decision.

[100] When chapter 12A is read as a whole it is impossible to see how it serves any significant earthquake recovery purpose. To the extent that it addresses urban limits it is addressing issues that existed long before the earthquakes and it provides solutions that are likely to endure well beyond the expiry of the CER Act. It also has a geographic impact well beyond that attributable to earthquakes. In this respect I note that the statistics relied on by the applicants at [70] above have not been contradicted. Equally importantly, chapter 12A was not necessary to achieve or give effect to the zoning changes that were made by the Minister to provide housing for people displaced by the earthquakes. For reasons that I will give later,[31] I am satisfied that the changes to the district plans were capable of standing on their own feet.

[101] Similar considerations apply to chapter 22. Again the RPS is used as the vehicle to resolve an issue that existed long before the earthquakes. The noise contour had been considered by the Environment Court in *Robinsons Bay Trust v Christchurch City Council*[32] and again in *National Investment Trust v Christchurch City Council.*[33] Moreover, the long term solution implemented by the chapter is obviously intended to outlive the CER Act. The evidence does not suggest that the actual operation of the airport has significantly altered, or will significantly alter, as a result of the earthquakes, at least in a way that directly impacts upon the 50 dBA Ldn contour. The inescapable conclusion is that chapter 22 was not driven in any significant sense by earthquake recovery objectives.

[102] I do not accept that chapter 22 can be justified on the basis that the rezoning of land at Kaiapoi within the 50 dBA Ldn corridor will open the floodgates to further incursions into the corridor. As I will explain in more detail later,[34] the amendment to the Waimakariri District plan reflected a situation peculiar to Kaiapoi and

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[31] At [138] – [148].
[32] *Robinsons Bay Trust v Christchurch City Council* EnvC Christchurch C60/2004, 13 May 2004.
[33] *National Investment Trust v Christchurch City Council* EnvC Christchurch C41/2005, 30 March 2005.
[34] Also at [138] – [148].

rezoning through the district plan was effective as a discrete standalone measure without the backing of chapter 22.

[103] All of this means that insertion of chapters 12A and 22 into the RPS was not in accordance with the purposes of the CER Act as required by s 10(1). Rather than serving earthquake recovery purposes, the underlying purpose of these two chapters was to resolve longstanding issues by setting long-term planning strategies. Given that the revocation of PC1 is inextricably linked to those chapters, that decision is also tainted by the same illegality.

[104] Having said that, I accept that the Minister acted in good faith. Nevertheless, acting for an improper purpose in an administrative law sense can arise as the result of an *unintentional* misapplication of statutory power: *Aon New Zealand Limited v Attorney-General.*[35] Finally, as observed earlier with reference to *Unison*,[36] it is not for this Court to go into the merits of the Minister's decisions. It is enough that he stepped outside the legal limits of his power.

Conclusion

[105] The first ground of review has been made out.

Second ground of review – misapplication of statutory power

[106] The applicants contend that instead of using s 27 to amend the RPS the Minister should have used the Recovery Strategy or a Recovery Plan, thereby allowing public participation.

Applicants' argument

[107] Specific and separate provision for long term planning for earthquake recovery is available under the Act by means of the Recovery Strategy or a Recovery

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[35] *Aon New Zealand Limited v Attorney-General* [2008] NZCA 524 at [55].
[36] At [90] above.

Plan. Failure to use one of those processes on this occasion has given rise to a reviewable error of law: *Poananga.*

[108] By using s 27 the Minister has avoided the safeguards built into the Act. These include review by the Panel and the requirement for the Minister to have regard to its recommendations. Having circumvented these controls in favour of an uncontrolled discretion, the Minister has misapplied the statutory power conferred on him.

[109] Section 27 cannot be used as an alternative means of establishing and implementing the long term planning objectives contemplated by ss 11 – 26. The approach adopted by the Minister is even more clearly unlawful because the Recovery Strategy that has been released states that the development of long term planning is not possible at this time.

First respondent's argument

[110] It cannot be disputed that the words of s 27 empowered the Minister to amend the RPS. The Minister was responding to "immediate needs" and his s 27 decisions are likely to be overtaken in due course by the Recovery Strategy/Plans. This is consistent with the briefing he received.

[111] The applicants' argument is not supported by the CER Act which provides alternative methods of achieving the same objective. An argument similar to that advanced by the applicants was rejected in *Pub Charity v Attorney-General*[37] and the legislation underpinning *Poananga*, upon which the applicants rely, was quite different. Here the express wording of s 27 contemplates far reaching decisions such as the suspension or revocation of RPS and the section should not be read down.

[112] Apart from consistency with the words of the Act, this interpretation best serves the purposes of the Act. If required the Minister can act quickly under s 27 with public participation still being possible through the Recovery Strategy/Plan

[37] *Pub Charity v Attorney-General* CA 103/4, 7 December 2004 at [101].

process. Section 27 does not carry any requirement for public participation so that the Minister can act under it without encountering delays.

Discussion

[113] The primary difference between the applicants and the first respondent is the role they ascribe to s 27. Whereas the applicants consider that the section has the limited role of supporting the Recovery Strategy and Recovery Plans, as well as providing for situations where quick and discrete action is required, the first respondent believes that it has a much wider and independent role which effectively stands alongside the Recovery Strategy and Recovery Plans.

