IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Plan Change 4 to the Canterbury Land and Water Regional Plan

RESPONSE OF HEARING COMMISSIONERS VAN VOORTHUYSEN AND SHEPPARD TO RECUSAL APPLICATION

Notification of Plan Change 4 to Land & Water Regional Plan

[1] Acting under the Resource Management Act 1991 ('the RMA') at its meeting on 27 August 2015, the Canterbury Regional Council ('the Council') resolved to notify a change (Plan Change 4) to its partly operative Land and Water Regional Plan ('the LWRP'). On 12 September 2015, the Council gave public notice of Plan Change 4, and that the closing date of the period for lodging submissions on it would be 12 October 2015.

Appointment of hearing commissioners

[2] At its meeting on 15 October 2015 the Council, under section 34A of the RMA appointed Edward Ellison, Rob van Voorthuysen and David Sheppard to be hearing commissioners to consider, hear, and report with recommendations on submissions on Plan Change 4. By Minute dated 8 December 2015 the commissioners gave notice that a hearing of the submissions would commence on 29 February 2016; and gave directions on the procedure in preparation for and during the hearings.

Submission of Forest & Bird

[3] Among the 35 submissions on Plan Change 4 that were lodged with the Council was one by Royal Forest and Bird Protection Society Incorporated ('Forest & Bird'). That submission gave details of decisions requested of the Council, including proposed amendments to Plan Change 4. Another submission was lodged by North Canterbury Fish and Game Council ('Fish & Game').

Application for Recusal

[4] On 11 February 2015 we received an application from Forest & Bird that we, David Sheppard and Rob van Voorthuysen, recuse ourselves from hearing Plan Change 4, on the ground that a fair-minded lay observer would reasonably apprehend that we may not bring an

impartial mind to Plan Change 4. In summary, the ground for the application is that Forest & Bird complains that, as hearing commissioners on a previous variation to the LWRP, we were not impartial, treating different submitters differently, giving one submitter (Central Plains Water –'CPW') substantially more favourable treatment than other submitters, particularly Forest & Bird and Fish & Game.

Decision-makers' role on a recusal application

[5] When an application is made that a decision-maker recuse himself or herself from his or her duties, it is the practice that the application is made to the decision-maker who is the subject of the application. Forest & Bird addressing its application to us follows that practice; and accordingly we have ourselves considered it, and we now give our response to it. This is the response of the two of us, individually and jointly.

Declining the application

[6] Having considered the recusal application, and taken counsel, we find and have concluded that it is not the case that a fair-minded lay observer would reasonably apprehend that we, or either of us, might fail to consider impartially, and neutrally evaluate on its merits, Forest & Bird's submission on Plan Change 4 and any evidence adduced at the hearing in support of it, and our making of recommendations for decision on it. We therefore decline the application that we recuse ourselves, and intend to continue with our duties under our appointments by the Council. Our reasons for that finding and conclusion follow.

The Law

[7] We accept that passages from the judgment of the Court of Appeal in *Muir v Commissioner of Inland Revenue*[1] quoted in Forest & Bird's recusal application represent law that is applicable to our consideration. In addition to that case, we have also considered the judgments in the Supreme Court in *Saxmere v Wool Board.*[2] Accordingly we proceed in two stages in accord with the opinion of the Court of Appeal in *Muir* at [62].

The first stage (the circumstances relied on)

[8] The grounds of Forest & Bird's application involves a comparison of two actions in the hearing in 2014 of Variation 1: one action being our requiring Forest & Bird to show that each of various amendments to that Variation requested by it at that hearing, but not detailed in its primary submission, would be within the relief specifically requested in any primary submission;

[1] [2007] 3 NZLR 495 (CA).
[2] [2010] 1 NZLR 35 (SC).

and the second action being our alleged omission to make a similar requirement of CPW. We call those two actions the first comparand and the second comparand.

The first comparand

[9] The first comparand is clear from the record of the hearing of Variation 1. At the start of the hearing of Forest & Bird's submission on 17 September 2014, counsel presenting a joint case for Forest & Bird and Fish & Game produced a substitute Appendix 5 to the evidence statement of Scott Pearson setting out revised amendments to Variation 1 now requested by Forest & Bird.

