

**IN THE MATTER OF** the Canterbury Earthquake  
(Christchurch Replacement District Plan)  
Order 2014

**AND**

**IN THE MATTER OF** Stage 3 Chapter 9 Natural and Cultural  
Heritage Hearing

Date: 3 March 2016

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**MINUTE**

**Re Topics 9.1 – 9.5 and in response to Memoranda received in response to the Panel’s  
Minutes of 22 and 29 February 2016**

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**Memoranda in response to the Panel’s Minutes**

[1] In response to the Panel’s Minute dated 22 February 2016<sup>1</sup> (‘22 February Minute’), the Panel received two memoranda of counsel on behalf of Christchurch City Council:

- (a) A memorandum dated 25 February 2016 (‘the Council’s 25 February memorandum’) concerning the Panel’s proposal to appoint Mr John Kyle pursuant to clause 8, Schedule 3 to the OIC<sup>2</sup> as an expert to the Panel, to assist facilitated mediation on Topic 9.3, and to report to the Panel with detailed recommendations including on drafting matters;
- (b) A memorandum dated 26 February 2016 (‘the Council’s 26 February memorandum’) reporting on progress following mediation on Topic 9.1 (Indigenous Biodiversity) and addressing steps and seeking associated directions concerning the Council’s intended response to our 22 February Minute concerning Topics 9.3 (Historic Heritage) and 9.4 (Significant Trees).

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<sup>1</sup> Minute regarding Topics 9.1-9.5 dated 22 February 2016

<sup>2</sup> Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014

[2] In light of the concerns expressed by the Council in its 25 February Minute, the Chair issued a further Minute calling for any responses from other parties on 29 February 2016 ('29 February Minute'). One response was received, from Hands off Hagley Inc (#3711, 5034) ('HoH'). It opposes the appointment.

### **Decision not to appoint an expert adviser at this time**

[3] In view of the Council's and HOH's expressed concerns, we have decided not to appoint Mr Kyle to the role our 22 February Minute indicated. We reach that view reflecting on the "fair-minded lay observer" test of bias<sup>3</sup>. At this stage, despite our efforts, we have not been able to identify any other planning expert who would have the requisite drafting skills for this task, and who is not precluded by reason of existing engagement by parties before us (which we record would not have precluded Mr Kyle, as our 22 February Minute sets out).

[4] That means that, as things stand, we will proceed in the absence of such an appointment being made. We are mindful that this has a consequence of leaving parties without an opportunity to test and contest what such an expert could have recommended, so as to assist our final determination of the most appropriate provisions, and best ensure drafting quality. However, we will endeavour to ameliorate that to the extent we are able to, in the context of the resumed hearing, following the conclusion of the intended mediation process. We have in mind a process of expert "hot-tubbing" as one possible measure. However, we will issue directions on this in due course.

[5] At this stage, in view of our decision not to appoint an expert at this time, we make consequential modifications to the directions we made in our 22 February Minute.

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<sup>3</sup> HOH refers to the Court of Appeal decision in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, at 148. Although that decision remains good authority on the question of delay in bringing proceedings, we understand the law concerning apparent bias is now as expressed by the Supreme Court decision in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, which adopted from a High Court of Australia decision in *Ebmer v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337, at [3], [33] the "fair minded lay observer" test, ie a judge or decision-maker is disqualified if "a fair-minded lay observer might reasonably apprehend that the judge [or decision-maker] might not bring an impartial mind to the resolution of the question the judge [or decision-maker] was required to decide": *Elmer*, at [3], [33]. The question is one of real (not remote) possibility of bias, not probability: see also PA Joseph, *Constitutional and Administrative Law in New Zealand*, 4<sup>th</sup> edition, 25.5.4, particularly at page 1084.

### **Topic 9.1: indigenous biodiversity**

[6] The Council's 26 February memorandum reports on progress following mediation, including that the Council "anticipates that, by the time closings are filed, the provisions will reflect a substantial degree of agreement between the mediation participants, with reduced and clearly defined points of disagreement".

[7] As requested, the memorandum proposes a timetable for conclusion of the hearing. The timetable covers arrangements for filing and exchanging updated drafting proposals, and statements of agreement and disagreement on these, by the Council and various mediation participants. We consider those timetabling suggestions are appropriate, and we have made directions accordingly. The memorandum also proposes a timetable for sequential exchange of closing submissions. In principle, we consider sequential exchange of closing submissions would be appropriate. However, before we make directions on the timing of closing submissions, we want to gauge how far matters have progressed, both in terms of mediation and drafting. For instance, we may want to reserve further hearing time. Therefore, we have made directions leaving aside those matters for further direction at a later stage.