[114] Taken in isolation s 27 certainly seems to confer very wide powers in relation to RMA documents, including RPS's. But once it is construed in the wider context of the Act, as it must be, it becomes apparent that its role is not as wide as first impressions might suggest. In my view it does not provide an alternative and independent mechanism in situations where the Recovery Strategy or a Recovery Plan should be used. The policy of the Act is for long term planning strategies which are likely to have far reaching implications to be developed through the public process of the Recovery Strategy or a Recovery Plan, except where quick and discrete action is required for earthquake recovery purposes.

[115] To a large extent this reflects the statutory safeguards that accompany the development of the Recovery Strategy and Recovery Plans. In the case of a Recovery Strategy the following safeguards have been included by Parliament:

(a) consultation with the local authorities and others listed in s 11(4);

(b) public notification inviting members of the public to make written comments: s 13;

(c) one or more public hearings: s 12(1);

(d) review by the Panel,[38] with the Minister being required to have regard to its recommendations: s 73(2) and 74(1);

(e) approval by way of Order in Council: s 11(2).

No doubt these safeguards reflect, first, the potentially far reaching consequences of the Recovery Strategy and, secondly, an underlying philosophy of community participation whenever possible.

[116] In many respects an RPS is similar to a Recovery Strategy. They are both at the apex of the hierarchy of statutory instruments. Both provide overarching long term Strategies. They are created or amended by a process involving public participation. And, very importantly, they are likely to have far reaching consequences for the community. All of this seems to be acknowledged by the Minister when he states at paragraph 41[39] of his affidavit that when he made his decisions "it was apparent there was potentially considerable overlap between PC1 and the draft Recovery Strategy".

[117] Assuming for the moment that long term strategies for the growth of greater Christchurch and the protection of the airport (in the form of chapters 12A and 22) were required for earthquake recovery purposes, those strategies would come within the scope of the Recovery Strategy described in s 11(3).[40] If that is the case development of those chapters should have included the safeguards specified by Parliament.

[118] It could not have been intended by Parliament that those safeguards could be side-stepped by using s 27(1) (which does not have corresponding safeguards). This is especially so where the effect of the Minister's decision was to put an end to litigation that was before the Environment Court. To the extent that quick action was required this could be (and was) accomplished by rezoning land via the relevant district plan. No compelling earthquake recovery reason has been demonstrated for

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[38] Under s 72(1) the Panel consists of four persons with relevant expertise or appropriate skills. One of those people must be a former or retired Judge of the High Court or a lawyer.
[39] See [44] above.
[40] That provision is quoted at [53] above.

excluding community participation when making these far reaching changes to the RPS.

[119] An alternative scenario would be for chapters 12A and 22 to be developed by way of a Recovery Plan. Again the Minister's affidavit seems to indicate (at 41[41]) that he was aware of this possibility:

> Even if the Recovery Strategy was not going to deal with the projected growth, residential density and provision of infrastructure, the proposed Recovery Plans were another vehicle which could do that.

Development of the chapters by way of a Recovery Plan could have preceded the Recovery Strategy: s 19(2) of the CER Act. However, it seems that the Minister decided not to use the Recovery Plan process because of concerns about the implications of the Environment Court appeals. But that could not justify a departure from the statutory scheme.

[120] Had the Minister used the Recovery Plan process there would have been the following safeguards:

(a) notification in the *Gazette*: s 16(4);

(b) the Minister must have regard to the matters listed in s 19(2) when determining how the Recovery Plan was to be developed, including any requirements as to consultation or public hearings;

(c) public notification inviting members of the public to make written comments: s 20(2) and (3);

(d) the Minister must give reasons when approving a recovery plan: s 21(3);

(e) after a Recovery Plan has been approved there is notice in the *Gazette* and a copy of the plan is presented to the House of Representatives: s 21(4).

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[41] See [44] above.

Given the wide reach of the amendments to the RPS arising from the Minister's decisions, (b) is particularly significant. Under s 19(2)(a) and (b)[42] the Minister must have regard to (amongst other things) the nature *and scope* of the Recovery Plan as well as *the needs of people affected by it.*

[121] Those matters alone provide strong support for the applicants' contention that the Minister misused his statutory powers by using s 27 to amend the RPS and revoke PC1. However, before leaving this ground of review it is appropriate to say something about the first respondent's argument that s 27 offered an alternative method of achieving the Minister's objective.

[122] In my view the organisation and format of the CER Act counts against that proposition. Section 8 provides:

> **8 Functions of Minister**
>
> The Minister has the following functions for the purpose of giving effect to this Act:
>
> (a) establishing a community forum in accordance with section 6 and a cross-party parliamentary forum in accordance with section 7:
>
> (b) recommending for approval a Recovery Strategy for greater Christchurch under section 11:
>
> (c) reviewing the Recovery Strategy and approving any changes to it under section 14:
>
> (d) directing the development of, and matters to be covered by, Recovery Plans for all or part of greater Christchurch under section 16:
>
> (e) approving Recovery Plans and the review and changes to them under sections 21 and 22:
>
> (f) suspending, amending, or revoking the whole or parts of RMA documents, resource consents, and other instruments applying in greater Christchurch in accordance with section 27:
>
> (g) giving directions to councils or council organisations under section 48:

[42] This section is quoted at [59] above.

(h) directing a council to carry out certain functions of the council within a specified timeframe under section 49:

(i) issuing a call-in notice under section 50 and assuming certain responsibilities, duties, or powers of the council if a timeframe under that section is not complied with:

(j) compulsorily acquiring land in accordance with subpart 4:

(k) determining compensation in accordance with subpart 5:

(l) appointing a Canterbury Earthquake Recovery Review Panel under, and for the purposes outlined in, subpart 7 regarding development of delegated legislation:

(m) reporting to the House of Representatives on the operation of the Act in accordance with sections 88 and 92:

(n) any other functions provided in this Act.

