IN THE COURT OF APPEAL OF NEW ZEALAND

CA438/2012
[2012] NZCA 601

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

CA505/2012

AND BETWEEN	CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Appellants

AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondents
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Respondent
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Seventh Respondent
AND	SELWYN DISTRICT COUNCIL Eighth Respondent

CA507/2012

AND BETWEEN	MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Appellant
AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondents

AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS Sixth Respondent
AND	CANTERBURY REGIONAL COUNCIL, CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL, SELWYN DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Seventh Respondents

CA514/2012

AND BETWEEN	SELWYN DISTRICT COUNCIL Appellant
AND	INDEPENDENT FISHERIES LIMITED First Respondent
AND	R S PEEBLES Second Respondent
AND	CASTLE ROCK ESTATE LIMITED Third Respondent
AND	G F CASE, M M CASE AND M G M CASE Fourth Respondents
AND	PROGRESSIVE ENTERPRISES LIMITED Fifth Respondent
AND	CLEARWATER LAND HOLDINGS LIMITED Sixth Respondent
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY Seventh Respondent

	AND	CANTERBURY REGIONAL COUNCIL, CHRISTCHURCH CITY COUNCIL, WAIMAKARIRI DISTRICT COUNCIL AND NEW ZEALAND TRANSPORT AGENCY Eight Respondents

Hearing: 20 and 21 November 2012

Court: White, Miller and Asher JJ

Counsel: D J Goddard QC, M S R Palmer and J V Ormsby for Appellant in CA438/2012, CA505/2012 and CA514/2012
M E Casey QC and K G Stephen for Appellant in CA507/2012
F M R Cooke QC, P A Joseph and P A Steven for Respondents
J M Appleyard for Christchurch International Airport Ltd as Intervener

Judgment: 20 December 2012 at 10.00am

JUDGMENT OF THE COURT

A Selwyn District Council is granted an extension of time to appeal.

B Christchurch International Airport Ltd is granted intervener status.

C The appeals are dismissed.

D Costs are reserved.

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] The principal issue on these appeals is whether the High Court erred in deciding that two decisions of the Minister for Canterbury Earthquake Recovery (the Minister)[1] relating to the use of land in greater Christchurch were unlawful in terms of the Canterbury Earthquake Recovery Act 2011.[2]

[2] The Minister's two decisions, both made in October 2011 under s 27 of the Act, were:

(a) to amend the 1998 Canterbury Regional Policy Statement (RPS) by adding a new chapter (chapter 22) to set in place an airport noise contour around Christchurch International Airport within which noise sensitive activities, including residential activities, were to be avoided (excepting a limited number of households in Kaiapoi); and

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1 Canterbury Earthquake Recovery Act 2011 [the Act], s 4(1), definition of "Minister".

2 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 [the High Court decision].

(b) to revoke Proposed Change 1 (PC1) to the 1998 Canterbury RPS and to insert a new chapter (chapter 12A), which set an urban limit for greater Christchurch and provided for urban development of designated greenfield areas over the next 35–40 years, including space for 47,225 residential properties.

[3] The Minister also made decisions in November 2011 to amend the District Plans of the Christchurch City Council and Waimakariri District Council to give effect to some of the residential zoning anticipated by the new chapters added to the RPS. These decisions were not challenged.

[4] The effect of the Minister's two October 2011 decisions was to bring to an end long-standing issues under the Resource Management Act 1991 (the RMA) relating to the RPS and PC1 and various unresolved appeals to the Environment Court, including appeals by respondents.[3]

[5] The validity of the two October 2011 decisions was challenged in High Court judicial review proceedings by the respondents in their capacity as land owners affected by restrictions on the use of their land resulting from the decisions. The respondents claimed successfully in the High Court that the Minister's decisions were unlawful on the grounds that:

(a) they were made for purposes not authorised by the Act;[4]

(b) they involved the misapplication of the Minister's power under s 27 of the Act;[5]

(c) the exercise of the Minister's power was not "necessary" in terms of s 10(2) of the Act;[6] and

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3 See, for example, the following interlocutory applications in the appeals: *Prestons Road Ltd v Canterbury Regional Council* [2011] NZEnvC 131, [2012] NZRMA 283; and *MHR Group Ltd v Canterbury Regional Council* [2011] NZEnvC 215. The appeals were consolidated and a full list of the appeals and parties is attached as a schedule to *MHR Group Ltd v Canterbury Regional Council*.

4 High Court decision, above n 2, at [64]–[105].

5 High Court decision, above n 2, at [106]–[127].

6 High Court decision, above n 2, at [128]–[150].

(d) the exercise of the Minister's power was fundamentally flawed because it had the effect of denying the respondents access to the Courts, namely the Environment Court.[7]

[6] The effect of the High Court decision was to invalidate the Minister's two decisions to add chapters 12A and 22 to the RPS and to reinstate PC1 and the Environment Court proceedings. An application for a stay of the High Court decision was declined.[8] It is understood that since the High Court decision the Environment Court proceedings have been pursued.

[7] The Minister and the councils responsible for local government in greater Christchurch[9] have appealed to this Court against the High Court decision essentially on the grounds that the Minister's decisions were within the purposes of the Act and that it was necessary for him to proceed as he did. In this Court their principal submissions are, first, that the Minister's decisions achieve planning certainty that is necessary for earthquake recovery for the people of greater Christchurch and their councils; and, secondly, that the decisions avoid council staff distraction in the Environment Court appeals.

[8] These submissions were supported by affidavit evidence from council officers confirming that the addition of chapters 12A and 22 provided planning certainty that assisted earthquake recovery. Council officers deposed that the 1998 Canterbury RPS had provided little specific direction for urban development, which was essentially driven by developers obtaining private plan changes, and that this had led to inefficiencies, uncertainties and a lack of cross-boundary co-ordination. PC1 was an attempt to overcome these difficulties. Council officers also deposed that the need for planning certainty was even greater following the earthquakes because of the need to make decisions for the repairing or rebuilding of

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7 High Court decision, above n 2, at [151]–[182].

8 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1909, [2012] NZAR 785.

9 "Council" is defined in s 4(1) of the Act as meaning the Christchurch City Council, the Canterbury Regional Council (Environment Canterbury), the Selwyn District Council, or the Waimakariri District Council, and "greater Christchurch" is defined as meaning the districts of the Christchurch City Council, the Selwyn District Council and the Waimakariri District Council, including the coastal marine area adjacent to those districts.

infrastructure, prioritising scarce resources, providing replacement housing and investment certainty for developers.

[9] As in the High Court, Christchurch International Airport Ltd was granted intervener status in this Court with the right to file written submissions but not to make oral submissions unless called on by the Court. We also received submissions for the Councils on all aspects of the appeals.[10]

[10] With the assistance of counsel for all parties and as envisaged by s 82 of the Act, this Court has expedited the hearing and determination of the appeals.

[11] As the issues on these judicial review appeals depend largely on the interpretation of the Act,[11] we propose to consider the issues in the context of the relevant provisions of the Act before referring in further detail to the Minister's two decisions and their impact on the respondents' rights.

The Canterbury Earthquake Recovery Act 2011

Overview

[12] In interpreting the relevant provisions of the Act, we are to ascertain their meaning from their text and in light of their purpose.[12] In determining purpose we have regard to both the immediate and general legislative context, as well as the social, commercial and other objectives of the Act.[13] We also recognise that the legislation should be interpreted in a realistic and practical way in order to make it work.[14]

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10 See *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177.

11 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]–[54]; and *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [59].

12 Interpretation Act 1999, s 5.

13 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

14 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA); and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 205.

[13] In the present case the relevant context is obviously the devastation caused to greater Christchurch by the Canterbury earthquakes,[15] the Government's establishment of the Canterbury Earthquake Recovery Authority (CERA)[16] and Parliament's enactment, with cross-party support,[17] of legislation imposing obligations and conferring wide powers on the executive branch of government to make decisions to ensure the expeditious recovery of Christchurch in the wake of both the September 2010 and February 2011 earthquakes.[18] There can be little doubt from the legislation that Parliament considers it to be in the national interest to accord priority to the recovery of Christchurch.

[14] At the same time, as the Act itself recognises, the powers conferred by Parliament on the Executive in this context are not unfettered. Parliament was concerned to ensure that, notwithstanding the need to confer extraordinary powers on the Executive to deal with an extraordinary situation, the rule of law was protected. Hence the powers conferred on the Minister are not untrammelled. The Act contains express provisions constraining the exercise by the Minister of his powers and there is a right to challenge the exercise of the powers by judicial review proceedings, such as the present.

Constraints on the Minister

[15] It is common ground on these appeals that to be valid the Minister's decisions must meet the requirements of s 10(1) and (2) of the Act, which provide:

> **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.

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15 Defined in s 4(1) of the Act as meaning any earthquake in Canterbury on or after 4 September 2010 and including any aftershock.

16 By the State Sector (Canterbury Earthquake Recovery Authority) Order 2011 and see the definition of "CERA" in s 4(1) of the Act.

17 (14 September 2010) 666 NZPD 13959–13969; and (12 April 2011) 671 NZPD 18224–18238.

18 The current Act replaced the Canterbury Earthquake Response and Recovery Act 2010.

[16] The need for the Minister's decisions to be "in accordance with the purpose of the Act" reflects well established principles of administrative law.[19] But, as Mr Cooke QC for the respondents correctly pointed out, the need here is reinforced and strengthened by the express obligation imposed on the Minister by s 10(1) to "ensure" that he exercises his powers under the Act "in accordance with its purposes".

[17] Before referring to the purposes of the Act, we note that the second important constraint on the exercise by the Minister of his powers is imposed by s 10(2). The Minister may exercise his powers where he "reasonably considers it necessary". We received a range of submissions from the parties to this appeal as to the meaning of this crucial provision, but by the end of the hearing the differences between them had narrowed significantly.