### **Topic 9.3: historic heritage**

#### *Interior fabric*

[8] In our 22 February Minute, we reserved leave to the Council to apply to adduce supplementary evidence for the purposes of specifying interior heritage fabric for protection, for specified listed buildings. As a proviso, we specified that any such application had to specify intended arrangements for landowner engagement for those purposes. The Council's 26 February memorandum seeks to adduce supplementary evidence for those purposes. However, we are concerned about a number of aspects of the Council's leave request.

[9] One matter of concern is the vagueness of what the Council seeks to do. Rather than specifying a list of buildings, it suggests that it intends to encompass in the order of 25% of the properties listed in the Notified Proposal together with a further "100 scheduled heritage buildings" where information is held on Council files. Secondly, it is vague about how engagement with landowners is proposed to be undertaken. As we understand the Council's

present intention, it would be to confine that engagement to the 100 or so buildings where the Council proposes to draw from information on Council files. Even that engagement appears confined, namely to write to the owners to “invite comment” as to the correctness of the list.

[10] We remind the Council of the provisos we stated to our leave direction, and our related observations at paragraph [39] of our Minute, including:

“... this matter directly impacts on matters of certainty and the capacity, or otherwise, of a landowner to adaptively reuse their property. We have noted Heritage New Zealand’s position as to the importance of clear identification. Related to that, it would appear that it is inherently important to engage with landowners in the process of identification”.

[11] We have a related concern about the associated delay that would ensure were we to grant leave on terms more closely aligned to the expectations we have expressed in our 22 February Minute. That is particularly in view of the fact that, despite not according with our expectations as noted, the Council seeks until 29 April 2016 to file its related supplementary evidence.

[12] Therefore, we decline the Council’s request for leave and instead direct that, if the Council still seeks leave to adduce supplementary evidence on this, it must make a fresh request properly according with our 22 February Minute by 4pm 7 March 2016.

*Barrington Park stone gates and Coronation Hall*

[13] The Council seeks leave to call supplementary evidence as to its investigation for any listing of Barrington Park stone gates and Coronation Hall. It seeks a direction allowing for that evidence to be filed by 29 April 2016.

[14] That requested date may not give rise to undue delay if what the Council seeks in its supplementary evidence is not opposed by any other submitter. However, if it is opposed, we are concerned that consequential timetabling of rebuttal evidence, prior to a resumed hearing, could give rise to undue delay. We appreciate that mediation could assist to give greater clarity on this risk. Therefore, we invite the Council to continue to progress this topic, but on the basis that we will withhold from making directions until we have greater clarity on any attendant

delay risk. In the meantime, if the Council considers it can give any greater clarity on timeliness, we encourage the Council to do so.

#### **Topic 9.4: significant trees**

[15] The Secretariat will confer with the Council on arrangements for the requested facilitated mediation.

[16] The Council signals a wish to make an application in due course, seeking leave to file supplementary evidence on topics to be confirmed. Towards that end, it now seeks leave to file a memorandum confirming those topics and arrangements for engagement with interested parties, by Monday 7 March 2016 (following mediation on Thursday 3 March 2016). Leave is granted, subject to noting our observations on undue delay in regard to any future application made for related timetabling directions.

[17] The Panel has received an application by Faye and Ron Sedgley for leave to lodge a late further submission in response to the submission by Christchurch Civic Trust (#3700) in respect to Topic 9.4 and the Schedule of Significant Trees. The application refers to the processes by which the Liquidambar Styraciflua (Sweet Gum) (T444) on the Sedgley's property at 8 Blair Avenue, Papanui was proposed for addition to the schedule, following mediation. In view of those circumstances, and being satisfied that no prejudice would arise to other parties, we consider the balance of fairness lies in favour of granting the leave request. On delegation from the Chair, I grant the application accordingly. We urge parties to mediation to reflect on whether or not it is appropriate for the tree to be added to the list. On the evidence we have heard, including as to the condition of the tree and its effects, we struggle to understand why it would be appropriate. We invite relevant parties to address this in mediation, but we will in due course determine the matter in light of closing submissions, if need be.

[18] The Sedgley's leave application did not attach the intended further submission. Therefore, in the directions below, I have specified a due date of Friday 18 March 2016, by 4pm.