These functions appear to reflect a broad hierarchy both in terms of time and subject matter which is consistent with the hierarchy in Subpart 3 of the Act. Within that hierarchy the powers under s 27(1) are more limited in scope than those relating to a Recovery Strategy or a Recovery Plan. That is why s 27(1) is not accompanied by similar safeguards.

[123] The first respondent relies on the *Pub Charity* case in which the Court of Appeal said:[43]

> [101] ...Nor do we believe that there is any general principle that a regulation-making power must be used in preference to an alternative statutory power where an Act provides for alternative methods of achieving the same objective. The fact that there are certain constitutional safeguards which follow from the making of Regulations but not from the use of the s 8(3) process does not alter that view.

However, in that case the Court was commenting about *alternative methods of achieving the same objective*. As already indicated, I do not accept that s 27(1) provides an alternative method of taking steps that were intended by Parliament to be taken under ss 11 – 26.

[124] Contrary to the submissions on behalf of the first respondent, I find the Court of Appeal's decision in *Poananga* very relevant. Ms Poananga received a letter from

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[43] *Pub Charity v Attorney-General,* above n 37.

the State Services Commission advising her that the Secretary of Foreign Affairs had informed the Commission that her personal views had been in sharp conflict with the policy of the Ministry and the situation had now been reached where her continued employment with the Ministry untenable. The letter gave Ms Poananga notice that she had been transferred under s 37 of the State Services Act 1962 from the Ministry to another Department at the same grading and salary. Section 37 gave the Commission the administrative power to transfer employees from one Department to another.

[125] When Ms Poananga's application for judicial review failed in the High Court she successfully appealed to the Court of Appeal. That Court held that the Commission could not transfer her administratively under s 37 contrary to her will when the real reason for the action was that she had been guilty of conduct constituting in substance a disciplinary offence. In that situation Ms Poananga was entitled to the benefit of the disciplinary procedures provided by ss 57 and 58 of the State Services Act to reply to the charges and be heard, and to exercise the right of appeal given by s 64 of that Act. It was only after those processes had been completed that she could be transferred against her will.

[126] On my analysis there are significant parallels between *Poananga* and the instant case:

(a) taken at face value the wording of the section that was used (s 37 of the State Services Act/s 27 of the CER Act) appeared to be wide enough to authorise the decisions under challenge;

(b) however, once the real reason for the decisions was taken into account (misconduct of Ms Poananga/resolving longstanding disputes by setting long term planning strategies and terminating the appeals to the Environment Court) it became clear that Parliament intended the alternative process prescribed by the statute to be followed;

(c) failure to follow the alternative process deprived the applicants of rights conferred by the statute.

In *Poananga* the Court of Appeal effectively found that there was a reviewable error because statutory scheme had been circumvented (although it declined to grant relief). Leaving aside the issue of relief, I do not believe that there is any basis on which that decision can be distinguished and I am bound by it.

Conclusion

[127] The second ground of review also succeeds.

Third ground of review – exercise of power not "necessary"

[128] This ground revolves around s 10(2) which provides:

> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.

Applicants' argument

[129] The decision paper which persuaded the Minister to exercise his s 27 power failed to direct his attention to the question whether it was *necessary* to exercise the power. This is a prerequisite under s 10(2) which contains two requirements: first, the Minister must, as a *subjective* requirement, consider it necessary to exercise the power in question; secondly, the Minister's view that it is so necessary must, as an *objective* requirement, be a reasonable one.

[130] In this case the Minister has not formed any opinion as to the need to exercise the power and has failed both the subjective and objective requirements of the legislation. He cannot repair the situation by stating in his affidavit that he considered his exercise of the powers conferred by the Act was necessary.

[131] Under s 10(2) the exercise of the power must be essential to achieve the statutory purpose, which inevitably involves options. If the purposes of the Act can be achieved without the exercise of the power proposed, then it is not necessary for the power to be exercised. In this case a more discrete exercise of the s 27 power

could have adequately responded to the need for further residential land to accommodate those displaced by the earthquakes.

[132] The need for certainty and predictability is no answer because it is not a stated purpose in s 3. Moreover, it is only achieved by overriding the community participation purpose, and then as a by-product.

First respondents' argument

[133] As the Minister deposed in his affidavit, he considered that the exercise of his powers under s 27 was necessary in each case. There were reasonable grounds for his view:

(a) need for people living in the residential red zone to be able to sell to the Crown and move on;

(b) need to make more land available for residential development which was pressing because of residential red zone decisions;

(c) importance of the airport operating without constraints such as curfews, so the need for the 50 dBA Ldn noise contour;

(d) absence of countervailing pressure on space for development and housing;

(e) need for people to know what activities and what development was allowed to take place near the airport;

(f) uncertainty that the present position of PC1 was causing developers and the local councils;

(g) delay caused by the Environment Court hearings and diversion of council officers from recovery planning;

(h) prospect of significant numbers of people not being able to find appropriate accommodation, and the risk of rampant land inflation;

(i) other powers available under the CER Act, the Recovery Strategy and Recovery Plans, would not be available as quickly as a decision under s 27.

[134] The timing of chapter 22 was driven by the need to find land in Kaiapoi to accommodate people living in the residential red zone. Chapter 12A reflected a need for developers and councils to have certainty. And PC1 needed to be revoked because it was causing confusion and would have impeded development for earthquake recovery purposes.