[18] In our view, the meaning of the provision is clear when the focus is on its text and purpose in the context of this Act. In short, two elements are involved:

(a) The Minister must consider the exercise of the power "necessary", that is, it is needed or required in the circumstances, rather than merely desirable or expedient, for the purposes of the Act.

(b) The Minister must consider that to be so "reasonably", when viewed objectively, if necessary by the Court in judicial review proceedings such as these. The Minister must therefore ask and answer the question of necessity for the specific power that he intends to use. This means that where he could achieve the same result in another way, including under another power in the Act, he must take that alternative into account.

[19] Mr Casey QC for the Minister and Mr Goddard QC for the Councils argued, at least initially, that the word "necessary" should be interpreted to mean "expedient

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19 *Unison Networks Ltd v Commerce Commission*, above n 11, at [53]–[55].

or desirable",[20] while Mr Cooke supported "indispensible, vital, essential". We prefer the primary, ordinary meaning of "needed" or "requisite", which in turn is defined as "required by circumstances".[21] It seems to us unlikely that Parliament would have intended either of the more extreme definitions here. If Parliament had intended a different standard, it would have said so expressly.

[20] The expression used is not, as is commonly the case, "reasonably necessary".[22] Here "reasonably" qualifies "consider" not "necessary". The Minister must "reasonably consider" the exercise of the power to be "necessary". The purpose of s 10 is to provide a safeguard against the exercise by the Minister of powers which carry significant consequences,[23] including the overriding of normal processes, procedures and appeals under the RMA.[24] Accordingly, the ordinary meaning of "reasonably", which results in a relatively high threshold, is appropriate in the context of the Act.

[21] While it was common ground that the Court was able to review the exercise of the power objectively, the parties disagreed as to the standard of review involved in the requirement for the Minister "reasonably" to consider the exercise of the power necessary. Mr Goddard submitted that this meant that the Court needed only to be satisfied that the Minister's decision was "reasonably" open to him and that the Court should avoid a review of the merits of the decision. Mr Cooke submitted, however, that the Court had to examine the Minister's decision closely in order to be satisfied that it was one that the Minister could "reasonably" consider was truly necessary.

[22] We agree with Mr Goddard that a review of the merits of the decision, as on an appeal,[25] is to be avoided. We also accept that the decision should not be

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20 On the basis of *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 178; and *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC) at 524.

21 *Oxford English Dictionary* (online edition), definitions of "necessary" and "requisite".

22 See, for example, *Ports of Auckland Ltd v Kensington Swan* CA84/90, 12 April 1990 at 10 and 13; and s 71(1) of the Act itself.

23 (12 April 2011) 671 NZPD 18130, 18140 and 18163.

24 The Act, ss 15, 23–25 and 27.

25 *Austin, Nicholls & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

reviewed on the basis of *Wednesbury* unreasonableness or irrationality because the requirement to consider "reasonably" imports a higher standard. Indeed it was not argued that the decision was so unreasonable that no reasonable person could have made it. The Court must be satisfied that the Minister's consideration of necessity was reasonable. This will involve the Court being satisfied that the Minister did in fact consider that the exercise of the particular power was necessary to achieve a particular purpose or purposes of the Act at the time the power was exercised, taking into account the nature of the particular decision, its consequences and any alternative powers that may have been available. In making this assessment, the Court will give such weight as it thinks appropriate to the Minister's expertise and opinion, while recognising that Parliament has enacted s 10(2) as a constraint on the exercise by the Minister of his powers under the Act.

[23] The first two issues in this case, when refined, are therefore whether the Minister's two decisions were:

(a) "in accordance with the purposes of the Act"; and

(b) "necessary" in the sense of being needed, rather than merely expedient or desirable, when viewed objectively.

The purposes of the Act

[24] The purposes of the Act are prescribed by s 3, which 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):

(i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

[25] As already noted,[26] a number of expressions in this provision are separately defined in s 4(1), namely "greater Christchurch", "council", "the Canterbury earthquakes", the "Minister" and "CERA". And so too, significantly, are the expressions "recovery" and "rebuilding":

recovery includes restoration and enhancement

rebuilding includes—

(a) extending, repairing, improving, subdividing, or converting any land, infrastructure, or other property; and

(b) rebuilding communities

[26] Both of these important definitions are inclusive.[27] This means that in the context of this Act Parliament intended to make it clear that the expressions are to be interpreted broadly with extended meanings.

[27] The expression "recovery", which features in the title to the Act and in several of the Act's prescribed purposes, therefore means here "the fact of returning to an improved economic condition",[28] including restoration and enhancement, the latter clearly incorporating the concept of improvement. The scope of the Act is

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26 Above at fns 1, 9, 15 and 16.
27 Burrows and Carter, above n 14, at 417–418.
28 *Oxford English Dictionary*, above n 21.

therefore not limited merely to restoring greater Christchurch to its previous state but extends to enhancing or improving it.

[28] At the same time we accept Mr Cooke's submission that the concept of "recovery" is not, as Mr Goddard submitted, so open ended that almost anything is covered. As the references to "recovery", "restoration", "rebuilding" and "repairing" make clear, the starting point must be to focus on the damage that was done by the earthquakes and then to determine what is needed to "respond" to that damage. But, as the purposes and definitions also make clear, the response is not limited to the earthquake damaged areas. Recovery encompasses the restoration and enhancement of greater Christchurch in all respects. Within the confines of the Act, all action designed, directly or indirectly, to achieve that objective is contemplated.

[29] The expression "rebuilding" is to be given a broad meaning extending well beyond merely restoring physical structures, to cover not only "improving" land, infrastructure and other property, but also rebuilding "communities". The reference to "improving" both links to and reinforces the reference to "enhancement" in the definition of "recovery", and the reference to rebuilding "communities" confirms that the scope of the Act is intended to reach beyond physical restoration and to encompass the people in the communities of greater Christchurch.

[30] We turn then to the first specific purpose, which is:

> ... 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:

[31] This purpose confirms that the Act is designed to achieve the full recovery of greater Christchurch. That this recovery extends beyond restoring physical structures to rebuilding communities is reinforced by the sixth and seventh purposes, which are:

> (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:

[32] The latter purpose puts beyond doubt Parliament's intention that the focus of the Act is on the recovery of all aspects of the "well-being" of the communities of greater Christchurch. As Mr Cooke realistically acknowledged in the course of argument, this purpose has the effect of broadening the scope of the Act significantly.

[33] The second purpose of the Act reinforces the focus on the communities of greater Christchurch by expressly recognising that there is to be community participation in the planning of the recovery of affected communities. As we shall see, subsequent provisions in the Act provide for community participation and involvement in the recovery process.

[34] At the same time, as the second purpose also recognises, community participation is not intended to impede "a focused, timely, and expedited recovery". The requirement for "a focused, timely and expedited recovery" is then reiterated in the fourth purpose. These references to a timely and expedited recovery are reflected in other provisions of the Act which require a timely recovery process, including the time permitted for the development of a draft Recovery Strategy,[29] obligations on the court and the expiration of the Act after five years.[30]

[35] The third purpose makes it clear that responsibility for ensuring recovery is to be imposed on the Minister and CERA. The imposition of this responsibility on the Executive is significant in the context of this case.

[36] Finally, the eighth purpose makes it clear that Parliament intends to provide "adequate statutory power" in the Act to achieve the preceding seven purposes. These powers are therefore among the "appropriate measures" referred to in the first purpose of the Act.

[37] Applying the relevant definitions to the purposes of the Act, it is clear that Parliament intended a broad, all-encompassing approach to be adopted. We note that the definitions of "recovery" and "rebuilding", their impact on the purposes of the Act and the nature and scope of the purposes when read together, especially the

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[29] Section 12(2).
[30] Sections 82(2) and 93(1).

seventh purpose, do not seem to have been taken into account by Chisholm J in the High Court or by the respondents in their submissions seeking to uphold his decision.[31]

[38] We do not agree with Mr Cooke that a narrower approach to the interpretation of the purposes should be adopted because of the nature of the powers conferred by the Act. The fact that the powers are significant and must be exercised for the purposes of the Act does not mean that the purposes should be interpreted restrictively when Parliament has made it clear that they should be interpreted broadly. The Act is designed to confer adequate powers on the Executive to achieve the full social, economic, cultural and environmental recovery of greater Christchurch in the widest sense.

[39] When the Act is interpreted in this way, we consider that a decision designed to achieve planning certainty may be within its purposes. We do not agree with Mr Cooke that "certainty in RMA planning" is not within the purposes of the Act because it is not referred to explicitly in s 3. In our view the wide nature of the powers in s 3 and the overarching purpose of achieving the full social, economic, cultural and environmental recovery of Christchurch in a timely and expeditious manner do envisage providing the people of Christchurch and their businesses with RMA planning certainty. This conclusion is also reinforced by the specific provisions of the Act that override the RMA[32]. Whether in a particular case such a decision is within the Act's purposes will, however, depend on the nature and consequences of the particular decision considered in the context of both the RMA and this Act.

[40] In the context of the RMA, planning certainty is a relative concept. In a legal sense, RMA documents such as regional policy statements and regional and district plans provide certainty until they are reviewed and amended[33] and a resource consent granted in terms of a district plan will enable the holder to implement the consent.[34] Once an RMA document is reviewed and amended, however, any long-term certainty

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31 High Court decision, above n 2, at [49]–[63] and [86].
32 Sections 15, 23, 24, 25 and 27.
33 Resource Management Act 1991 (RMA), s 79.
34 RMA, s 123.

provided by its predecessor will have ended. In a practical sense, steps taken in accordance with a district plan or a resource consent, such as a subdivision or new construction, will alter the basis for any RMA document review and amendment, but will not otherwise necessarily constrain the review. It is therefore normal for councils and their officers to operate under a degree of uncertainty.

[41] In the context of the present Act, planning certainty is also a relative concept. As we shall see,[35] a decision made under s 27 would be overtaken by the Recovery Strategy, a draft of which had to be developed within nine months after the date on which the Act came into force (19 April 2011).[36] The Act itself therefore contemplates a period of uncertainty during which there is an opportunity for public participation. Decisions made in this period under s 27 are necessarily provisional.

