BEFORE THE HEARING COMMISSIONERS

IN THE MATTER	of the Resource Management Act 1991
AND IN THE MATTER	of Proposed Plan Change 4 to the partly operative Canterbury Land and Water Regional Plan

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APPLICATION BY THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED SEEKING THAT COMMISSIONERS SHEPPARD AND VAN VOORTHUYSEN RECUSE THEMSELVES FROM HEARING PLAN CHANGE 4

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APPLICATION BY THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED SEEKING THAT COMMISSIONERS SHEPPARD AND VAN VOORTHUYSEN RECUSE THEMSELVES FROM HEARING PLAN CHANGE 4

1. Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest & Bird**) applies to have Commissioners David Sheppard and Robert van Voorthuysen recuse themselves from hearing Plan Change 4.

2. The grounds of the application are that the circumstances of Variation 1 are such that a fair minded lay observer would reasonably apprehend that Crs Sheppard and van Voorthuysen may not bring an impartial mind to Plan Change 4.

Background

3. Environment Canterbury has appointed Crs David Sheppard (Chair), Rob van Voorthuysen and Edward Ellison to hear submissions on Proposed Plan Change 4 to the Canterbury Land and Water Regional Plan. The hearing is due to commence on 29 February 2016.

4. Forest & Bird recently lodged a formal complaint with Environment Canterbury about the partiality of Crs Sheppard and van Voorthuysen in relation to their role as independent commissioners appointed by Environment Canterbury to hear submissions on Variation 1 to the Land and Water Regional Plan, relating to the Selwyn te Waihora catchment (**the complaint**).

5. In summary, the complaint alleges that Crs Sheppard and van Voorthuysen were not impartial, treating different submitters differently. In particular, Crs Sheppard and van Voorthuysen gave one submitter, Central Plains Water Ltd (**CPW**), substantially more favourable treatment than other submitters, particularly Forest & Bird and Fish and Game.

6. A copy of the complaint is attached to this memorandum.

7. Forest & Bird has lodged a submission on Plan Change 4 and intends to be heard and to call expert evidence.

The Law

8. Impartiality of adjudication of legal disputes is a cornerstone of our democratic society. This was eloquently put by the Court of Appeal in the leading case on recusal, *Muir v Commissioner of Inland Revenue*:[1]

> *From at least the time of John Locke in the late 17th century, adjudication of legal disputes by impartial and independent judges has been recognised as an essential underpinning of western society. That proposition – which was undoubtedly espoused by the common law – is today also found in specific instruments. For instance, under s 25 of the New Zealand Bill of Rights Act 1990, in matters of criminal law, there is a right to a fair and public hearing by an independent and impartial court (reflecting art 14(1) of the International Covenant on Civil and Political Rights); and in s 27 (the "Right to Justice") of that statute there is a right to the observance of the principles of natural justice in other matters, which undoubtedly also encompasses the proposition that judges must be independent and impartial.*

9. In *Muir v Commissioner of Inland Revenue* [2] the Court of Appeal traversed the jurisprudence on recusal in New Zealand and elsewhere and set out the test for determining whether a judicial officer should recuse themselves as follows:

> *[62] In our view, the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct.*

10. It is not necessary to show bias. All that is required is a reasonable apprehension that the judge **might** not bring an impartial mind to the case.

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[1] *Muir v Commissioner of Inland Revenue* CA46/06 7 August 2007at [32]
2 CA46/06 7 August 2007

11. "Reasonably apprehend" has been considered to mean a "real possibility". This interpretation was adopted in England by the House of Lords in *Porter v Magill*,[3] applied in the English decision of *AWG Group v Morrison*,[4] and was adopted in New Zealand by the Court of Appeal in *Muir v Commissioner of Inland Revenue.*[5]

12. The Court of Appeal in *Muir* also cited with approval a number of principles that were referred to the English decision of *AWG Group v Morrison*[6]. Perhaps the most significant of these is that if there is doubt about whether recusal is appropriate, that doubt should be resolved in favour of recusal.