Discussion

[135] Like subs (1), subs (2) of s 10 is intended to constrain those exercising powers under the CER Act. I accept that it involves both the subjective and objective elements described by counsel for the applicants. However, contrary to their submission, I am prepared to accept that the Minister was subjectively satisfied that it was reasonably necessary to insert chapters 12A and 22 into the RPS and to revoke PC1. The only issue is whether in terms of s 10(2) those decisions were also reasonably necessary in an objective sense.

[136] Of course the Minister had to make his decisions in light of the circumstances prevailing at the time. When reviewing his decision the Court should proceed on a similar basis. Having said that, I acknowledge that the Court probably has the advantage of significantly more information than was available to the Minister. However, that is not unusual in a judicial review situation.

[137] There are two underlying questions: first, whether in all the circumstances it was reasonably necessary in terms of s 10(2) for the Minister to go beyond the amendments to the district plans; secondly, if so, whether it was reasonably necessary, again in terms of s 10(2), to amend the RPS in the detail, and with the consequences, that occurred in this case.

[138] A good deal of information is before the Court about the amendments that were made to the Christchurch City and Waimakariri District plans by the Minister. As already noted, the primary effect of these amendments was to rezone land at specific locations to provide for residential (and some business) development for earthquake recovery purposes. The applicants do not take issue with any of these amendments, and I accept that they were properly made under s 27.

[139] The amendments to the Christchurch City plan created Living G zones. This gave rise to what were effectively comprehensive and stand alone packages of objectives, policies and rules providing for a range of housing at Halswell and Prestons Road. Subject to the usual controls, residential activities were permitted.

[140] The Waimakariri District plan was also amended by way of a comprehensive set of objectives, policies and rules providing for residential development. Again, subject to the usual controls, residential development was a permitted activity. The primary difference between the amendments to this plan and those relating to the Christchurch City plan was that the new zoning in Kaiapoi was within the 50 dBA Ldn contour.

[141] This intrusion into the noise contour at Kaiapoi was accompanied by a detailed explanation of the relevant policy in the District plan.

> For these defined areas of Kaiapoi, under the 50 dBA Ldn aircraft noise contour consideration is made for the provision of residential development, having regard for the form and function of Kaiapoi and to offset the displacement of households within the Kaiapoi Residential Red Zone which were already within the 50 dBA Ldn contour and which were displaced as a consequence of the 2010/2011 Canterbury earthquakes. It also provides, as part of greenfields residential development, for Kaiapoi's long term projected growth. Such development provides for the contiguous and consolidated urban development of Kaiapoi. In recognition of the potential adverse effects of aircraft noise over Kaiapoi in the future, information relating to the 50 dBA Ldn aircraft noise contour and the potential for increased aircraft noise will be placed on all Land Information Memoranda for properties within the 50 dBA Ldn aircraft noise contour for Christchurch International Airport.

There were also associated amendments to the district plan relating to the airport noise contour.

[142] One of the explanations for inserting chapter 22 into the RPS is that unless the location and effect of the 50 dBA Ldn contour was made clear, developers would attempt to pursue developments at other locations within the contour on the coat tails of the Kaiapoi incursion. In other words, the territorial authorities would be flooded with requests for private plan changes. However, any possibility of that happening needs to be weighed against the detailed provisions in the Waimakariri district plan which make it clear that the circumstances giving rise to the incursion in Kaiapoi were unique.

[143] Assuming, however, that some added protection was needed in the RPS, a discrete amendment to that instrument could have achieved the desired result. For example, it could have been amended to make it clear that the intrusion into the corridor at Kaiapoi was an earthquake recovery measure reflecting the unique situation at Kaiapoi and that it should not be interpreted as a precedent, or something to that effect. Such an approach would have left the Environment Court to finally resolve the wider noise contour issue in due course. In my view chapter 22 went beyond what was reasonably necessary in terms of s 10(2).

[144] Similar considerations apply to chapter 12A. If it was necessary for earthquake recovery purposes to rezone the lands involved in the settlements that had not been accepted by the Environment Court, the Minister could have amended the relevant district plan/s to achieve the required zoning. But he went much further by introducing comprehensive provisions for the location, timing and method of expanding greater Christchurch over the next 30 years. It is said that this step was necessary to avoid earthquake recovery being hindered by the uncertainty arising from PC1. This is based on the RMA requirement for local authorities/consent authorities to "have regard to" a proposed regional policy statement when considering applications for plan changes (s 74 (2)) or resource consents (s 104(1)).

[145] That argument is not convincing. By themselves the Minister's amendments to the district plans were comprehensive and capable of standing on their own feet. To the extent that further rezoning was required for earthquake recovery purposes, that objective could also be achieved under s 27. If that was not enough to achieve the desired certainty and predictability, the RPS could have been amended along the

lines that nothing in the RPS was to be applied or interpreted in a manner that impeded the urban development of lands designated for earthquake recovery. And if there were any residual issues in relation to particular developments, the Minister could resort to s 48.

[146] It follows that chapter 12A also went too far. In terms of s 10(2) it was not reasonably necessary for earthquake recovery purposes.

[147] Finally, there is the revocation of PC1. There appear to have been two interlinked objectives driving the revocation. The first was to remove the concern of the UDS partners that PC1 was giving rise to uncertainty and that this situation would remain until the appeals to the Environment Court were resolved. The second was to overcome the impact on Council officers of the Environment Court's refusal to adjourn the appeals.