Implementation of purposes

[42] The purposes of the Act are implemented by the subsequent provisions in pt 2, which is headed "Functions and powers to assist recovery and rebuilding" and which contains the following relevant subparts:

> Subpart 1—Input into decision making by community and cross-party forums
>
> Subpart 2—Minister and chief executive of CERA
>
> Subpart 3—Development and implementation of planning instruments

[43] Implementing the second purpose of the Act, subpart 1 contains s 6, which provides:

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

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35 See below at [51], [67], [86]–[87], [111] and [126]–[128].

36 See below at [52].

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

[44] This is an important provision because not only does it impose an obligation on the Minister to arrange a community forum, which must meet at least six times a year, but it also requires him and the chief executive of CERA to have regard to "any information or advice" given by the forum. In this way there is formal recognition of community participation in the recovery process and, potentially, a further constraint on the Minister when exercising his powers under the Act.

[45] Under s 7 there is also provision for a cross-party parliamentary forum. The Minister is under an obligation to arrange for this forum to be held "from time to time", but unlike the community forum he is not required to have regard to its views. The contrast between the provisions relating to the two forums serves to reinforce the importance of the community forum.

[46] Then, implementing the third purpose of the Act, subpart 2 contains the functions of the Minister and the chief executive of CERA as well as s 10 to which reference has already been made.[37]

[47] The functions of the Minister are prescribed by s 8, which 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:

[37] Above at [15]–[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:

(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.

[48] The functions of the chief executive of CERA, prescribed by s 9, are wide ranging, but of no direct relevance to the issues on this appeal.

[49] Subpart 3, headed "Development and implementation of planning instruments", contains a series of detailed provisions elaborating on the functions of the Minister and the chief executive relating to the development of a Recovery Strategy. By s 11(1) the chief executive is required to develop a Recovery Strategy for consideration by the Minister, who is then responsible under s 11(2) for recommending to the Governor-General that it be approved by Order in Council.

[50] The Recovery Strategy is defined in s 11(3):

(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:

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

[51] It is clear from this definition that the development and approval of the Recovery Strategy is an essential feature of the Act. The definition also serves to confirm the wide approach to the interpretation of the purposes of the Act to which we have already referred. Significantly for the present case, it is clear from s 11(3) that it is the Recovery Strategy that is intended to address the "long-term strategy" for the reconstruction, rebuilding and recovery of greater Christchurch, including the identification of areas for rebuilding and redevelopment, their sequencing and the location of "existing and future infrastructure". These provisions suggest strongly that Parliament intended planning certainty in the long-term to be addressed, at least principally, in the Recovery Strategy.

[52] Notwithstanding the long-term implications of the Recovery Strategy, but reflecting the emphasis in the Act's purposes on a timely and expedited recovery, s 12(2) requires the draft Recovery Strategy to be developed within nine months after the date on which the Act came into force (19 April 2011).[38]

[53] The importance of the Recovery Strategy is also reinforced by the following requirements, which reflect the community participation purpose of the Act:

(a) to develop it in consultation with the councils, Te Runanga o Ngai Tahu, and any other persons or organisations that the Minister considers appropriate: s 11(4);

(b) to publicly notify the draft: s 13;[39] and

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38 Section 2.

39 Public notification requires a notice published in the *Gazette* or in a newspaper circulating in the area to which the notice relates: s 4(1), definition of "public notice or publicly notify".

(c) to have public hearings while developing the draft Recovery Strategy: s 12(1).

[54] A Recovery Strategy may be amended, but, unless the amendments are minor, further consultation will be required.[40]

[55] Once approved by the Minister, a Recovery Strategy will, by virtue of s 15, prevail over any "RMA document" and other relevant instruments under s 26(2).[41]

[56] The expression "RMA document" is defined in s 4(1):

> **RMA document**—
>
> (a) means any of the following under the Resource Management Act 1991:
>
> (i) a regional policy statement:
>
> (ii) a proposed regional policy statement:
>
> (iii) a proposed plan:
>
> (iv) a plan; and
>
> (b) includes a change or variation to any document mentioned in paragraph (a).

[57] As will be seen later, the reference in this definition to "a proposed regional policy statement" is particularly significant for the respondents' claim that they were unlawfully denied access to the Environment Court.[42]

[58] A Recovery Strategy prevails over any RMA document because s 15 provides:

> **15 Effect of Recovery Strategy**
>
> (1) No RMA document or instrument referred to in section 26(2), including any amendment to the document or instrument, that applies to any area within greater Christchurch may be interpreted or applied in a way that is inconsistent with a Recovery Strategy.

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40 Section 14.

41 The instruments referred to in s 26(2) are various local government, land transport and conservation strategies, policies and plans.

42 See below at [136]–[149].

(2) On and from the commencement of the approval of a Recovery Strategy, the Recovery Strategy—

(a) is to be read together with and forms part of the document or instrument; and

(b) prevails where there is any inconsistency between it and the document or instrument.

(3) No provision of the Recovery Strategy, as incorporated in an RMA document under subsection (2)(a), may be reviewed, changed, or varied under Schedule 1 of the Resource Management Act 1991.

[59] Reflecting the Minister's functions under s 8(d) and (e), the Minister has various obligations and powers under ss 16–22 relating to the development of Recovery Plans. While a Recovery Plan must be consistent with the Recovery Strategy, it may be developed and approved before the Recovery Strategy is approved.[43] Like a Recovery Strategy, a draft Recovery Plan must be publicly notified and available for written comment.[44] And once a Recovery Plan has been publicly notified, any person exercising functions or powers under the RMA must not make a decision or recommendation that is inconsistent with the Recovery Plan on any of the matters prescribed in s 23(1).

[60] A council must also amend its RMA documents if a Recovery Plan so directs, to the extent that the document relates to greater Christchurch.[45] A council must do so as soon as practicable without using the process in sch 1 of the RMA,[46] which therefore excludes the Environment Court, or any other formal public process. The latter restriction reflects the fact that the opportunity for public participation will have occurred during the development of the Recovery Strategy.

Section 27

[61] We then come to s 27 of the Act, which appears under the subheading "Provisions affecting councils and others" and materially provides:

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43 Sections 18(1) and 18(2).
44 Section 20.
45 Section 24(1).
46 The Act, s 24(2).

> **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:
>
> (b) a plan or policy of a council under the Local Government Act 2002, except a funding impact statement in an annual plan or a long-term plan.
>
> ...
>
> (2) The Minister may, by public notice, suspend or cancel, in whole or in part, any of the following for an activity within greater Christchurch:
>
> (a) any resource consent:
>
> (b) any use protected or allowed under section 10, 10A, or 10B of the Resource Management Act 1991:
>
> (c) any certificate of compliance under that Act.
>
> ...

[62] Three issues of interpretation arise in this case in respect of this provision:

(a) Does it confer an independent, stand-alone power on the Minister, or a power that may normally only be exercised after the Recovery Strategy or a Recovery Plan has been developed?

(b) Does the power to "suspend, amend, or revoke" extend to adding new chapters to a proposed RPS as occurred in this case?

(c) Does the exercise of the power override processes and appeals already in progress under the Resource Management Act?

[63] On the first of these issues Chisholm J said:[47]

> 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

[47] High Court decision, above n 2, at [114] (emphasis added).

> 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.

[64] The Judge considered that his view reflected the statutory safeguards that accompany the development of the Recovery Strategy and Recovery Plans, namely the requirements for consultation, public notification and public hearings, which in turn reflected:[48]

> ... first, the potentially far reaching consequences of the Recovery Strategy and, secondly, an underlying philosophy of community participation whenever possible.

[65] It was submitted for the Minister and the Councils that the Judge erred because s 27 conferred a stand-alone power which the Minister was able to exercise independently from the Recovery Strategy or a Recovery Plan. In particular, it was submitted that there is nothing in the text of the provision itself to suggest that the s 27 power may not be exercised instead of the Recovery Strategy or a Recovery Plan. If Parliament had intended to impose such a constraint, it would have done so expressly by providing that the s 27 power was to be exercised only for the purpose of giving effect to a Recovery Strategy or Recovery Plan.

[66] Mr Cooke supported the Judge's approach to the interpretation of s 27, submitting that the provision is not a completely stand-alone power to implement long-term planning. It is an ancillary or additional provision giving the requisite powers to implement the long-term planning contemplated by the Recovery Strategy and Recovery Plans.

[67] For the following reasons, we agree with the approach of Chisholm J:

(a) The primary focus of the Act is on the Recovery Strategy which the chief executive "must" develop as a long-term strategy for the reconstruction, rebuilding and recovery of greater Christchurch and

[48] High Court decision, above n 2, at [115].

which "must" involve council consultation and processes for public notification and hearings.

(b) The Act clearly contemplates the development and approval of the Recovery Strategy as the primary means to implement and achieve the Act's purposes.

(c) The non-mandatory discretionary power conferred on the Minister by s 27 is an ancillary power which may be exercised, if necessary, before, during or after the processes required for the development and approval of the Recovery Strategy.

(d) Whether the exercise of the s 27 power is necessary will depend on the circumstances of the particular case. The power to "suspend, amend, or revoke" an RMA document relating to an area within greater Christchurch may well need to be exercised expeditiously to assist the recovery and in advance of the development of the Recovery Strategy. As Chisholm J recognised, "quick and discrete action [may be] required for earthquake recovery purposes."[49]

(e) The s 27 power is not unfettered. It is constrained by s 10, which requires that it be exercised "in accordance with the purposes of the Act" and only if the Minister "reasonably considers it necessary". In particular, the Minister must consider whether the exercise of the s 27 power, rather than an alternative such as a Recovery Strategy with public consultation, is necessary. These constraints are important safeguards in the context of this legislation.

