

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of applications for resource consents by the Central Plains Water Trust and a notice of requirement for the designation of land by Central Plains Water Limited associated with the construction and operation of the Central Plains Water Scheme

**MEMORANDUM OF COUNSEL ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED IN RESPONSE TO THE
COMMISSIONERS MINUTE DATED 1 APRIL AND THE APPLICANT'S MEMORANDUM OF
COUNSEL DATED 1 MAY**

Dated 8 May 2009

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1. INTRODUCTION

- 1.1. This memorandum responds to the Minute of Commissioners dated 1 April 2009 ('the Minute'), and to submissions made on behalf of the Applicant in the Memorandum of Counsel dated 1 May ('the Applicant's Memorandum').
- 1.2. I will not be able to appear in person to present this memorandum, and I appreciate the Commissioners taking time to consider these submissions.
- 1.3. Forest and Bird's position is that the Commissioners should close the hearing and proceed to a final decision.
- 1.4. This memorandum will address the issue of an 'holistic approach', as referred to in the Minute at paragraphs 28 (a) - (c).
- 1.5. I have reviewed draft submissions to be filed on behalf of the Director General of Conservation, Malvern Hills Protection Society and Fish & Game. I adopt those submissions to the extent they are relevant to Forest and Bird.

2. COMMONSENSE APPROACH

- 2.1. I joined Forest and Bird at the beginning of 2009, having previously worked at a large corporate law firm. I therefore have not been at the hearings and do not know the minutiae of the application. However, I am now broadly familiar with the application - what these submissions offer is a 'commonsense approach', and case law to support this approach.
- 2.2. In this case the Applicant has presented a decision-making body (i.e. the Commissioners) with a proposal for a comprehensive project. The Applicant took the gamble that this was the appropriate course of action, and that a smaller scheme would not have been more appropriate for its needs, or in terms of the RMA.
- 2.3. The Commissioners have noted that the proposal was presented as an integrated package, and the Applicant has admitted as much (at paragraph 3 of their Memo to the Commissioners of 26 March 2009). The Applicant goes on to argue (in that same paragraph) that the applications were for the discrete elements requiring consent, rather than the project as a whole, and that the consents were not unavoidably interdependent. With respect, this seems rather counter-intuitive. Most large-scale proposals will involve a number of resource consents. If the applications were presented as a whole package, which by all accounts they were, it cannot be right that the Applicant can now claim that the consents were in fact distinct.

- 2.4. The Commissioners note at paragraph 12 of the Minute that an ‘all or nothing’ approach is potentially wasteful of the effort that the Applicant and others have put into the hearing thus far. However, that is the gamble that the Applicant took. It is not the role of a decision-making body to allow a consent applicant to perfect their case, where it has taken a considered risk in applying for a large-scale project. The Commissioners should not feel obliged to grant something simply because the Applicant decided to propose such a large project, with such significant environmental effects.
- 2.5. In terms of the effort put in by other parties, it is true that Forest and Bird, like many others, has been involved for some time with this proposal. However it is Forest and Bird’s position that the most fair and efficient course of action would be to close the hearing and decline the whole project. If the Applicant so wishes, it should re-apply for a new scheme, rather than be allowed to undertake significant re-design so late in the proceedings. This would be much clearer for all involved, and may mean that some parties currently involved would not need to participate.

3. CASE LAW

Unison Networks Limited

- 3.1. The Environment Court in *Outstanding Landscape Protection Society Incorporated v Hastings District Council* (W024/047) considered the possibility of declining part of a 37-turbine windfarm application by Unison Networks Limited. The application had been stated as being for ‘up to 37 turbines’, but the Court held that it could not grant consent for a lesser number of turbines, as all the evidence related to the full 37:

We considered the possibility of declining part of the proposal – those turbines within the equivalent length of the Waka (ie roughly 1.8km) south of the Waka sternpost (see para [49]). **But the proposal is for the layout of 37 turbines and that is what the evidence related to.** We have no evidence as to the effects of a major change on the viability, layout and practicability of what would remain of the project, or whether a more extensive project extending to the south might be preferred by the applicants. Nor do we have evidence about the acceptability of the different landscape, cultural and other effects from such an altered proposal. **While relocating some turbines or even eliminating a few might fall within the ambit of this hearing it is not open for us to embark on a major redesign of the project. Redesign of the project would need to be undertaken by Unison and fresh applications made.** [117] (Emphasis added)

- 3.2. Unison appealed this to the High Court, where in decision *Unison Networks Limited v Hastings District Council* CIV-2007-485-896 Potter J affirmed the Environment Court’s decision:

[103] Unison contends that the Environment Court erred in law in finding the Court was not able to approve a "reduced proposal" when such a finding was available on the evidence.