[148] As to the need to remove uncertainty, the short answer is that this could have been achieved by the discrete amendments to the RPS mentioned at [143] and [145] above. Turning to the refusal of the Environment Court to grant an adjournment, it is important to keep in mind that a judicial review application was already before this Court. If that application succeeded the staffing problem facing the Councils would probably have been resolved. If not, any further breathing space required for earthquake recovery purposes could have been achieved by a further suspension of PC1. No doubt it was for those reasons the briefing papers recommended that the Minister suspend PC1 "and see how the Court proceedings play out".

[149] Instead of taking that path the Minister revoked PC1 and thereby permanently deprived the applicants of the ability to have their appeals determined by the Environment Court (as discussed under the next ground of review). I am satisfied that in all the circumstances this step was not reasonably necessary in terms of s 10(2).

Conclusion

[150] This ground of appeal has also been made out.

Fourth ground of review – access to the Courts

[151] It is alleged that the Minister's exercise of power was fundamentally flawed because it had the effect of denying the applicants access to the Courts.

Applicants' argument

[152] The Minister's decision determined the appeals lodged in the Environment Court by the UDS partners in their favour and extinguished the applicants' appeals before that Court, as well as the possibility of any further appeals. This amounts to political interference in the administration of justice. Section 27 does not expressly confer such powers and those powers cannot arise by implication.

[153] The right of access to the Courts is deeply embedded in the common law and can be traced back to Magna Carta. It can be regarded as a constitutional right. The Courts have repeatedly affirmed that access to the Courts is an inviolable right which cannot be abrogated by implication: *R & W Paul Ltd v The Wheat Commission*[44] and *Chester v Bateson*[45] (which, like the present case, involved emergency legislation). Those cases have been followed in New Zealand.

[154] Modern expression of the underlying principle is found in Lord Hoffman's "principle of legality" that while Parliament can legislate contrary to human rights, if it does so it must squarely confront what it is doing and accept the political cost: *R v Secretary of State for the Home Department: Ex parte Simms.*[46] That principle has been applied in numerous decisions of the New Zealand Courts.

[155] This case is indistinguishable from *R v Lord Chancellor: Ex parte Witham.*[47] While there were other options available to the Minister he chose the option that extinguished the applicants' appeals to the Environment Court. This was despite the warning in briefing papers about the possibility of judicial review. The affidavit of the Minister fails to address and explain his stance.

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[44] *R & W Paul Ltd v The Wheat Commission* [1937] AC 139 (HL).
[45] *Chester v Bateson* [1920] 1 KB 829.
[46] *R v Secretary of State for the Home Department: Ex parte Simms* [2000] 2 AC 115 (HL) at 131.
[47] *R v Lord Chancellor: Ex parte Witham* [1998] QB 575.

[156] Had Parliament wished the Minister to exercise the extraordinary power of ousting the jurisdiction of the Courts under the CER Act it would have expressly said so. This happened when Parliament enacted the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. In that case Parliament expressly removed the jurisdiction of the Environment Court in relation to the Hurunui Report.

First respondent's argument

[157] The applicants' submissions overlook the statutory context of both the CER Act and the RMA. In any event, access to the Courts remains available to the applicants, as is evidenced by this application for judicial review.

[158] As to the statutory context, the hearing of appeals against a Regional Council's decision on an RPS is only one step in the development of the final document. Parliament cannot have intended that the power to amend or revoke an RMA document under s 27 would be available before appeals were filed and after a proposed change became operative, but not during the intervening period. It would make more sense to exclude amendment or revocation of an operative RPS which had been confirmed by the Environment Court.

[159] Withdrawal of PC1 by the Regional Council would have produced the same result. It would be illogical if Parliament was not able to confer the same power on the Minister.

[160] The Environment Court was not adjudicating on private rights. It is necessary to distinguish between decisions that affect rights (or in this case, expectations, if that) and those that impede access to the Courts. In this case the applicants remain able to have recourse to the Environment Court, but the thing that their appeals challenged (PC1) no longer exists. In this respect the situation is analogous to *Cooper v Attorney-General.*[48] Access to the Courts is also available in the form of judicial review. Thus the Minister's decision did not prevent any right of access to the Courts.

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[48] *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC).

[161] For the second respondents Mr Ormsby advanced supplementary submissions concerning the cases relied on by the applicant. He submitted that they could be distinguished on the basis that they involved subordinate legislation.

Discussion

[162] For present purposes it does not matter whether the right of access to the Courts is best described as a common law right or a constitutional right. Either way, it is deeply embedded in the law of this country. I do not understand the first respondent to argue otherwise.

[163] Standing alongside that principle is the "principle of legality" which Lord Hoffman described in *Ex parte Simms*:[49]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights...The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Numerous cases were cited by Dr Joseph to demonstrate that this principle has been adopted in New Zealand, and I accept that they demonstrate that point.[50]

[164] Two questions now need to be answered: whether the applicants have been deprived of access to the Courts by the revocation of PC1; and, if so, whether the CER Act authorised the Minister to take that step.

[165] As to the first question, I am satisfied that the revocation of PC1 deprived the applicants of access to the Environment Court (and also the possibility of pursuing

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[49] *Secretary of State for the Home Department: Ex parte Simms,* above n 46, at 131.

[50] The cases cited by Dr Joseph included: *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [27]; *R v Gwaze* [2010] 1 NZLR 646 (CA) at [145]; *R v Pora* [2001] 2 NZLR 37 (CA) at [53]; *Chief Executive of Department of Labour v Yadegary* [2009] 2 NZLR (CA) 495 at [35]; *Air New Zealand Limited v Wellington International Airport Limited* [2009] NZCA 259 at [152]; *Minister of Conservation v Maori Land Court* [2009] 3 NZLR 465 (CA) at [116].

any appeals against that Court's decision). This conclusion reflects a number of matters.