(f) The existence of the provisions relating to the development of the Recovery Strategy and Recovery Plans, with community participation, does not mean that the Minister should be prevented from exercising the s 27 power in an appropriate case. It is possible that the s 27 power could be used prior to the development of the Recovery

[49] At [114], see above at [63].

> Strategy to meet a particular emergency, but that would have to be done with the primacy of the pending Recovery Strategy and Recovery Plans firmly in mind. Whether the Minister ought to do so in a particular case is a separate question depending on the facts of the case and whether, objectively, he "reasonably considers it necessary" to do so.[50] We consider this separate question later.

[68] As to the second issue of statutory interpretation in respect of s 27, we are satisfied that in the context of this Act the reference to amending a RMA document such as the RPS included adding the two new chapters. Given the purposes of the Act, the expression "amend" should be interpreted broadly. We accept that there may be some doubt where the line should be drawn, but here the addition of two chapters to the proposed RPS was clearly within the concept of an amendment. We agree with Mr Goddard that "amend" should be given an interpretation similar to that in relation to statutes, which are often amended by adding or inserting new sections or parts.[51] Adding two chapters to the RPS is analogous to amending an Act by deleting a part and inserting a new part.

[69] We address the third issue of statutory interpretation when we consider whether the respondents have been unlawfully denied access to the Environment Court.

Other relevant provisions

[70] For completeness we also note the following relevant provisions:

(a) There is no right of appeal under the Act or the RMA against a decision of the Minister under s 27.[52] An appeal to the Environment Court under the RMA is therefore excluded.

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50 The distinction is between the existence of the power and the legitimacy of its exercise: *New Zealand Kiwifruit Marketing Board v Beaumont* [1997] 3 NZLR 516 (CA) at 520.

51 Burrows and Carter, above n 14, at 638.

52 Sections 68(1), 68(2) and 68(6).

(b) Orders in Council exempting, modifying or extending provisions in a range of statutes that are reasonably necessary or expedient may be made for the purposes of the Act.[53] The Judicature Amendment Act 1972 under which judicial review proceedings such as the present are brought is expressly excluded.[54]

(c) The Minister is required to present a quarterly report to Parliament on the operation of the Act, including a description of the powers exercised.[55]

(d) There are to be annual reviews of the Act and the Act is to expire five years after its commencement.[56]

Summary

[71] We are satisfied from our analysis of the relevant statutory provisions that:

(a) The overarching purpose of the Act is to impose obligations and confer adequate powers on the Executive to achieve in a timely and expeditious manner the full social, economic, cultural and environmental recovery of greater Christchurch.

(b) To implement this overarching purpose, a range of obligations is imposed and powers conferred on the Executive, including the obligation to develop the Recovery Strategy, which is the primary focus of the Act; and the ancillary discretionary power conferred on the Minister by s 27, which may, depending on the circumstances, need to be exercised before, during or after the development of the Recovery Strategy.

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53 Section 71.
54 Section 71(6).
55 Section 88.
56 Sections 92 and 93.

(c) There is also a range of safeguards in the Act relating to these obligations and powers, including in particular: the constraints imposed by s 10; the provisions relating to community participation, which include, in the case of the Recovery Strategy and Recovery Plans, public notification and hearings; the requirements for reporting; and the availability of judicial review proceedings.

(d) The consequences of the valid compliance with the obligations and exercise of the various powers include the removal of RMA processes and council and Environment Court hearings.

[72] In light of our analysis we turn to consider the Minister's two decisions in this case and their validity.

The Minister's two decisions

Background

[73] The undisputed factual background leading up to the Minister's two October 2011 decisions is described in some detail in the High Court decision.[57] We have also been assisted by the chronology provided by the Minister and relevant decisions of the Environment Court. The essential features of the background may be summarised as follows.

[74] Well before the first earthquake occurred in September 2010, the Councils and the New Zealand Transport Agency (NZTA) had developed an urban development strategy to address perceived shortcomings in the 1998 Canterbury RPS. Following public consultation, the strategy had been publicly notified in 2007 as PC1. It included provisions relating to urban limits through to 2041, the sequencing of new greenfield land for residential development, and a long standing policy precluding noise sensitive uses of land within a 50 dBA Ldn contour around Christchurch International Airport.

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[57] High Court decision, above n 2, at [8]–[44].

[75] Relevant territorial authorities were required to have regard to these matters when preparing or changing their district plans[58] and once the change to the RPS was operative would have to give effect to the modified RPS.[59]

[76] Some 700 submissions relating to PC1 were lodged, with submissions from landowners, including the respondents, seeking either to have their land included within the urban limits or the amendment of provisions relating to the sequencing of greenfield land to development. Christchurch International Airport Ltd lodged a submission supporting PC1 and seeking the inclusion of updated air noise contours.

[77] Following settlement of judicial review proceedings,[60] the PC1 submissions were heard by independent Commissioners whose recommendations were adopted by the Regional Council in December 2009. In broad terms the use of urban limits in PC1 was upheld, with some changes resulting from the inclusion of new greenfield areas for residential development, the identification of "Special Treatment Areas" involving land owned by some of the respondents (with the Christchurch City Council directed to investigate zoning) and provision for growth at Kaiapoi within the airport noise contour.

[78] Some 50 appeals against the Regional Council's decision, including appeals by the respondents, the Christchurch City Council, the Waimakariri District Council and Christchurch International Airport, were lodged with the Environment Court. The Court decided to hear the appeals in stages,[61] with the principal question for the first stage being:[62]

> ... whether there should not be an urban growth boundary for the purpose of allocating the location and numbers of new houses in greenfields areas ...

[79] Before the Environment Court was scheduled to hear the appeals, the earthquakes occurred and the Act, which came into force on 19 April 2011, was enacted.

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58 RMA, s 74(2)(a)(i).
59 RMA, s 75(3)(c).
60 *National Investments Ltd v Canterbury Regional Council* HC Christchurch CIV-2009-409-1280.
61 *MHR Group Ltd v Canterbury Regional Council*, above n 3, at [20].
62 Ibid, at [1].

[80] We adopt Chisholm J's descriptions of the sequence of earthquakes that occurred and their impact on RMA issues:

> [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 Act].

[81] As Chisholm J pointed out later in his judgment,[63] some 7,250 properties in Christchurch City and Waimakariri District were red zoned requiring relocation of householders. A more detailed description of the consequences of the earthquakes is contained in the Environment Court decision in *MHR Group Ltd v Canterbury Regional Council*, where reference is made to evidence that at least 12,000 and possibly as many as 20,000 dwellings had been severely damaged or destroyed, representing six to ten years of pre-earthquake annual residential construction in greater Christchurch, and that 500 to 5,000 dwellings were estimated to be permanently unavailable for residential use as a result of liquefaction problems.[64] After referring to evidence relating to the impact of the earthquakes on employees and businesses,[65] the Environment Court noted:

> [12] As a result of the September 2010 earthquake alone, local authorities initially estimated they had suffered over $500m damage to infrastructure (roads, bridges, footpaths, sewers, pump stations, water supply wells, stormwater drains, parks, reserves, sports grounds etc). That figure more than trebled as a consequence of the 2011 shocks.
>
> (Footnotes omitted)

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63 High Court decision, above n 2, at [70].
64 *MHR Group Ltd v Canterbury Regional Council*, above n 3, at [8].
65 Ibid, at [11].

[82] The 22 February 2011 earthquake delayed the Environment Court hearing of the first stage for a month from May to June 2011,[66] but a subsequent adjournment application by the Councils was declined on 19 May 2011.[67] The Environment Court recognised that proceeding with the hearing might be a waste of time because the Minister could revoke PC1 at any time under s 27(1)(a) of the Act or the Recovery Strategy could head down a different path or a Recovery Plan could direct the Regional Council to amend PC1.[68] But the Court decided that the hearing should not be adjourned because:

(a) the rule of law required the Court to proceed without regard to whether the various powerful over-riding provisions in the Act might be exercised;[69]

(b) the need for a timely and expedited recovery of greater Christchurch strongly favoured an early resolution of PC1;[70] and

(c) the wishes of most of the landowners should prevail despite the uncertainty over what might be in the Recovery Strategy or any Recovery Plan.[71]

[83] During the stage one hearings, which took place in Queenstown in June and early July 2011, the Environment Court was advised that a number of parties, including Prestons Road Ltd, had reached agreements with the Councils.[72] In an interim decision given on 28 July 2011 the Court, however, declined to endorse the agreements because it wished to be satisfied that PC1 did promote the purpose of the RMA in light of the circumstances in greater Christchurch after the earthquakes, uneasiness over the procedure followed by the Canterbury Regional Council and its

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66 *Cashmere Rural Landowners Inc v Canterbury Regional Council* [2011] NZEnvC 90 at [2] and [9]; compare High Court decision, above n 2, at [16].
67 *Prestons Road Ltd v Canterbury Regional Council*, above n 3, at [1].
68 Ibid, at [43].
69 Ibid, at [44].
70 Ibid, at [45]–[47].
71 Ibid, at [49].
72 *MHR Group Ltd v Canterbury Regional Council*, above n 3, at [25]–[28].

fairness to other parties, and a concern not to waste time.[73] The Court therefore itself called a number of witnesses for the Council to give evidence.[74]

[84] The Environment Court decided that in light of the settlement agreements and consequent changes in position by the Canterbury Regional Council it should not give a decision on the stage one issues, but should adjourn the proceedings to the next stages of the hearing to ensure that other parties had an opportunity to be heard.[75] In reaching this interim decision, the Court was critical of the Canterbury Regional Council for changing its position in relation to the Commissioners' decision on PC1 several times.[76] The Environment Court's criticisms of the Regional Council are referred to in the High Court decision.[77] While it is not necessary for us to determine whether the criticisms were justified, we note that the Regional Council was faced with considerable planning pressures following the earthquakes which may explain its changes of position.

[85] At a pre-hearing conference for stage two of the PC1 appeals on 5 August 2011, the Environment Court made a timetable for hearings to begin in Queenstown in November 2011.