[104] The Court held at [117]: (*see above*)

[105] The Court did not decide that it was not open to it to approve a reduced proposal. Rather it held that the proposal before it was for 37 turbines, which was the proposal addressed in evidence. The Court did not consider it had before it the evidence to determine an altered or reduced proposal, and that it was not open for it to embark upon a major redesign of the project.

[106] That conclusion was clearly open to the Court. The Court was not presented with a reduced proposal by Unison. The proposal had focused on 37 turbines and that was the proposal the evidence addressed. The Court simply considered and rejected a modified proposal on the basis that there was insufficient evidence for it to determine a reduced proposal.

- 3.3. Similarly in this case, as the evidence was presented for a comprehensive, integrated project, the Applicant should not now be allowed to 'embark on major redesign'. The evidence was presented, and the hearing was conducted, on the basis of a comprehensive project.
- 3.4. Two other cases on this issue are noted in the Applicant's Memorandum at paragraphs 20-21, namely *Motorimu Wind Farm Ltd v Palmerston North City Council* (W067/08) ('*Motorimu*') and *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council* (A095/08) ('*Te Maru*').

Motorimu

- 3.5. In *Motorimu* the Environment Court granted consent to a further 5 turbines, of the 38 that were in dispute in those appeal proceedings. Similarly the Council had granted consent to a lesser number of turbines than was originally applied for, in that some of the turbines were considered 'adversely prominent' (Council Decision paragraph 8.10, quoted at paragraph 25 of *Motorimu*).
- 3.6. At the Environment Court, the applicants presented their landscape evidence on the basis of groupings of turbines, and the Court considered those groupings separately. Aside from the applicant's assertions that it would not go ahead with the proposal if all turbines were not consented, there was no logistical reason that made it difficult for the Court to decline some of those turbine groupings. The groupings were not dependent on each other in any material way, and could easily operate with a lesser total number of turbines. Similarly, the Council granted consent only to those turbines that would not have significant adverse landscape effects. This did not affect the operation of the consented turbines, and the Hearings Commissioners clearly already had sufficient evidence before them to distinguish between the effects of unrelated

parts of a proposal (as compared with the evidence before the Court in the *Unison* case, which was presented as on the basis of one complete set of turbines).

- 3.7. Here the Commissioners have been presented with a comprehensive project, with complex and inter-related components. Declining a major part of that project will necessitate further detailed evidence and analysis, involving significant expense and delay for all parties. This is not a simple case of taking out groupings of unrelated turbines from a windfarm. While the evidence in this case related to the component parts of the scheme, the scheme was presented as an inter-related whole, the components of which would be quite different if core parts were removed from the scheme.

Te Maru

- 3.8. In *Te Maru* the Court granted consent to the Rotorua District Council to take and use water from springs which were sacred to tangata whenua. The Court found that the continued taking of that water caused significant cultural adverse effects, and allowed the Council a lesser amount and shorter consent term than what had been applied for.
- 3.9. Like the removal of groupings of unrelated turbines in *Motorimu*, the reduction of water quantity allowed to be taken did not require any change to the Council's evidence, or mean that the subject of the consent application was materially altered. All it meant was that the Council could take less water than it wanted (which in any case was an increase from what had previously been taken). A reduction in requested water take (especially where that is in fact an increase in water taken) cannot be said to be the same as removing a core part of a large-scale scheme such as CPW, changing it from a water storage scheme to a run-of-river one. This may have quite different effects, indeed the mere fact that the Applicant will have to produce further evidence as to the effects, suggests that this scheme is quite different from a simple reduction in water take as in *Te Maru*.

Conclusions from case law

- 3.10. While *Motorimu* and *Te Maru* support the proposition that 'the greater includes the lesser', in this case there is no certainty that the effects of a major change in the project from one based principally on water storage to a run-of-river scheme will necessarily be lesser in all respects. In those cases, approving a reduced consent was a simple matter. In *Motorimu* this was because the turbines had been described in groupings - it was clear what the effects of each grouping would be, and the groupings did not relate to each other in any significant way. Similarly, in *Te Maru* the granting of a lesser amount of water for a shorter time did not make a material difference to the operation of that water take.

3.11. *Unison* shows further that while it may be open in certain circumstances for a Court to consent a reduced proposal, where evidence has not been adduced on that basis, it is not the role of the Court to 'embark on a major redesign' of a project. Nor should the Applicant in this case be allowed the chance to do so, where it has made the decision to present a comprehensive package.

4. CONCLUSION

- 4.1. If an Applicant takes the decision to apply for a comprehensive project, and presents evidence to a hearing on that basis, then it should not be allowed the chance to perfect its case once it is clear that some parts of that project will not succeed. This is unfair on all parties to the proceedings, who participated on the basis of one comprehensive project.
- 4.2. As Potter J affirmed in the High Court, if the Commissioners do not feel that they have the evidence before them for a different scheme, then the whole proposal should be declined.

Dated: 8 May 2009



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Royal Forest and Bird Protection Society Inc