## Memorandum of counsel on behalf of the Greater Christchurch Building Trust

[19] Unrelated to the 29 February Minute, but in response to the Panel's 22 February Minute, the Panel also received a memorandum of counsel on behalf of the Greater Christchurch Building Trust, dated 29 February 2016 ('GCBT memorandum'). It seeks that:

- (a) The "issue as to the activity status of demolition of" the ChristChurch cathedral under a "section 38 notice" pursuant to the Canterbury Earthquake Recovery Act 2011 ('CER Act') "be considered separately from the demolition of other buildings under such notices, including in mediation"; and
- (b) Any further mediation on the activity status of demolition of the Cathedral be consistent with the purpose and finding of the so called "Dean Report"<sup>4</sup>.

[20] The matters arising from GCBT's memorandum can be quickly addressed. Firstly, we make clear that we make no direction compelling GCBT or any other submitter to attend mediation. It is a matter for each party to choose whether or not it will attend (with the obvious exception that the Council is a required attendee). GCBT would appear to seek directions as to how mediation is to proceed, and what it is to address. We do not consider it would be helpful or appropriate to do so, beyond what our 22 February Minute already sets out. GCTB is expected to abide directions from the mediation facilitator, Mr Mills, should it elect to participate.

[21] It was improper for GCBT to seek to include in its memorandum substantive arguments on how we should ultimately decide matters concerning activity status and section 38 notices, in relation to ChristChurch cathedral. That is particularly given that our Minute makes clear that we will await the outcome of mediation on these matters. As we have made clear, all parties will have the opportunity to make closing submissions according to a timetable we will set in due course.

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<sup>4</sup> The Report on Facilitated Discussions with Engineers for Church Property Trustees and the Great Christchurch Buildings Trust on Engineering Options for Report, Restoration or Replacement of the Christchurch Cathedral facilitated by Ms Miriam R Dean QC and released on 23 December 2015.

## Directions

[22] I **direct** as follows:

- (a) The directions we make at [98] of our 22 February Minute are modified by deletion of direction (e), i.e. ~~“Mr Kyle’s participation in that mediation will be as expert adviser to the Panel (on the basis that the Panel will, in due course, receive a report from Mr Kyle with his recommendations for changes to the Revised Version);~~
- (b) On Topic 9.1: indigenous biodiversity, the following timetable applies:
  - (i) By **4pm 11 March 2016**, the Council must file an update to the provisions it proposes for this topic reflecting the matters agreed at mediation and the Council’s position on the matters that are not agreed (and must also circulate that update to the mediation participants; email circulation sufficing);
  - (ii) By **4pm 18 March 2016**, parties who participated in mediation must provide to the Council (by email sent to the Council’s lawyers, ie Mr Conway at Simpson Grierson) the following two things: (A) any corrections and clarification sought in relation to the Council’s circulated provisions, and (B) confirmation of which provisions are agreed by those participants and which are not agreed;
  - (iii) By **4pm 24 March 2016**, the Council must file a revised proposal, identifying provisions about which there is known disagreement with any party or parties;
- (c) On Topic 9.3, historic heritage, leave is reserved to the Council to apply to adduce supplementary evidence for specified listed buildings, for the purposes of specifying interior heritage fabric for protection, provided that any application for leave must:

- (i) Specify intended arrangements for landowner engagement (noting, in particular, the expectations we set on that in our 22 February Minute and reiterate herein);
  - (ii) Be filed with the Secretariat by **4pm Monday 7 March 2016**.
- (d) On Topic 9.3 and the matter of Barrington Gates and Coronation Hall, leave is reserved to the Council to seek alternative or further directions for the filing of supplementary evidence, at any time up to two days after facilitated mediation has concluded (or, of sooner, once it is known whether or not the supplementary evidence would be opposed).
- (e) On Topic 9.4, significant trees, leave is granted to the Council to file a memorandum of counsel, by **Monday 7 March 2016**, the memorandum to:
- (i) confirm topics and arrangements for engagement with interested parties; and;
  - (ii) request leave to file related supplementary evidence;
  - (iii) seek related timetabling directions for any resumed hearing (bearing in mind our general concern to avoid unnecessary delay).
- (f) The application by Faye and Ron Sedgley for leave to lodge a late further submission is granted, on the basis that the submission may be lodged at any time prior to **4pm 18 March 2016**.



Environment Judge John Hassan  
Deputy Chair