[86] In the meantime, as required by the Act,[78] a draft Recovery Strategy had been developed and was publicly notified on 10 September 2011. The draft provided that CERA and various other bodies were to prepare various plans for recovery, including a "Land, Building and Infrastructure recovery plan" that was to identify:

> ... when and how rebuilding can occur; timeframes for making decisions about whether land can be remediated, and a process and timeframe for land remediation; a methodology for reviewing existing national, regional and local strategies and plans; programmes and sequencing of areas for rebuilding and development; a spatial plan for housing and strategic infrastructure and community facilities to maintain the short-term wellbeing of communities, long-term recovery and growth aspirations; a framework for identifying investment priorities and opportunities for horizontal, strategic and community infrastructure; and identification and prioritisation of 'early-win' projects.

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73 Ibid, at [29].
74 Ibid, at [29]–[30].
75 Ibid, at [46].
76 Ibid, at [37]–[45].
77 High Court decision, above n 2, at [21].
78 Sections 11–13.

[87] The land, building and infrastructure plan was clearly intended to overlap with many aspects of PC1. Development of the plan was to be led by CERA and supported by the Councils, NZTA, Ngai Tahu, Infrastructure Alliance, EQC and the Department of Building and Housing. In terms of time frames it provided: "Existing plans and strategies reviewed and spatial plan prepared by December 2011, Draft Recovery Plan prepared by April 2012".

[88] A further request by the Councils for an adjournment of the Environment Court appeals was declined by the Court in September 2011.[79] The grounds for the Councils' adjournment application included the likelihood that the publicly notified draft Recovery Strategy would overrule PC1 and that council resources were required for earthquake recovery purposes.

[89] Urgent judicial review proceedings challenging the Environment Court's adjournment refusal[80] were then overtaken by events, namely the Ministers' two October 2011 decisions. These decisions followed meetings between CERA, the Minister and the Councils in the period after April 2011, when the issues of urban land supply, the role of PC1 and Ministerial intervention under the Act were discussed. A number of the respondents also communicated with the Minister.[81]

[90] The Minister's decisions to insert chapter 22 and to revoke PC1 and insert chapter 12A into the Canterbury RPS were publicly notified on 8 and 17 October 2011. This was roughly a month after the draft recovery strategy had been published and six months before the draft Land, Building and Infrastructure plan was to be prepared under the draft Recovery Strategy.

[91] We now turn to examine CERA's advice and recommendations to the Minister that led to his two decisions and the Minister's reasons for his decisions given in his affidavit filed in this proceeding, which explain why he decided to adopt, with one exception, the CERA recommendations. In doing so we accept, as

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79 *MHR Group Ltd v Canterbury Regional Council (No 6)* [2011] NZEnvC 306.

80 *Canterbury Regional Council v The Environment Court of New Zealand* HC Christchurch CIV-2011-409-1953.

81 See the High Court decision, above n 2, at [25]–[26].

Chisholm J did in the High Court,[82] that in the context of this case it was appropriate for the Minister to provide an affidavit giving his reasons and that his reasons should be given "real weight".[83] At the same time we are not restricted to the Minister's view of what he did.[84] Here CERA's advice, which was contained in formal decision papers, was advice coupled with recommendations. The reasons for the decisions are in the Minister's affidavit. We therefore do not accept Mr Cooke's submission that CERA's advice constituted the decision and that "deficiencies in the formal decision papers" could not be remedied by the Minister.

[92] In examining the Minister's reasons, it is important to emphasise that we are doing so for the purposes of ensuring compliance with s 10(1) and (2) of the Act. A judicial review challenge to the validity of the Minister's decisions is not an appeal against the merits of those decisions. The Minister was not and would not be cross-examined as of right on his affidavit.[85] We must therefore examine the reasons for his decisions taking into account the information before him, the nature of the particular decision and its consequences.

The airport noise contour decision (chapter 22)

[93] On 8 October 2011 the Minister gave public notice that, pursuant to s 27(1)(a) of the 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 of Christchurch through avoiding noise sensitive activities within the 50 dBA Ldn air

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82 Ibid, at [42].

83 *Kellian v Minister of Fisheries* CA150/02, 26 September 2002 at [8]; and see the authorities collected in Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at [29.4.3].

84 Ibid.

85 *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA); and see the authorities collected in GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [10.36].

noise contour.

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

- *CERA's advice*

[94] CERA's advice to the Minister that led to this decision is summarised in part in the High Court decision:

> [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.

[95] CERA's specific advice in the briefing papers relating to the use of s 27 was:

> 21 The use of section 27 powers to enable land to be made available for residential development is within the purposes of [the Act]. It provides for the Minister to ensure recovery for those whose land has been red zoned. The proposal is focused, timely and will expedite recovery. It will restore social and economic well-being both by assisting residential development in Kaiapoi and strengthening the protection for Christchurch International Airport.

> 22 Use of the section 27 powers has been seen as a bargaining tool with developers to ensure that they bring sections to market quickly and give regard to affordability. Although making this change now without obtaining an understanding from the developer may reduce the subject matter for negotiation with these particular land owners, there are other levers that can be pushed in relation to them. Use of the section 27 power now will illustrate to developers that CERA is serious about making use of the tools within [the Act].

[96] CERA's briefing paper then referred to the Minister's question whether the exemption from the noise contour should apply only to north-eastern Kaiapoi or be extended to cover all of the township. CERA's advice was:

> 25 We think that CIAL will object to allowing the exemption to cover all of the Kaiapoi township. Christchurch City Council does not support this proposal as staff consider it undermines the concept of an exemption. ECan has given qualified support. At this stage no comment has been received from Waimakariri or Selwyn District Councils but earlier conversations would suggest that they would not oppose the extended exemption area.
>
> 26 Our assessment is that exempting either the north-eastern Kaiapoi or all of the Kaiapoi township can be justified on the basis of displacement of residential properties from the Red Zone. However, the larger the area exempted the greater the risk that the air noise contour will be undermined and others will also seek to be exempted from the restriction of noise sensitive activities under the contour.

- *The Minister's reasons*

[97] The Minister's reasons for this decision are set out in his affidavit:

> 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 Ltd said they would not object if the decision was made, I considered exempting the whole of Kaiapoi was the right decision.

- *In accordance with the purposes of the Act?*

[98] In our view this decision was clearly made by the Minister "in accordance with the purposes of the Act" as required by s 10(1). Our reasons for reaching this view and disagreeing with the High Court Judge's decision[86] and the submissions for the respondents may be stated shortly.

[99] First, the exception to the restrictions imposed by the noise level contour for residential development in Kaiapoi was clearly designed to assist the recovery of Kaiapoi and was therefore in accordance with the purposes of the Act. Indeed there is no challenge to the validity of the District Plan change implementing this aspect of the Minister's decision.

[100] Second, there is little doubt that the continued safe and efficient operation and further development of Christchurch International Airport is essential for the full social, economic, cultural and environmental recovery of greater Christchurch in the widest sense. If the Minister was to permit extra residential development in an area that might be affected by airport operations, it was proper, and arguably important, to consider the airport noise contour. The insertion of chapter 22 in the RPS, which was designed to strengthen the protection for Christchurch International Airport and provide certainty for Christchurch residents by settling the location of the 50 dBA Ldn air noise contour, was therefore in accordance with the overarching purpose of the Act.

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[86] High Court decision, above n 2, at [101]–[102].

[101] Third, the fact that the issue relating to the location of the airport noise contour existed long before the earthquakes and had been the subject of Environment Court decisions[87] does not of itself take the Minister's decision outside the purposes of the Act. On the contrary, the fact that it was an existing issue needing resolution supports the view that, following the earthquakes, continuing uncertainty could well impede the planning certainty required for the full recovery of greater Christchurch.

[102] Fourth, the fact that chapter 22 had the effect of restricting urban development in the area within the noise level contour does not mean that it had "nothing to do with earthquake recovery" as submitted by Mr Cooke. Settling the location of the contour provided planning certainty, a potentially essential prerequisite for recovery in the widest sense.

[103] This leaves open, however, the separate question of whether it was reasonable for the Minister to consider that the exercise of the power for this authorised purpose was necessary in this case, in particular whether it was reasonable for the Minister to consider that the exercise of the s 27 power by inserting chapter 22 was necessary to achieve the planning certainty sought by the Councils.

- *Reasonably considered necessary?*

[104] There is no dispute that, acting in good faith, the Minister himself considered that the decision was "necessary". But, viewed objectively, was it necessary that the Minister achieve his objective by exercising his ancillary discretionary power under s 27 in October 2011 rather than proceeding by way of the mandatory Recovery Strategy, the draft of which had already been publicly notified on 12 September 2011 and which contemplated a land, building and infrastructure recovery plan by December 2011?

[105] In respect of the airport noise level contour decision, there is no suggestion in CERA's advice or from the Minister in his affidavit that he considered whether the options of using the Recovery Strategy and/or a Recovery Plan might not have

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87 *Robinsons Bay Trust v Christchurch City Council* EnvC Christchurch C60/2004, 13 May 2004; and *National Investment Trust v Christchurch City Council* EnvC Christchurch C41/2005, 30 March 2005.

achieved the same outcome. In referring to the use of s 27, CERA's advice makes no reference to the necessity requirement or to the other available options. While the Minister in his affidavit does say that he considered it was "necessary" to use his s 27 powers because it was "essential" that people knew what activities were allowed near the airport, he does not say that it was therefore essential that he exercise his s 27 power in October 2011 rather than pursue one of the other options. In particular, the Minister does not explain why the need for planning certainty could not be met by the Recovery Strategy, with its long-term strategy addressing the location of existing and future infrastructure, including the international airport, coupled with a short-term decision such as a change to the Waimakariri District Plan to allow subdivision at Kaiapoi.

[106] In our view the Minister should also have given consideration to the other options because, unlike the power under s 27, the use of the Recovery Strategy and/or a Recovery Plan would have involved public notification and the opportunity for public comment and thus have been in accordance with the public participation purpose of the Act. The Minister needed to consider these options before he could be reasonably satisfied that the exercise of the s 27 power in October 2011 was indeed needed.