[166] First, in its supervisory role the High Court must diligently protect fundamental rights including the right of access to the Courts, especially where, as here, that right has been specifically conferred by Parliament (under the RMA). When considering whether the applicants have been deprived of that right the Court needs to look at the *substance* of what has happened. In this case the only tenable conclusion is that the revocation of PC1 had the direct consequence of removing the applicants' access to the Environment Court, which is hardly surprising given that that seems to have been the underlying purpose of the revocation.

[167] Secondly, I do not accept that conclusion is called into question by *Cooper* in which Baragwanath J stated:[51]

> ...the true purpose and effect of [Parliament's] amending legislation was not to deprive parties of access to the Court to secure enforcement of legal rights but rather to remove the rights themselves.

In that case Baragwanath J was addressing a situation where an amendment to the fisheries quota management legislation had the effect of reversing a Court of Appeal decision (and some other decisions) that had previously allowed fishermen in the same situation as the applicants in *Cooper* to apply for quota. Having interpreted the amending Act, the Judge held that it had been effective in achieving its purpose, namely, to keep out further entrants into the scheme who were not permit holders. In other words, the situation before Baragwanath J was quite different to that now before the Court.

[168] Thirdly, any distinction between depriving parties of access to the Courts and removing underlying rights is entirely academic in this case. This is because it is impossible to split the revocation of PC1 from its consequence, namely, depriving the applicants of access to the Environment Court so that they could complete the litigation that was already in progress.

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[51] *Cooper v Attorney-General,* above n 48, at 483.

[169] Fourthly, I am satisfied that the revocation deprived the applicants of a *private* right. In a very real sense RMA processes are capable of, and do, determine the private rights of individuals arising from their occupation, ownership, or other interest in land, water or air. In this case it is beyond argument that the applicants' private use of land was in issue. Revocation of PC1 terminated their ability to have that issue determined by the Environment Court and, if necessary, to pursue further appeals.

[170] Finally, it is unrealistic to suggest that the applicant's right of access to the Courts has survived by virtue of the judicial review now being pursued. Whereas the appeals to the Environment Court were directed at resolving *substantive* issues, this application for judicial review is confined to the *processes* that were followed (there is no suggestion of *Wednesbury* unreasonableness).

[171] Having reached the conclusion that the applicants were deprived of their right of access to the Courts, I now turn to the second question: whether this was authorised by s 27 or, indeed, by any other provision in the CER Act.

[172] Clearly s 27 does not *expressly* authorise the Minister to suspend, amend or revoke RMA documents for the purpose of removing the jurisdiction of the Environment Court. The general words in the section fall well short of that. So it is necessary to look at the other provisions of the Act to see whether they provide any compelling indications that Parliament intended to confer this power on the Minister. Having undertaken that exercise I am satisfied that Parliament did not intend to confer such a power. Indeed, the indications are to the contrary.

[173] Section 68, which addresses appeal rights, includes the following subsections:

> (4) Despite anything to the contrary in the Resource Management Act 1991, while this Act is in force there is no right of appeal under the Resource Management Act 1991 against a decision of a type described in section 69(1)(c) or (d), except as provided in sections 69 and 70.[52]

[52] Section 69(1)(c) concerns activities that are specified in a Recovery Plan as being subject to s 69 and s 69(1)(d) refers to decisions that have been called in by the Minister.

> (5) To avoid doubt, subsection (4) does not apply to or affect appeals or objections commenced under that Act before the commencement of this Act.

It is clear from subsection (5) that Parliament specifically turned its attention to the existing appeals to the Environment Court and decided not to intervene or give the Minister the necessary power.

[174] A further indication of Parliament's intention arises from the Christchurch City Council's submission to the Local Government and Environment Committee (which was included in the appendices to the Committee's report to the House):

> A second issue relates to the role of the Environment Court to consider and determine RMA appeals etc which are currently before it, but which might be affected by a Ministerial direction under the Act. For example, the Minister could exercise powers which affect an RMA document which is currently subject to appeals. If that is the case, while it is probably implicit that the Environment Court has no further jurisdiction to consider and determine the relevant appeal, it would probably be sensible to remove the Court's jurisdiction to consider such appeals...

Even though the very issue that has arisen in this proceeding was brought to the attention of the House, it elected not to remove the Environment Court's jurisdiction, or to authorise the Minister to do so.

[175] It is also significant that the previous year Parliament expressly removed the jurisdiction of the Environment Court when enacting the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act. Had the legislature intended the Minister to have the power to take similar action under the CER Act it might be expected that it would have done so in an equally forthright and clear fashion.

[176] I do not accept Mr McCarthy's proposition that this interpretation means that the Minister's power to amend or revoke an RMA document under s 27 would not be available while there are live appeals to the Environment Court that might be affected by the amendment. Carried to its logical extreme that would mean the Minister could not rezone any land in greater Christchurch because it is all subject to the PC1 appeals. Obviously that could not have been intended.

[177] The explanation is that there are important differences between the revocation of PC1 and Mr McCarthy's proposition. Whereas the purpose of revoking PC1 was to bring *all* the Environment Court appeals concerning PC1 to an end, any impact on those proceedings arising from the discrete use by the Minister of his powers under s 27 (for example, by rezoning) would be restricted to the particular land involved. Moreover, the effect on any appeals before the Environment Court would be an incidental consequence which would have been within the contemplation of Parliament.

