

## **Decision to Offer Only 50 Percent for Uninsured Red Zone Properties Must be Reconsidered**

Canterbury Earthquake Recovery Minister and Chief Executive must reconsider decision to purchase Red Zone residential properties from owners of vacant land and uninsured homes.

The High Court has set aside the offers made by the CERA Chief Executive to owners of vacant land and uninsured homes in the Red Zone to purchase their properties for 50 percent of the 2007 rating value of their properties. The Court found that the decision to make the offers was not made according to law and directed the CER Minister and Chief Executive to reconsider and reach a new decision to purchase the owners' properties.

The judgment only applies to the property owners who made the application for judicial review – a development company that owns 11 sections in Brooklands and a group of 46 owners of vacant land or uninsured homes in the Red Zone (referred to as the Quake Outcasts). The judgment does not guarantee that the affected property owners will be offered more than 50 percent of the 2007 rating value of their properties; it only requires the Minister and Chief Executive to reconsider their decision and the offers with regard to the purposes and principles of the CER Act 2011 and the reasons given in the judgment.

The Government has said that it will appeal the decision to the Court of Appeal.

The applicants considered that they had been treated unequally in comparison to the owners of insured homes in the Red Zone who were offered 100 percent of the 2007 rating value of their properties. They argued that the decision to offer them only 50 percent of the 2007 rating value of their uninsured properties was unlawful because it was not made in accordance with the purposes and principles of the CER Act 2011 and because it was oppressive, disproportionate, and in breach of the applicants' human rights (the Human Rights Commission sought to be a party to the review as it considered that the case raised significant human rights concerns).

The Court identified two main issues to be determined:

First, did the creation of the Red Zone and the making of buy-out offers to property owners within the zone affect the property rights of the applicants?

Second, should the decision(s) which resulted in the Chief Executive making 50 percent offers to property owners in the Red Zone be set aside?

The Court noted that the applicants had originally sought a declaration that the creation of the Red Zone was unlawful. They subsequently amended their claim and sought only a declaration that neither the creation of the Red Zone, nor the subsequent offers made by the Crown, affected the existing rights at law of residential occupation of property owners in the Red Zone. However, the Court considered that it was "essential to examine whether the Red Zone decision was made according to law" in order to determine the first issue and that the question was of equal application to the determination of the second issue.

In relation to the first issue, both sides agreed that the property rights of the applicants were not affected, but for quite different reasons – a common ground that the Court described as 'fragile' and properly a disagreement as to the correct characterisation of the decisions to create the Red Zone and make buy-out offers and how they could be lawfully reached.

The applicants argued that their property rights were not affected because the creation of the Red Zone was unlawful as the Minister did not exercise his statutory powers under the CER Act 2011 to suspend their rights as property owners under the Resource Management Act 1991 to establish and live in their homes subject to the provisions of the Christchurch City Council District Plan.

The Minister argued that the applicants' property rights were not affected because the Crown did not need to

exercise its statutory powers under the CER Act 2011 to create the Red Zone, rather it could do so, and did, by exercising the Crown's common law powers to publish information.

The Court rejected the Minister's argument and found that the decision to create the Red Zone could only have been made using the statutory powers under the CER Act 2011, saying that the decision was much more than just an exercise of the Crown's common law power to publish information:

"The decisions must....be viewed as a package. There were four elements: the zone, the purchase offers, the announcement and the clearance strategy... In combination the package was essentially destructive of the residential zoning designations of the red zone land. In reality the decisions meant that over time the red zone would cease to be residential, and would become open space. In the meantime, the residential zone under the district plan subsisted, but in reality were no longer operative."

The Court went on to say that the use and enjoyment of a person's home is a fundamental right (as submitted by the Human Rights Commission). It considered that the creation of the Red Zone was an arbitrary and unlawful interference with that right because the Minister failed to invoke the CER Act 2011 when creating the Red Zone, when in the Court's view he was obliged to do so.

The Court made a declaration that the decision to create the Red Zone announced on 23 June 2011 did not lawfully affect the property rights of the property owner applicants, noting however that "this declaration provides clarification and vindication, but is limited to those who have successfully challenged the decision making process."

In relation to the second issue, the Court found that the decision(s) which resulted in the Chief Executive making 50 percent offers to property owners in the Red Zone were not made according to law because the decision was made outside of and without regard to the statutory regime. That is, the Minister and Chief Executive did not undertake a deliberative process as required under section 10 of the CER Act 2011 (to exercise powers under the Act in accordance with the purposes of the Act and only where he or she reasonably considers it necessary to do so).

The Court did not consider the other grounds of challenge in any detail, although did say that the unequal treatment argument had considerable merit, as the considerations applied to insured property owners – such as the need to provide certainty and create the confidence necessary to enable people to move on with their lives – applied equally to uninsured property owners.