[107] As we have already decided,[88] the discretionary power conferred on the Minister by s 27 is an ancillary power that may be exercised, if necessary, before, during or after the processes required for the development and approval of the Recovery Strategy. But the issue is whether the power was exercised legitimately in the circumstances of this case when, in terms of the Act, the Minister had the option of proceeding in a different way. In the absence of any evidence from the Minister justifying his choice of the s 27 option, we cannot be satisfied, objectively, that the exercise of the power was necessary rather than merely expedient or desirable.

[108] It is important in the context of the Act that the Minister should be constrained by the requirements of s 10(2) because the public participation purpose is a significant safeguard in the Act. In the event that the Minister were to decide to proceed by way of the Recovery Strategy (which was already in draft at the time of

[88] Above at [51] and [67].

his decision) or a Recovery Plan, it would be speculation to conclude now that he would necessarily make the same decisions.

[109] We return to the consequence of this finding later in our judgment.[89]

The residential property zoning decision (chapter 12A)

[110] On 17 October 2011 the Minister gave public notice that the RPS was further amended by inserting chapter 12A. The chapter was broadly similar to PC1 except that it reflected agreements the Regional Council had reached with some of the parties to the Environment Court appeals and some of the policies had been updated to reflect the earthquakes. It also reversed the changes arising from the Regional Council's decision, including changes supported by the respondents.

- *CERA's advice*

[111] CERA's advice to the Minister that led to this decision is summarised in part in the High Court decision:

> [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 s 27 of [the Act] is in accordance with many of the purposes of [the 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

[89] Below at [152]–[162].

> 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".

[112] CERA's briefing papers also referred to the confusion, uncertainty and litigation costs arising from the Environment Court appeals relating to PC1 and then continued:

> 18 By giving effect to the contents of a revised PC1, there would be the ability to cut through this uncertainty and provide confidence that development can occur in certain places. That will mean that providers of infrastructure will have greater certainty about need. It will also provide for certainty about what is expected of the district councils and developers in terms of design (including density) of residential and business developments. Some of these matters may need to be translated into district plans to provide the final degree of certainty, but there will be policy that will give guidance.
>
> 19 There will be disadvantages to those that are trying to have their properties included within the urban limit line through the present Environment Court process. Giving effect to the present urban limit does not, however, mean that the limit cannot be changed at a later date. PC1 itself contemplates this if there is a change of circumstances, and there is the ability to use section 27 powers to make further changes if needed. Giving effect will also require planning through outline development plans, but as a quality residential development is still anticipated this should not cause an unnecessary restraint. Meeting minimum density levels will also be required which may disadvantage proposed large section development, but will assist in bringing more sections to market.

[113] On the question of the use of the s 27 powers, the briefing papers say:

> 23 The use of section 27 powers to provide a specific chapter within the RPS to deal with development of greater Christchurch is within the purposes of [the Act]. It provides for the Minister to ensure recovery by providing planning certainty. The proposal is focused, timely and will expedite recovery by allowing territorial authorities, infrastructure providers and developers to have certainty about location of future development and the standards that will apply. It will restore social, economic and environmental well-being of greater Christchurch communities by recognising the impact of the earthquakes on urban development and natural resources and providing a mechanism to avoid risks while providing for those relocated from the red zones.
>
> 24 It does not, however, enable community participation in the planning of the recovery of affected communities in relation to changes to the RPS as a result of the earthquake. ECan did, however, have a very extensive public process to develop the [Urban Development] Strategy and PC1 has been through a hearing process resulting in appeals. The public generally have had significant opportunities to be involved. Those persons who have live appeals and have not yet negotiated a resolution will, however, consider that they have not had an opportunity to participate. They may also consider that some of the substance of PC1 goes beyond the purposes of [the Act] as it is concerned with growth through to 2041, not just immediate recovery.
>
> 25 This is a legitimate perspective, but it is important to consider the changes to the RPS in context. First, just because this proposal will add a new Chapter 12A, there is no reason why further additions to either Chapter 12A or the new Chapter 22 specifically identified for earthquake issues cannot be made under the section 27 process. Second, section 23 of [the Act] provides that any person exercising functions under the RMA must not make a decision or recommendation that is inconsistent with a Recovery Plan. One of the proposed Recovery Plans is the "Greater Christchurch Land-use and Infrastructure Recovery Plan", which is likely to deal with similar issues but updated as more information becomes available. This may, therefore, be able to deal with such concerns. Third, the operative RPS is in the process of being reviewed. Although there is no chapter presently dealing with urban land use matters, it is a possibility that any outstanding issues could be considered. It is also relevant to note that long term planning including growth will be of assistance to the infrastructure recovery planning.
>
> 26 It is, therefore, possible to consider that the change to the RPS by including a new chapter 12A is a temporary remedy to overcome the present uncertainties but that it is subject to change as more information about land and need for urban development becomes available.

[114] On the question of suspension or revocation, the briefing papers say:

> 28 Although [the Act] allows for suspension of PC1 it is not clear what this means in practice. It is assumed that PC1 would have no effect so it need not be had regard to, but it would still exist and so be in front of the

> Courts. If the Environment Court had agreed to the adjournment then this may have been appropriate, but it did not do so. This issue is presently before the High Court on judicial review and so PC1 could be suspended until the High Court has concluded whether the decision not to adjourn was correctly made or not. The status of PC1 can then be reviewed at that point.
>
> 29 Alternatively, PC1 could be revoked which means that it no longer exists. 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.
>
> 30 Given the complicated circumstances, it is recommended that at this stage you suspend PC1 and see how the Court proceedings play out. Suspending now, still enables revocation at a later date if necessary.

- *The Minister's reasons*

[115] The Minister's reasons for his second decision are set out in his affidavit. In order to fully understand his reasons, it is best to set them out as Chisholm J did. We therefore attach the reasons as an appendix to this judgment and summarise them here.

[116] The Minister deposed that in his view the Environment Court proceedings were creating significant planning uncertainty for developers and the Councils that impeded recovery. The continuation of the proceedings was also delaying the implementation of negotiated agreements between the Councils and some of the parties to the appeals that would have allowed the development to proceed. Although the Minister was aware that using s 27 could be perceived as curtailing public participation, he was also aware that the community had been consulted for some years on the urban limit line and with a few exceptions where people wished to extend the line to include their properties, there was no community opposition to having an urban limit. The inclusion of a new chapter 12A was therefore a "neat solution" to resolve the problems facing Christchurch at that time and a "useful starting point" to provide planning certainty following the earthquakes. Ending the appeals would also allow council officers to focus on recovery planning rather than participating in the appeals. The Minister explained that he decided to reject CERA's recommendation that he suspend PC1 because there was uncertainty about what

suspension would mean in practice and he was keen that there be no doubt that the appeal process and the time commitment required for it had been brought to an end.

[117] Although the Minister was aware that his decision would result in disadvantages to those seeking to have their land included within the urban limit, he considered such disadvantages were outweighed by the need to provide planning certainty to allow residential development to occur. The Minister also noted that chapter 12A might be changed as a result of the Recovery Strategy and recovery plan processes or in individual cases of merit.

- *In accordance with the purposes of the Act?*

[118] In our view to the extent that this decision achieved planning certainty it was clearly made by the Minister "in accordance with the purposes of the Act" as required by s 10(1). Our reasons for reaching this view and disagreeing with the High Court Judge's decision[90] and the submissions for the respondents may be stated shortly.

[119] It is convenient to start with the Judge's principal reasons for his decision on this issue:

> [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;

[90] High Court decision, above n 2, at [92]–[100].

> (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.
>
> …
>
> [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 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 [that while chapter 12A provided for 47,225 properties, only 7,250 properties had been red-zoned] 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, I am satisfied that the changes to the district plans were capable of standing on their own feet.

[120] We agree with the Judge that purposes (a) to (e) in [92] are within the purposes of the Act. The respondents did not submit otherwise. For the reasons we have already given,[91] we are also satisfied that purpose (g) is within the purposes of the Act. Once this conclusion is reached, we have little difficulty in concluding for the following reasons that purpose (f) to the extent that it achieved planning certainty is also within the purposes of the Act.

[121] First, to the extent that purpose (f) achieved planning certainty it was the means by which purposes (a) to (e) were implemented. We have already accepted that achieving planning certainty was within the scope of the purposes of the Act. As

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[91] Above at [98]–[102].

such it was an integral part of the steps being taken by the Minister to achieve the full social, economic, cultural and economic recovery of greater Christchurch. The addition of chapter 12A and the revocation of PC1 also ended the Environment Court appeals and freed up council staff to focus on more pressing earthquake recovery matters.

[122] Second, the fact that the insertion of chapter 12A and the revocation of PC1 addressed issues that existed long before the earthquakes did not mean that providing solutions for the issues was necessarily outside the scope of the purposes of the Act. On the contrary, resolving these long standing issues could be seen as a positive step in assisting the recovery of greater Christchurch.

[123] Third, the fact that chapter 12A provided space for 47,225 residential properties when only 7,250 properties in Christchurch City and Waimakariri District had been red zoned did not necessarily mean that it was outside the scope of the purposes of the Act. On the contrary, when the full scale of the impact of the earthquakes is taken into account and the enhancement aspect of recovery is recognised, the benefit of planning certainty in respect of future growth, not only for residential properties but also for infrastructure (as Mr Goddard emphasised), can be seen as falling within the purposes of the Act.

[124] In view of the conclusion we reach on the next question, it is unnecessary for us to identify whether any aspects of chapter 12A did not achieve planning certainty and therefore went beyond the earthquake recovery purposes of the Act.