[178] Another suggested anomaly is that the same outcome could have been achieved by the Regional Council withdrawing PC1 and thereby putting an end to the litigation. Again there is an important difference. Withdrawal of a proposed policy statement is explicitly authorised by Parliament under clause 8D of Schedule 1 of the RMA. When enacting that provision Parliament can be taken to have been aware of the consequences. On the other hand, there is no indication in the CER Act that Parliament intended to confer a similar power on the Minister.

[179] I agree with the applicants that there are strong parallels between this case and *Ex parte Witham*. In that case the Lord Chancellor increased court fees in purported exercise of his statutory powers. Although that step was within the scope of the statutory powers it was held to have the effect of barring many persons from seeking justice before the Courts. Laws J concluded:[53]

> Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door. That has not been done in this case.

The other member of the Court, Rose LJ, agreed. He considered that there was nothing in the section or elsewhere to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees that totally precluded the poor from having access to the courts. Rose LJ considered that clear legislation would have been necessary to confer such a power.[54]

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[53] *R v Lord Chancellor: Ex parte Witham,* above n 47 at 586.
[54] Ibid.

[180] Like the legislation in *Ex parte Witham*, when s 27 is taken at face value it appears to confer the power to revoke PC1. But once the consequences of exercising the power are taken into account it becomes apparent that the Minister has taken away the applicants' access to the Courts without the necessary authority of Parliament. It might also be added that whereas in *Witham* exclusion of access to the Courts appears to have been an *unintended* outcome, that was the *intended* outcome in this case.

[181] Finally, I do not accept Mr Ormsby's submission that the cases relied on by the applicants are distinguishable because they involve subordinate legislation. In my view they provide strong support for this ground of review.

Conclusion

[182] The applicants have also established this ground of review. To the extent that the applicants have been deprived of their right of access to the Courts, this is a serious error.

Fifth ground of review – failure to take into account relevant considerations

[183] Given that the applicants have succeeded on all the other grounds of review and that this ground traverses many of the matters that have already been traversed, I do not intend to address it.

Relief

[184] The applicants seek the following relief:

> (a) orders setting aside the Minister's decision to implement Chapters 12A and 22 by s 27; and
>
> (b) directions to the Minister under s 4 of the Judicature Amendment Act 1972 in light of the Court's findings, including in respect of the disputed land and its availability for development.

This relief does not expressly include setting aside the Minister's decision revoking PC1. While that is probably implicit, I will take the precaution of amending the

statement of claim to make it explicit.

[185] Relief is strongly opposed by all the respondents, Christchurch International Airport Limited, Prestons Road Limited, and Highfield Park Limited.

[186] In support of their application for relief the applicants rely on *Air Nelson Limited v The Minister of Transport*[55] which indicates that if a claimant demonstrates that a public decision-maker has erred in the exercise of power, there must be extremely strong reasons for declining relief. On the other hand, those opposing relief rely on *Rees v Firth*[56] to support the proposition that there should be a more "nuanced" approach reflecting the gravity of the error in the context of the circumstances of the case.

[187] Regardless of the approach that is adopted I am satisfied that this is an appropriate case for relief to be granted. In reaching that conclusion I have taken into account the following matters.

Delay

[188] The relevant decisions of the Minister were notified in October 2011. This proceeding was issued on 9 March 2012. Delay is not pleaded by the first respondent. However, it is relied on by the second respondents and the interveners.

[189] Shortly after the Minister's decisions were released three of the applicants requested the Minister to reconsider their individual situations. The Minister declined those requests on 21 February 2012. In the meantime the first applicant had taken advice from Dr Joseph and his opinion was provided to the Minister on 3 November 2011. That opinion was to the effect that the Minister's decisions concerning the RPS were unlawful. A reply from the Minister's office indicating that he was not prepared to review or alter the RPS to give effect to the first applicant's wishes was not communicated to the first applicant until 21 February 2012.

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[55] *Air Nelson Limited v The Minister of Transport* [2008] NZAR 139 (CA) at [60] and [61].
[56] *Rees v Firth* [2012] 1 NZLR 408 (CA) at [48].

[190] This proceeding was issued two weeks later and it was heard at the beginning of July 2012. Given the events recorded above and the complexity of the matter there was no delay in issuing the proceeding or having it heard that should count against relief.

Prejudice - second respondents

[191] Their position is that since the Minister made his decisions they have acted in reliance on chapters 12A and 22 being operative and would be severely prejudiced if the Minister's decisions are overturned. The decisions they have taken relate to such matters as: rezoning; subdivision consents; plan changes; requests for private plan changes; reviews; structural plans; consultation with the community; and commitment to expenditure.

[192] The second respondents claim that if the Minister's decisions are set aside those decisions will be undermined. They claim that "administrative chaos" would ensue if PC1 reverted to its original proposed state and the Environment Court proceedings were reinstated. They also contend that if this happened their attention would be diverted away from their recovery roles under the CER Act and the "recovery process is likely to be stalled".

[193] While I accept that there will be consequences for the second respondents, which is unfortunate, those consequences need to be kept in perspective. It is difficult to understand how there can be significant prejudice where rezoning has been completed or consents have been granted (which seems to account for a significant number of the plan changes/consents referred to). And where plan changes/consents are in progress the Minister could, if it was reasonably necessary for earthquake recovery purposes, ameliorate any prejudice by taking the steps suggested in [143] and [145] above and/or by using his powers under s 48.