[10] That substitute Appendix 5 contains 23 separate entries over a total of 20 pages. Of those entries, five related to water quality targets and limits (entries 19-23 inclusive); and of those five, one sought deletion of Table 11(j).

[11] The transcript of the proceedings on 17 September 2014 records Commissioner Sheppard, as chairperson of the hearing commissioners on Variation, remarking to counsel for Forest & Bird that he would need to address, in respect of each outcome requested in Mr Pearson's substitute Appendix 5, his submission that the outcomes his client was seeking were fairly and reasonably within the scope of its submission in respect of each outcome requested.[3] Counsel responded that he could not do that right then.[4] Later, counsel repeated that he could not on that day go through and identify the changes sought in Mr Pearson's substitute Appendix 5 with specific reference to a submission. Counsel then offered to provide a memorandum or some other document which would set out the jurisdiction for those changes, and submitted that this would be the most sensible way of dealing with the issue; and remarked he could not think of an easier way to address the question.[5] The Chairperson responded that counsel could consider that over a break in proceedings, and that the hearing commissioners would similarly do so.[6]

[12] The transcript records that after an adjournment, the Chairperson announced that the hearing commissioners were willing to accept a substitute Appendix 5 on the condition that counsel would provide them with a revised version by the following Monday that would identify the source in a primary submission for each of the amendments requested.[7] Counsel for Forest & Bird and Fish & Game replied "...we will, next Monday, we will get you a revised version."[8]

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[3] Transcript of hearing proceedings, pg 4.
[4] Transcript, pg 5.
[5] Transcript, pg 28.
[6] Transcript, pg 29.
[7] Transcript, pg 30.
[8] Transcript, pg 30.

[13] Those exchanges were summarised in the hearing commissioners' report on Variation 1 to the Council.[9] In that report, the commissioners recorded that they had subsequently received a memorandum on behalf of Fish & Game and Forest & Bird dated 22 September 2014, accompanied by a revised version of Mr Pearson's Appendix 5. The commissioners' report summarised the contents of that memorandum, and recorded that neither the memorandum nor the revised version of Appendix 5 that accompanied it, gave particulars of which amendments requested in which of the Forest & Bird and Fish & Game submissions (or in any other primary submission on the variation) were relied on for each amendment now shown in Appendix 5.[10] In the report the hearing commissioners stated their conclusion that as the memorandum and revised schedule of amendments did not inform them of the sources relied on by the submitters, they did not fulfil their purpose.[11]

[14] In the report, the hearing commissioners then summarised the main amendments requested in the revised schedule;[12] applied the law to the circumstances; and gave reasons for findings that requests for them were not reasonably or fairly raised in the submissions, and were beyond the scope of the Council's jurisdiction.[13]

[15] We record that the context of those passages is a full report of the hearing commissioners on all the submissions on Variation 1. As recorded in that report, all submissions were carefully considered;[14] in respect of each submission point the commissioners had checked whether the issue was within the scope of the Council's authority to amend the variation;[15] the sufficiency of a submission needed to be judged individually;[16] Forest & Bird's submission was not alone in failing to give details;[17] the rationale for calling for identifying scope for submission points by reference to contents of primary submissions was explained;[18] opportunity for a submitter to adopt other's submission points was also explained;[19] other non-compliant submissions were considered individually;[20] and Appendix A contains a point-by-point review of the requests for amendments to the variation by reference to tests in section 32 of the RMA, and for making a coherent measure that would assist the Council.

[16] Subsequently, the recommendations contained in the commissioners' report were adopted by the Council as its decisions on the submissions. Forest & Bird lodged an appeal against that

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[9] Report of hearing commissioners, paras [238] to [240].
[10] Report, para [243].
[11] Report, para [245].
[12] Report, para [246].
[13] Report, paras [247]-[250].
[14] Report, paras [7] to [12].
[15] Report, para [164].
[16] Report, para [187].
[17] Report, para [188].
[18] Report, paras [190]-[196].
[19] Report, para [197].
[20] Eg Report, section 3.8, paras [220] to [232].

decision to the High Court, challenging (among other things) the correctness in law of the hearing commissioners' requirements of identifying the scope for submission points.

[17] We quote the first two of the ten questions of law raised by Forest & Bird in its appeal to the High Court:

> (a) Did the Commissioners have jurisdiction to make the changes sought by the Appellant at the hearing?
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> (b) How should the Commissioners have treated the nitrogen load attributable to Central Plains Water Enhancement Scheme when determining existing water quality for the purposes of the National Policy for Freshwater Management 2014 and/or the existing environment?