Disqualification procedure

13. The Court of Appeal gave guidance on the disqualification procedure:

> *Disqualification procedure*
>
> *[65] The actual practice to be followed when bias is sought to be raised is important. There is little discussion of this issue in the cases, but there are some real difficulties in this area, particularly in the case of appellate courts.*
>
> *[66] In case it should be of assistance to practitioners we note that the Guide to Judicial Conduct to which we have previously referred (above at [57]) helpfully articulates a set of principles relating to disqualification procedure (at 15 – 16): 3.5 Disqualification procedure*
>
> *(a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.*
>
> *(b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:*
>
> *(i) The head of the jurisdiction;*

[3] *Porter v Magill* [2002] 2 AC 357
[4] [2006] 1 WLR 1163
[5] *Muir* at [44]-[64]
[6] [2006] 1 WLR 1163 at 51

(ii) The person in charge of listing;

(iii) The parties or their legal advisers;

not necessarily personally, but using the court's usual methods of communication.

(c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.

(d) It will generally be appropriate in cases of uncertainty for the judge to hear submissions on behalf of the parties and that should be done in open court.

(e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.

(f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.

(g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.

(h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.

(i) *The judge has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.*

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

[67] For our part, we find that advice helpful.

14. It is submitted that the same approach should be adopted in this case.

Stage 1: What are the relevant circumstances?

15. The key relevant circumstances are, Forest & Bird submits, that Crs Sheppard and van Voorthuysen were not impartial in the treatment of the Forest & Bird submission on Variation 1, treating another submitter, CPW, more favourably.

16. Forest & Bird and Fish and Game submitted on Variation 1, which related to the Selwyn te Waihora catchment. Forest & Bird and Fish and Game submissions addressed the limits set out in Tables (c) – (k) of Variation 1, critically including Tables (i) and (j). The submissions by Forest & Bird and Fish and Game did not provide any specific relief in terms of changed limits. The reason for this was that the submission time was too short for a full evaluation of the relevant provisions particularly the limits. Many parties were in a similar position, including, as discussed below, CPW.

17. Forest & Bird and Fish and Game presented jointly at the hearing and sought a number of specific changes. Expert evidence was jointly called by Forest & Bird and Fish and Game from Dr Alison Dewes, Dr Jim Cooke and Brett Stansfield at considerable cost, totalling many tens of thousands of dollars.

18. At the commencement of the Forest & Bird and Fish and Game joint case, Crs Sheppard and van Voorthuysen raised jurisdiction requesting:

    a. that a jurisdictional basis be provided for each of the specific amendments sought;

    b. that this justification be provided by way of a memorandum filed by Forest & Bird and Fish and Game, which was filed as requested.

19. In the decision, the Commissioners addressed the issue of whether it was necessary for Forest & Bird and Fish and Game to provide "precise details" of the relief sought at length. They concluded:

> *[187] ...we doubt that the authorities support the general proposition of Fish & Game and Forest & Bird that is not necessary for **precise details** of the relief sought (or indeed any relief) to be contained in the submission..."*

20. Crs Sheppard and van Voorthuysen ruled that all of the specific amendments sought at the hearing were beyond scope.

21. The source of Forest & Bird's concern about the impartiality of Crs Sheppard and van Voorthuysen is the treatment of the submission by CPW. In a similar vein to Forest & Bird and Fish and Game, CPW was unable to provide the precise details of the relief sought. The CPW submission stated, with respect to the Tables (i) and (j):

> *Central Plains seeks that the allocations be corrected to remove any errors and ensure that they are reasonable. It is not able to provide any **specific relief** at this time.*

22. This is, in effect, the same as the relief sought by Forest & Bird and Fish and Game. That is, Forest & Bird, Fish and Game and CPW were all interested in limits, particularly those contained in Tables (i) and (j), but could not say exactly what limits they sought in their submissions. Like Forest & Bird and Fish and Game, CPW sought a number of specific changes at the hearing.

23. Crs Sheppard and van Voorthuysen treated CPW differently from Forest & Bird and Fish and Game. Crs Sheppard and van Voorthuysen did not require CPW to file a memorandum addressing the jurisdictional basis for the specific changes CPW sought at the hearing. Indeed, in sharp contrast to Forest & Bird and Fish and Game, Crs Sheppard and van Voorthuysen recommended changes to Variation 1 based on CPW submissions, without considering the question of jurisdiction in their decision.