[194] Ultimately it is necessary to balance the competing interests of the applicants and the second respondents. In my view that exercise supports relief. First, unless relief is granted the applicants will be permanently deprived of the ability to complete their appeals in accordance with their statutory rights under the RMA.

Secondly, that outcome would effectively condone the reviewable errors that have been found to exist. Thirdly, the second respondents were closely involved in those reviewable errors. Finally, overall fairness favours relief.

[195] There was a suggestion that the second respondents' preferences should prevail because they have to administer the instruments under consideration. While I can understand that point of view, in the situation under consideration the RMA provides for the Environment Court to be the final arbiter as to PC1. I also note that to the extent the local authorities were seeking a breathing space for their officers to focus on earthquake recovery matters, that objective has probably now been largely, if not completely, achieved by the passage of time.

Prejudice – airport company

[196] Christchurch International Airport Limited is strongly opposed to the reinstatement of the appeals before the Environment Court after a nine month hiatus. Apart from the cost and time involved in that step, the company is concerned about the uncertainty that would arise if chapter 22 is set aside and PC1 is reinstated.

[197] A particular concern highlighted by Ms Appleyard is that unless chapter 22 is retained there will be widespread attempts to undertake development within the 50 dBA Ldn contour. She submitted:

> ...CIAL has invested huge amounts of time and resources over many decades to ensure residents are kept out of areas exposed to aircraft noise, namely the 50 dBA Ldn contour. There should be no suggestion given through these proceedings that any land within the contour is suitable for residential use.

[198] As will already be apparent from this judgment, it is concerned with process rather than merits. The judgment should not be taken as indicating that any land within the contour is either suitable or unsuitable for residential use. Those are matters for the Environment Court, not this Court.

Prejudice – Prestons Road Limited

[199] For several years this company has been pursuing a change to the City plan to rezone approximately 200 ha from rural to residential. As I understand it, the land is outside the urban limit identified in PC1. Although it was an appellant in the Environment Court proceedings, the company withdrew part of its appeal on the strength of an agreement reached with the UDS partners which it understood would clear the way for its land to be used for residential development.

[200] In reliance on the Minister's decision the company has committed major expenditure towards completing a residential subdivision. On site work has commenced. Whereas chapter 12A provided it with a "clear path" in completing that development, it is concerned that if the appeal succeeds and PC1 is reinstated the development might encounter "obstacles".

[201] These concerns cannot justify refusal of relief in this case. If there are any obstacles, and assuming (as seems to be the case) that residential development of this land is required for earthquake recovery purposes, the Minister could exercise his powers under s 27 or s 48.

Prejudice – Highfield Park Limited

[202] This company is part way through a private plan change to rezone approximately 260 ha of rural land in Christchurch for residential use. It has invested significant time and resources in having its land included within the urban limits. Although it acknowledges that the outcome of the plan change process is not guaranteed, it derived a high degree of confidence that it would be successful when the land was included within the urban limits.

[203] While reverting back to PC1 might not necessarily assist this company's application for a private plan change, any such prejudice cannot outweigh the prejudice to the applicants. In the end any issues involving this land will be for the Environment Court, unless, of course, the Minister is able to, and does, exercise his powers under s 27 or s 48.

Other grounds for opposing relief

[204] It was argued that when exercising its discretion to grant relief the Court should be careful not to undermine the legislative intent of the CER Act. The argument was that setting aside the first respondent's decisions would be contrary to the purposes of the Act because the decisions to implement chapters 12A and 22 into the RPS were necessary for the focused, timely and expedited recovery of greater Christchurch. Thus returning to the uncertainty surrounding PC1 would be a major step backwards.

[205] I reject that proposition. This application for judicial review has succeeded because chapters 12A and 22 *did not* achieve the legislative intent. It follows that granting relief for the purpose of remedying the error could not undermine the intent of the statute. To the contrary, it is supported.

[206] Another argument that was advanced is that there are alternative remedies and that no useful purpose would be achieved by granting relief. This argument focused on the subsequent approaches to the Minister. In effect the argument seems to be that any invalidity has been cured by the Minister reconsidering his decisions and/or referring the matter back to him would be futile.

[207] To the extent that this argument is opposing the setting aside of the Minister's decisions inserting chapters 12A and 22 into the RPS and revoking PC1, I reject the argument. The only way that the reviewable errors can be effectively addressed is by setting those decisions aside. On the other hand, for the reasons I give below I agree that this Court should not issue the directions sought in the second part of the prayer for relief.

Scope of relief

[208] I am satisfied that chapters 12A and 22, together with the revocation of PC1, should be set aside. However, I am not persuaded that it would be appropriate for the Court to provide the Minister with directions in respect of the lands belonging to the applicants or its availability for development. That reflects that this proceeding

is about the process rather than the merits. It will be for the Minister to decide whether he wishes to take any further steps in relation to the applicants' lands in light of this judgment.

Result

[209] The application for judicial review is granted. The Minister's decisions inserting chapters 12A and 22 into the RPS and revoking PC1 are set aside. It is important, however, that these orders are kept in perspective. There has been no challenge to the amendments to the district plans that were notified on 1 November 2011 and the rezoning implemented by those amendments (or any later amendments to the district plans that might have been made by the Minister) are not affected by this decision. It is confined to the RPS.

[210] Leave is reserved to any party to apply further should the need arise.

Costs

[211] My preliminary view is that the applicants should receive costs against the first respondent on the 3C scale with allowance for one extra counsel. In the case of the second respondents and interveners my preliminary view is that costs should lie where they fall. If any party or intervener wishes to make submissions they should do so within one month. Memoranda should not exceed three pages.

Collins John J

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