[18] However in the event, those grounds of appeal were not pursued by Forest & Bird in the High Court. Its appeal was settled, and was concluded, by consent, by the High Court directing certain amendments to Variation 1. Those amendments did not bear on either of the first two questions of law raised by Forest & Bird which we have quoted.

The second comparand

[19] The second comparand arising from Forest and Bird's grounds for its recusal application is an allegation that CPW, by its submission on Variation 1, had not provided specific relief in its submission with respect to the contents of Tables (i) and (j) of the variation, but had sought that "the allocations in those tables be corrected to remove any errors and ensure that they are reasonable"; that at the hearing CPW had sought a number of specific changes, in respect of which we had not required CPW to file a memorandum addressing the jurisdictional basis for the specific changes CPW sought at the hearing; and that we had considered expert evidence called by CPW, and recommended changes to Variation 1 based on CPW's submissions, without considering the question of jurisdiction.

[20] The CPW submission on Variation 1 was a substantial document (40 pages) of which Annexure 2 set out specific relief sought, in nearly all respects giving precise details of amendments requested. An exception to that was in respect of Tables 11(a), 11(i) and 11(j), on which CPW's submission asked "that the allocations be corrected to remove any errors and to ensure that they are reasonable."

[21] However the submissions presented by counsel for CPW at the hearing did not refer to amendments to Tables 11(a) or 11(i) at all. Their submissions were directed to Table 11(j), on which counsel submitted proposed amendments to Table 11(j) supported by expert evidence that they presented at the hearing. In Annexure 1 to their submissions, with reference to

amending that Table, counsel for CPW addressed (in column 3 at pages 5 and 6) the source in CPW's submission for the amendments they proposed. We understand that passage to implicitly relate the request to its context in the submission, from which it takes more full meaning. In particular Annexure 1 of the submission, itemising CPW's fundamental concerns, contains (in the second page) a reference to CPW's "lack of confidence" that modelled loads correctly reflect actual and likely loads; and to their having unreasonable impact.

[22] We acknowledge that at the hearing of CPW's submission, none of the hearing commissioners asked CPW to explain how the amendments to Table 11(j) shown in Annexure 1 to counsel's submissions were related to amendments requested in any of the primary submissions.

[23] Forest & Bird's further submission did not address CPW's submission on Table 11(j). At the hearing of CPW's submission, neither Forest & Bird nor any other submitter raised any point about the acceptability of CPW's submissions in that respect, nor, more generally, the Council's authority to make amendments to Table 11(j) to meet that submission.

[24] In the hearing commissioners' report to the Council, in section 6.6 (paragraphs [442] to [456], reasons were given for the recommendations for amending Table 11(j). Paragraph [445] specifically addresses CPW's submission that the nitrogen load provided in the Table is incorrect. In following paragraphs, the report refers to evidence, and contains findings about amendments to the Table appropriate to remove errors and ensure the allocations are reasonable. For example, paragraph [454] contains discussion of the consequences of entries in the Table that would set an allowable nitrogen load that is too low or too high.

[25] A second relevant passage is in Appendix A to the commissioners' report, recording the hearing commissioners' recommendations on submission points of numerous submitters seeking amendments to Table 11(j) and other tables grouped with it, as well as CPW's submission.[21] The following reasoning was given:

> These submission points ask for various amendments to Tables 11(i), 11(j), 11(k), 11(l) and 11(m). We have reviewed the provisions in the light of all those requests, with a view to accepting all that would (having regard to the effectiveness and efficiency of the body of provisions), be most appropriate for achieving the objections of the LWRP (taking into account the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions and risks of acting or not acting), and contribute to a coherent body of provisions that would assist the CRC to carry out its functions in attaining the purpose of the RMA. In the result we recommend some of the amendments requested and do not recommend others.

[21] Hearing commissioners' report, Appendix A, pp104-105..

The second stage (link between those circumstances and apprehension of impartiality)

[26] Forest & Bird submit that a fair-minded lay observer would conclude that in the absence of explanation of inequality of treatment on Variation 1, there is a real possibility that the same impartiality might arise in Plan Change 4.