- *Reasonably considered necessary?*

[125] There is no dispute that, acting in good faith, the Minister himself considered that the decision was "necessary'. But, viewed objectively, was it necessary to exercise his ancillary discretionary power under s 27 in October 2011 to insert chapter 12A, rather than to proceed by way of the mandatory Recovery Strategy and/or a Recovery Plan, to achieve the planning certainty sought by the Councils? In particular, was it necessary to use the s 27 power when, as we have already mentioned, the draft Recovery Strategy, which had been publicly notified on

12 September 2011, contemplated a land, building and infrastructure recovery plan by December 2011?

[126] In respect of this second decision, there is evidence from both CERA's briefing papers and the Minister's affidavit that he was aware of both the draft Recovery Strategy and the proposed recovery plans, which were likely to deal with similar issues.[92] But there is no evidence explaining why the Minister considered that these options were not appropriate alternatives and that it was "necessary" for him to exercise his s 27 power at that time, especially as he recognised that his decision under s 27 was not necessarily going to be final as it was likely that chapter 12A would be reviewed and could change as the Recovery Strategy and future Recovery Plans were developed.

[127] Indeed we note that the Recovery Strategy approved on 31 May 2012 stated:

> When [the Act] was passed in April 2011, it was thought that the Recovery Strategy might address:
>
> 1 the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment;
>
> 2 the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction;
>
> 3 the kind of Recovery Plans that may need to be developed and the relationship between the plans; and
>
> 4 any additional matters to be addressed by Recovery Plans, and who should lead their development.
>
> The Strategy has not been able to address all of these issues, partly because of ongoing seismic activity. It is also a huge and complex task to make decisions about land zoning and the location and timing of rebuilding. Similarly, it is not yet clear where Recovery Plans – which are statutory documents with the power to overwrite a range of planning instruments – will be the most appropriate and effective way to provide direction. The Recovery Strategy therefore focuses on identifying work programmes which will make it easier to see where Recovery Plans are needed.

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92 Appendix at [41] and [53].

[128] The Recovery Strategy also said:

> Strategies that were developed before the earthquakes to guide planning and growth in greater Christchurch will need to be re-evaluated in the light of recovery needs. The most significant of these is the Greater Christchurch Urban Development Strategy (UDS). This non-statutory strategy was developed under the Local Government Act 2002 by Environment Canterbury, the Christchurch City Council, Selwyn and Waimakariri District Councils and the New Zealand Transport Agency. The UDS is implemented primarily through a range of statutory planning processes – in particular, the Canterbury Regional Policy Statement, District Plans, Councils' Long Term Plans, and the Canterbury Regional Land Transport Programme. As all of these are required to be consistent with the Recovery Strategy, the Strategy will also influence any re-evaluation of the UDS.
>
> Using [the Act's] powers, the Minister for Canterbury Earthquake Recovery has fast-tracked changes to the Regional Policy Statement. These changes are set out in chapters 12A and 22 of the Regional Policy Statement. Further changes are possible as a result of any re-evaluation of the UDS.

[129] As these passages from the Recovery Strategy indicate, a level of planning uncertainty was likely to continue regardless of what happened to PC1.

[130] There is also evidence in the affidavits of the council officers that in a number of respects they were in fact able to rely on PC1 prior to the Minister's decisions. In particular, the Councils were able to implement those parts of PC1 that were not in dispute and were having regard to PC1 in a purposeful, positive manner. Indeed in February 2010 the Selwyn District Council had promulgated a plan change that implemented the urban limit and other features of PC1. This evidence, which does not appear to have been taken into account by CERA or the Minister, suggests that the Councils' desire for planning certainty needed to be examined closely. The Minister recognised that most of PC1 was not in dispute, but does not appear to have appreciated the significance of this in the context of his decision to end the Environment Court appeals.

[131] Although the Minister recognised that acting under s 27 would exclude public participation, he considered that the public processes that had already taken place in relation to PC1 meant that there had already been sufficient public involvement in the matters that would be settled by his decisions. We do not agree, however, that consultation processes under the RMA can substitute for the consultation that was

meant to take place under the Act. Unlike consultation under the RMA, consultation under the Act is predicated on the fundamentally different circumstances existing in Christchurch as a result of the earthquakes. The Minister was therefore required to consider whether it was necessary to exclude the public processes involved in proceeding by way of the Recovery Strategy or Recovery Plans and instead use the s 27 power. Moreover, although counsel differed on the level of certainty the obligation provided, they accepted that Councils were obliged to "have regard" to PC1 as a proposed RPS without action from the Minister.

[132] The Minister does not appear to have recognised that the primary focus of the Act was on the mandatory long-term Recovery Strategy and that it would address the identification of areas for rebuilding and redevelopment, their sequencing and the location of existing and future infrastructure. The Minister needed to consider why it was necessary to exercise the discretionary ancillary power under s 27 in October 2011 while the Recovery Strategy was still being developed. Instead the Minister appears to have considered, incorrectly, that the s 27 power was simply an independent, stand-alone power.

[133] We do not overlook the fact that, as a result of the Minister's decisions, the Environment Court appeals were ended and Council officers were able to focus on earthquake recovery matters rather than the appeals. But the Minister does not appear to have considered whether a similar outcome might not have been achieved through the alternative Recovery Strategy and Recovery Plan process.

[134] For reasons similar to those we have given on this issue in respect of the Minister's first decision, we therefore cannot be satisfied that, objectively, the Minister reasonably considered that the exercise of the power in October 2011 was necessary. It is not at all clear from the evidence why a short term "neat solution", which precluded public participation, was necessary, rather than merely expedient or desirable, for a long-term problem which would be addressed in the Recovery Strategy, the draft of which had already been publicly notified.

[135] We return to the consequences of this finding later in our judgment.[93]

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[93] Below at [152]–[162].

Unlawful denial of access to Environment Court?

[136] There is no doubt that the right of access to the Courts is well established as part of the rule of law in New Zealand.[94] We agree with Mr Joseph, who presented the submissions for the respondents on this issue, that access to the Courts for the purpose of seeking justice, especially when decisions of the Government are involved, is a fundamental right.[95]

[137] But, as the High Court Judge recognised,[96] two questions are raised in this case:

(a) whether the respondents have been deprived of access to the courts by the revocation of PC1; and

(b) if so, whether the Act authorised the Minister to take that step.

[138] On the first question, there is no doubt that the revocation of PC1 did deprive the respondents of access to the Environment Court and also the possibility of pursuing any appeals against that Court's decision.[97] There is some force in the submissions for the appellants, however, that the role of the Environment Court relating to an RMA document is essentially a policy-making one, standing in the shoes of the planning authority, rather than adjudicating on the legal rights or obligations of private individuals, so that the right of access to the courts of general jurisdiction is not engaged. But, in our view, where, as here, the rights of the respondents to the private use of their land was in issue before the Environment Court, which is a "Court of record"[98] presided over by judges,[99] it is hard to say that

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94 New Zealand Bill of Rights Act 1990, ss 27(2) and 27(3); Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 1026; and *Turners and Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 13 August 2010 at [93]–[94].

95 *Raymond v Honey* [1983] 1 AC 1 (HL) at 12–13; *R v Secretary of State for the Home Dept, ex parte Leech* [1994] QB 198 (CA) at 210; *R v Lord Chancellor, ex parte Witham* [1998] QB 575 at 581–585 and 586–587; and *Thomas v Baptiste* [2000] 2 AC 1 (PC) at 23.

96 High Court decision, above n 2, at [164].

97 RMA, ss 299 and 308.

98 RMA, s 247.

99 RMA, ss 249(1), 250(1), 258(1) and 261(1).

their right of access to the Courts was not adversely affected by the revocation of PC1.

[139] This means that attention must focus on the second question, which is whether the exercise of the power under s 27 overrides processes and appeals to the Environment Court already in progress under the RMA.

[140] It is reasonably well established that a statute may by clear words expressly or by necessary implication abrogate a fundamental right such as the right of access to the courts.[100] Mr Joseph referred us to decisions that suggested the right of access to the courts could only be excluded by express language.[101] We note, however, that in *Secretary of State for the Home Department, ex parte Simms*, which is widely regarded as the leading decision on the principle of legality, Lord Hoffmann said that legislation should be interpreted consistently with fundamental rights "[i]n the absence of express language *or necessary implication to the contrary*".[102]

[141] In this context exclusion of a fundamental right by "necessary implication" means, as Lord Hobhouse of Woodborough put it in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax*:[103]

> A necessary implication is not the same as a reasonable implication... . A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

This statement has been applied by both the Privy Council in *B v Auckland District Law Society*[104] and the Supreme Court in *Cropp v Judicial Committee*.[105]

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100 *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 (HL) at 286; and Burrows and Carter, above n 14 at 323–324.

101 *R & W Paul Ltd v The Wheat Commission* [1937] AC 139 (HL) at 153–154; *Chester v Bateson* [1920] 1 KB 829 (KB).

102 *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 (emphasis added).

103 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45] (emphasis in the original).

104 *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [58].

105 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26].

[142] Here, as the High Court Judge held,[106] there is no express exclusion in s 27, but was access excluded as a matter of logic by necessary implication from the express provisions of the Act construed in their context?

[143] There is no doubt that under s 27 the Minister has power to revoke the whole or any part of an RMA document, which is defined as including a proposed regional policy statement, that is, a document which under the RMA may be subject to appeal to the Environment Court under the sch 1 process.[107] Consequently, in the event that the Minister were to revoke such a document, the right of appeal to the Environment Court in respect of that document would cease to exist. This consequence occurs as a matter of logic by necessary implication from the express provisions of s 27 and the definition of RMA document construed in its context. The Act therefore contemplates that the Minister's exercise of the s 27 power could end appeals before the Environment Court.

[144] On this basis the respondent's rights of appeal to the Environment Court in respect of PC1 to the Canterbury RPS ceased to exist when the Minister revoked PC1. As already noted,[108] the Environment Court itself recognised that this would be the outcome of a decision by the Minister to revoke PC1 under s 27(1)(a).

[145] Mr Joseph submitted that while it would be lawful for rights of appeal to the Environment Court to be extinguished as a consequence of the exercise of the s 27 power for a legitimate purpose, it was not lawful for the Minister to exercise his powers for the purpose of extinguishing appeals to the Environment Court as he had done here. In particular, he could not exercise his powers to bring the appeals to an end in favour of one side.