24. If Forest & Bird and Fish and Game were required to provide specific relief in their submission, then the same must apply to CPW. It did not.

25. Forest & Bird has lodged a formal complaint with Environment Canterbury about the way in which their submission was treated by Crs Sheppard and van Voorthuysen. Lodging this complaint was not done lightly.

26. One of the main reasons for lodging this complaint was that the expert evidence called by Forest & Bird and Fish and Game was not considered. Expert evidence called by CPW in almost identical circumstances was considered.

27. In conclusion, the key circumstances of this case are that Crs Sheppard and van Voorthuysen did not consider submissions on Variation 1 impartially. Submissions that were in substance the same were treated differently. Expert evidence called by Forest & Bird was not considered, but expert evidence from another submitter with a submission that was in substance the same was considered and changes recommended to the plan.

Stage 2: Would the fair minded lay observer reasonably apprehend that Crs Sheppard and van Voorthuysen might not bring an impartial mind to Plan Change 4?

28. As noted above, the second stage of the test is whether the circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the instant case. *Muir* set out some broad principles that might apply:

> *[64] It is not possible or desirable to create a catalogue of disqualifiers for judges in which a reasonable apprehension of bias may arise, but some broad principles can be stated. First, a judge should not decide a case on purely personal considerations. Secondly, there should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her. Thirdly, a judge must be in a position to consider all potentially relevant arguments. Fourthly, there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way.*

29. It is submitted that Crs Sheppard and van Voorthuysen did not treat Forest & Bird in the same way as CPW. Forest & Bird failed to provide specific details of the relief they sought with respect to Tables (i) and (j) and was taken to task on the question of jurisdiction in relation to the relief sought at the hearing, with such relief being ruled beyond scope. CPW was not taken to task on this same issue, and changes were made

to the Plan based on a submission that was in substance the same. The inequality of treatment is stark and obvious.

30. There is no apparent reason for the inequality of treatment.

    a. Why was Forest & Bird taken to task on jurisdiction but CPW not?

    b. Why were the amendments sought by Forest & Bird at the hearing ruled beyond scope but CPW's not?

31. The absence of any reason creates a perception that this lack of impartiality may also occur in Plan Change 4. If Crs Sheppard and van Voorthuysen did not bring an impartial mind to Variation 1, then there is a real possibility that they may also bring a similarly partial mind to Plan Change 4.

32. This falls within the second principle from *Muir*. The circumstances create the perception that Crs Sheppard and van Voorthuysen might not consider the Forest & Bird submission on Plan Change 4 impartially on the legal and factual merits. There is no room for such a perception.

33. It is submitted that a fair minded lay-observer would:

    a. look at the circumstances of Variation 1 and conclude that Crs Sheppard and van Voorthuysen did not bring a impartial mind to Variation 1;

    b. try and fail to find a reasonable explanation for the inequality of treatment; and

    c. in the absence of any explanation, conclude that there was a real possibility that the same lack of impartiality might arise from Crs Sheppard and van Voorthuysen in Plan Change 4 .

34. It is submitted on this basis that Crs Sheppard and van Voorthuysen should recuse themselves.

CONCLUSION

35. Crs Sheppard and van Voorthuysen failed to bring an impartial mind to Variation 1. Submissions that were identical in substance were treated in different ways. Forest & Bird was asked to justify the amendments sought at the hearing by way of memorandum. Crs Sheppard and van Voorthuysen found that they did not have jurisdiction to make changes sought by Forest and Bird and Fish and Game. A

submission from CPW similarly failed to identify the specific relief sought. However, changes were made based specific relief sought by CPW at the hearing.

36. As a result of the inequality of treatment without explanation on Variation 1, a fair minded lay observer might reasonably apprehend that Crs Sheppard and van Voorthuysen might not bring an impartial mind to Plan Change 4.

37. Forest & Bird does not consider there is any doubt, but if there is, it should be resolved in favour of recusal.

Dated: 9 February 2016

Peter Anderson
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