[27] The circumstances that Forest & Bird argues might lead to reasonable apprehension of impartiality is a comparison of those two actions of ours. Stage two of the process is considering whether that comparison might lead a fair-minded lay observer to reasonably apprehend that we might not treat impartially, and neutrally evaluate, Forest & Bird's submission on Plan Change 4.

[28] The crucial point is Forest & Bird's contention that there is no apparent reason for what it calls inequality of treatment. We do not accept that.

[29] Case law shows that the fair-minded observer is to be taken to be reasonably informed about the issues in the case, and about the facts pertaining to the situation said to give rise to an apprehension of bias.[22] In *Saxmere*, Justice Blanchard quoted this description given by Lord Hope in *Helow v Home Secretary*:[23]

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she had seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious. ... Her approach must not be confused with that of the person who has brought the complaint. ... The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. ... Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she had read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[30] We expect that a fair-minded, informed person, taking the kind of trouble as described, would compare the circumstances of the amendments requested at the Variation 1 hearing by Forest & Bird and CPW, and would not fail to recognise significant differences that explain our

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[22] *Saxmere v Wool Board* per Blanchard J at [5]; per Tipping J at [38] and [39]; and per McGrath J at [97].
[23] *Helow v Home Secretary* [2008] 1 WLR 2416 at 2418 [2]–[3] (HL(Sc)).

different actions. First, Forest & Bird were asking for 23 separate amendments, five on water quality targets and limits, and one seeking omission of Table 11(j). Secondly, the exchange between counsel for Forest & Bird and ourselves would not give an informed observer to understand that in developing those amendments, Forest & Bird had given attention, in respect of each of them, to whether it was within the scope of a requested amendment in any primary submission on the Variation. That is why we had to ask counsel for Forest & Bird to give us particulars to show it. Indeed, as the transcript shows, at the time counsel agreed to do so, without protest, even though the memorandum he did provide did not do that. The lay observer, taking the kind of trouble described by Lord Hope in the passage we have quoted, would refer to the text of the hearing commissioners' report, and find the reasons for our request for those particulars. She or he would also see that we were concerned to be fair to all submitters and potential submitters, and were not discriminating based on the personality of Forest & Bird as submitter.

[31] In comparison, of the numerous amendments requested in CPW's submission, there was only the one that was not plainly stated with precise details. Second, although that one request was not ideal in its compliance with the stipulation of giving precise details, when read overall in context with the general submission in Annexure 1, it did state what the submitter was looking for (correction of errors and addressing unreasonable impact). Thirdly, the passage about this amendment request in Annexure 1 of counsel's submissions showed that CPW had of its own initiative given attention to the 'scope' question and responded to it. Therefore there was no occasion for us to ask counsel about it.

[32] So we are satisfied that a fair-minded, informed lay person would understand that the differences between the two cases gave reason for our having asked Forest & Bird for particulars of how its 23 amendments were within the scope of requests in primary submissions, and for our not needing to have to ask CPW, whose counsel had already addressed the question of their own initiative.

Waiver

[33] We have not considered in depth whether Forest & Bird's complaint about our rejection of the amendments it sought at the Variation 1 hearing was waived by its settling its appeal to the High Court in which it had alleged that we had erred in point of law in doing so. We make no finding on that question, and simply reserve it.

Conclusion

[34] Might a fair-minded and informed observer reasonably consider that, because in hearing submissions on Variation 1 we had asked for particulars of scope of one submitter, and not of

another submitter (whose case was materially different), we would fail to treat impartially, and neutrally evaluate on the merits, the case of the first submitter in considering submissions on Plan Change 4? There is no necessary link between the inquiring, or not inquiring, for particulars of scope and the fundamental duty of considering submissions impartially and neutrally and fairly evaluating them on the merits. The putative observer is one who is fair-minded, informed, and takes trouble to consider actions in their contexts. We do not accept that she or he could reasonably conclude that those events on Variation 1 would have any bearing on how, 18 months later, we will treat Forest & Bird's submission on Plan Change 4 on its merits; or that those events they would result in our failing to treat impartially, and neutrally evaluate on its merits, Forest & Bird's submission on that plan change. In conclusion, we find that the ground of Forest & Bird's recusal application is not made out.

Dated 22 February 2016.

David F Sheppard, Hearing Commissioner

Rob van Voorthuysen, Hearing Commissioner