[146] We have already decided that insofar as the Minister's decisions promoted planning certainty and allowed Council officers to focus on recovery, they were within the purposes of the Act. The ending of the appeals was therefore simply the consequence of the legitimate exercise of the Minister's powers and was not unlawful.

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106 High Court decision, above n 2, at [172].
107 RMA, sch 1.
108 See above at [82].

[147] We do not agree with the High Court Judge[109] or the respondents that their rights of appeal were retained by s 68 of the Act. There is nothing in s 68, which deals with other appeal rights, to suggest that it was intended to preserve appeal rights which ceased to exist on the exercise of the power under s 27.

[148] Nor do we agree with the High Court Judge[110] that the legislative history or the inclusion of an express provision in the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 alters the position. The logical outcome of exercising the s 27 power was so clear that no further provision was required.

[149] Furthermore, we agree with Mr Goddard for the Councils that it makes no sense to suggest that the s 27 power may be exercised after the conclusion of an appeal to the Environment Court, in a manner that would reverse the result of the appeal, but not while the appeal is on foot. There is no warrant in the statutory language or scheme for such a limit. On the contrary, in the context of this Act an interpretation which results in an outcome that avoids the pursuit of unnecessary appeals makes sense.

Failure to take into account relevant considerations?

[150] In their notice supporting the High Court judgment on alternative grounds, the respondents rely on a claim not addressed by the High Court Judge that the Minister failed to take into account mandatory relevant considerations when he made his decisions. Relying on decisions of this Court that mandatory relevant considerations arise as a matter of statutory interpretation,[111] the respondents submitted that when the requirements of s 10 and the consequences of exercising the s 27 power are taken into account Parliament would expect the Minister to address the actual impact of the exercise of the powers.

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109 High Court decision, above n 2, at [173].
110 High Court decision, above n 2, at [174]–[175].
111 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); and *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [49].

[151] We refer to this ground for completeness, but given the conclusions that we have already reached it is unnecessary to address it further than it has already been dealt with directly and indirectly in this judgment.

Relief

[152] At the conclusion of the hearing we invited the parties to provide memoranda indicating their options for relief in the event that we decided that the High Court was wrong to find that the Minister's decisions were invalid on the improper purpose ground, but that they were nevertheless invalid on the ground that the Minister had failed reasonably to consider whether the exercise of the s 27 power was necessary. We received helpful memoranda from the Councils dated 28 November 2012 and the respondents dated 5 December 2012 suggesting a range of alternative options.

[153] The Councils sought orders allowing the appeal and setting aside the High Court orders on relief, thereby reinstating the introduction of chapters 12A and 22 and the revocation of PC1, and a direction under s 4(5C) of the Judicature Amendment Act that the Minister reconsider his decision. Alternatively, they suggested that instead of directing the Minister to reconsider his decision the question of relief could be adjourned pending formulation and approval of a Land Use Recovery Plan; or that the High Court orders reversing the insertion of chapters 12A and 22 be set aside, but that the High Court order setting aside the revocation of PC1 be upheld, with leave reserved to apply to the Court for further orders or directions. The Councils also sought consequential orders requiring the respondents to pursue their Environment Court appeals on the basis of the version of PCI prepared by the Councils and CERA for the Minister.

[154] The respondents sought orders dismissing the appeal and retaining the High Court decision. They submitted, however, that if this Court did not uphold the High Court judgment on the improper purpose ground, then the Minister's decision to revoke PC1 should be set aside, but the decisions to introduce chapters 12A and 22 need not be set aside, so that those chapters would remain in effect, except to the extent that the subject matter of those chapters was challenged in appeals before the Environment Court. This was on the basis that the challenged provisions would

become operative in the form determined by the Environment Court at the conclusion of the appeals. The respondents opposed the suggestion that the version of PC1 prepared by the Councils and CERA for the Minister should be the basis of their appeals.

[155] We have considered the alternative proposals put forward by the Councils and the respondents, but in the end have decided that we should approach the exercise of our discretion to grant relief in the usual way. The starting point is that the respondents, having demonstrated that the Minister erred in the exercise of his s 27 power, are entitled to relief.[112] We then consider that there are no extremely strong reasons to decline relief.[113]

[156] First, there is no challenge on appeal to the High Court Judge's conclusion that there was no delay by the respondents sufficient to require relief to be declined.[114]

[157] Second, contrary to the submissions for the Councils, there is no evidence of any disruption to the recovery of greater Christchurch as a result of the High Court decision. There was no application by the Councils for leave to adduce further evidence on appeal.

[158] In particular, there was no application for leave to adduce evidence that the practical difficulties identified by council officers in their affidavits in the High Court relating to decisions made in reliance on chapters 12A and 22 have eventuated since the reinstatement of PC1 following the High Court decision. We have nothing before us that supports the submission for the Councils that upholding the Judge's decision on relief will undermine the legislative intent of the Act. Even if there were evidence of some such difficulties, it may well have been outweighed by the prejudice to the respondents as found by the Judge in the High Court.[115]

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112 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [61].
113 Ibid, at [60]; and *Secretary for Justice v Simes*, above n 111, at [117].
114 High Court decision, above n 2, at [188]–[190].
115 High Court decision, above n 2, at [191]–[203].

[159] Furthermore, notwithstanding the High Court decision on 24 July 2012 setting aside chapters 12A and 22, the Minister on 15 November 2012 was able to exercise his power under s 16(4) of the Act to direct the Canterbury Regional Council to develop a Land Use Recovery Plan for Greater Christchurch, which is to provide for:[116]

> the location, type and mix of residential and business activities within specific geographic areas necessary for earthquake recovery, including:
>
> (i) the priority areas to support recovery and rebuilding in the next 10–15 years; and
>
> (ii) enabling and informing the sequencing and timescales for the delivery of infrastructure and transport networks and hubs to support the priority areas ...

[160] This tends to show that the Minister expects the Council to be able to develop this Plan in the absence of the "planning certainty" he sought to achieve through chapters 12A and 22.

[161] While there is some force in the Councils' submission that reactivation of the Environment Court appeals would be likely to divert council officers from earthquake recovery matters, the question whether the Environment Court should continue with the appeals following our judgment will depend on the steps that the Minister and the parties to those appeals decide to take. We therefore do not accept the submission that reactivation of the appeals will necessarily divert Council officers from earthquake recovery matters.

[162] We also agree with the respondents that this is not a case where we should formally direct the Minister to reconsider his decisions under s 4(5)–(5C) of the Judicature Act, either on the basis that his decisions are retained or set aside.[117] It is for the Minister to decide whether he wishes to reconsider his decisions in light of this judgment or to proceed in a different manner.

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116 "Direction to Canterbury Regional Council to Develop a Land Use Recovery Plan for Greater Christchurch" (15 November 2012) 136 *New Zealand Gazette* 3976, cl 2.2.

117 *Air Nelson Ltd v Minister of Transport*, above n 112, at [73]–[75]; and *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA) at 648.

[163] Finally, we do not consider that it is appropriate to accept the submission for the respondents to reinstate PC1 and chapters 12A and 22, except to the extent that the subject matter of those chapters is challenged on appeal. Our decision that the appeal is to be dismissed on the grounds we have identified means that it is unnecessary to consider the complexities which would inevitably be involved in relief of this nature.

Conclusion

[164] For the reasons we have given, we have concluded that to the extent that the Minister's two decisions achieved planning certainty they were made in accordance with the purposes of the Act. But we have also concluded that the two decisions were invalid because, in exercising his power under s 27 of the Act, the Minister failed to consider whether it was necessary to proceed by way of s 27 rather than by way of the Recovery Strategy and/or Recovery Plans. We therefore agree with the result in the High Court, but not with all of the Judge's reasons for reaching that result.

[165] We have accepted the submissions for the Minister and the Councils that decisions designed to achieve planning certainty for greater Christchurch may be in accordance with the purposes of the Act. Our decision, however, is based on the absence of evidence that the Minister reasonably considered the alternatives to proceeding in October 2011 by way of his discretionary power under s 27 rather than by way of the mandatory Recovery Strategy and Recovery Plans, which involved public participation and which were likely to overtake the s 27 decisions in any event. In these circumstances it has not been necessary to decide whether all the content of chapter 12A is in accordance with the purposes of the Act.

[166] Whether the Minister wishes to reconsider his decisions in light of this judgment or proceed in a different manner, such as by way of the proposed Land Use Recovery Plan, is for the Minister to decide.

Result

[167] The appeals are dismissed.

[168] Our preliminary view is that the respondents, as the successful parties, are entitled to their costs on a Band B basis for a complex appeal, together with disbursements in the usual way. But as they have not been successful on all grounds and as we did not hear from the parties on the question, costs are reserved. If the parties are unable to reach agreement, memoranda may be filed: the respondents by 31 January 2013 and the appellants by 14 February 2013.

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APPENDIX: EXTRACT FROM THE AFFIDAVIT OF THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY

38. I wish to highlight several aspects of the [decision] 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 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 s 27 powers to make further changes if necessary.

46. The October briefing paper contained guidance as to how I could exercise the section 27 powers within the purposes of [the Act]. Specifically, I was referred to the following purpose:

46.1 To enable community participation in the planning of the recovery of affected communities without impeding a focus, timely, and expedited recovery;

46.2 To provide for the Minister and CERA to ensure the recovery;

46.3 To enable a focussed, timely and expedited recovery;

46.4 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;

46.5 To restore the social, economic, cultural, and environmental well-being of greater Christchurch communities.

47. I was aware that the purpose of enabling community participation may have been perceived as being curtailed by using the section 27 process, but I was also aware that the community had been consulted for some years about the urban limit line and that, with a few exceptions where people wished to extend the line to include their property, there was no community opposition to having a line.

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 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 PCl.

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 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 l2A based on PCl 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 PCl. 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.