

25 May 2016

For: John Sule

Dunedin City Council
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By email - John.Sule@dcc.govt.nz

Dear John

Proposed Windfarm

1. You have instructed us to provide the Commissioner with legal advice on four issues that have arisen during the course of this hearing. These issues are:
 - (a) Whether the effects gateway (section 104D) can be passed if one of a number of effects is found to be more than minor.
 - (b) The weight that should be given to the Objectives and Policies on renewable generation in the 2GP in this case, because as the applicant states the Operative District Plan does not address this issue.
 - (c) Whether Landscape Objectives and Policies apply to this proposal which has the turbines positioned outside the Landscape Overlay.
 - (d) The power for the Commissioner to consider a report that the applicant has asked to be kept confidential to only the Commissioner.

We address each of these issues in turn.

Effects Gateway – Section 104D

2. We consider that the effects gateway test under section 104D(1)(a) can only be passed if all the adverse effects on the environment, as mitigated, are found to be minor. Because nearby residents are part of "the environment" adverse effects on them too must be minor to pass the gateway test.
3. The most relevant statement of the effects gateway test is that of the Environment Court in *Stokes v Christchurch City Council*¹ where the Court confirmed that "*The test is whether the adverse effects as proposed to be remedied and/or mitigated, and taken as a whole, are more than minor.*"²
4. In applying this test the Court said³:

¹ [1999] NZRMA 409 (EnvC)

² Para [76]

³ Para [79]

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Looking at all the adverse effects together with the proposed mitigating measures we consider they are not more than minor.

5. In a later case the Environment Court⁴ applied this test and found that where some of the effects were more than minor then the gateway test had not been passed. The Court stated:

[704] It is obvious from our discussions of, and the findings on, the adverse effects on the environment in Chapter 6 of this decision, that some of the adverse effects of the proposed scheme are more than minor. These include:

- [a] The reduction of flow in the river over the diversion reach and the resulting diminishment of natural character;*
- [b] The potential effect on trout within the diversion reach if there are extended periods of low flow through the summer period;*
- [c] The potential effects on the black-fronted tern which are considered to be of low probability but high impact.*

[705] Accordingly, the proposal does not pass through the first gateway.

6. This decision makes it reasonably clear that where there are some effects from the proposal that are found to be more than minor, the effects gateway is not passed.

7. The High Court has also discussed the context of this gateway as follows⁵:

[101] In this context, it becomes clear that the purpose of s 104D(1)(a) is to allow applications for non-complying activities which may or will be contrary to the objectives and policies of an operative district plan or proposed district plan where the adverse effect is so "minor" that that is likely not to matter. It presents a picture where non-complying activities are unlikely to get consent under an operative district plan, let alone under a proposed district plan, but they will be considered if the adverse effects will be "minor".

[102] In that context, it can be understood immediately that "minor" here is very much at the lower end of adverse effect...

8. We therefore consider that the case law as it currently stands requires essentially a conclusion that all relevant adverse effects are minor to pass the effects gateway. We note that the Environment Court has clearly found that where "some" effects are more than minor then the effects gateway is not passed.

9. We have considered Darryl Sycamore's evidence on the non-complying status⁶ and the legal submissions (18 May 2016)⁷. We agree that the legal submission is correct on this point. The effects gateway test does not involve weighing, or aggregation / balancing process (including of positive effects).⁸

10. Therefore, we advise that the application for the windfarm, if it is to be found to have more than minor adverse effects on residents (as mitigated), would not pass the effects gateway test of section 104D(1)(a).

Weight for 2GP Objectives and Policies

11. The applicant has argued that the Commissioner should attribute more weight than usual to the Objectives and Policies of the Proposed District Plan relating to renewable generation.

⁴ *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403

⁵ *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815 at para [101]

⁶ Darryl Sycamore's Planner's Report at [182]-[185] in Hearings Committee Agenda (17-19 May 2016)

⁷ Legal Submission on behalf of Simon Ryan and Jennifer Ashby (90 Pryde Road) and Lyndon and Kirsty Clayton (22 Pryde Road) at [3.1]-[3.6]

⁸ Legal Submission – para 3.5.

12. While generally speaking the weight to be attributed to the Objectives and Policies of a proposed district plan increases as it progresses through the submission and hearing process, weight can sometimes vary depending on the circumstances. We consider that the applicant makes valid points on this issue. In particular we consider the following are relevant:
- (a) The Operative District Plan has been operative since 2006 and makes no provision for renewable energy generation.
 - (b) In 2011 the Government has established the National Policy Statement for Renewable Electricity Generation 2011. This requires⁹ district plans to include objectives, policies and methods, including rules to provide for the development, operation, maintenance and upgrading of new and existing wind generation activities.
 - (c) The Proposed District Plan does propose Objectives and Policies addressing this National Policy Statement.
13. In terms of the decision being made, the National Policy Statement and the Proposed District Plan provide more direct and timely guidance on this topic to the Commissioner, than what can be found in the Objectives and Policies of the Operative District Plan.
14. Therefore while the proposed Objectives and Policies in the 2GP have only recently been notified and are subject to submissions that have not been heard or determined, we consider that the Commissioner can reasonably give them some, but not full weight in this case.

Case Law

15. The Westlaw commentary summarises a relevant High Court decision on the issue of weight between plans. This supports the position that weight can be varied as follows:

In Keystone Ridge Ltd v Auckland CC HC Auckland AP24/01, 3 April 2001, the High Court held that the importance of the proposed plan (or change) will depend on the extent to which it has proceeded through the objection and appeal process.

The extent to which the provisions of the proposed plan are relevant should be considered on a case by case basis and might include:

- (i) *The extent (if any) to which the proposed measure might have been exposed to testing and independent decision making;*
- (ii) *Circumstances of injustice;*
- (iii) *The extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.*

Where there has been a significant shift in council policy and the new provisions are in accord with Part 2, the Court may give more weight to the proposed plan.

Timing

16. We point out for completeness that deciding what weight to be attributed to the Operative and Proposed Plans occurs only under the assessment of the proposal under section 104, and after the gateway test in section 104D is passed.
17. In assessing whether the proposal is contrary to the Objectives and Policies of both the Operative and Proposed District Plans, under section 104D RMA, the application must not be contrary to the Objectives and Policies of both the Operative and Proposed District Plans.

⁹ Policy E3 Wind Resources

Weight Applying to Proposed Significant Natural Landscape Overlay in Proposed District Plan

18. We understand the applicant has argued that although weight should be applied to the Objectives and Policies of the Proposed District Plan, limited or no weight should be applied to the proposed Significant Natural Landscape Overlay.
19. While these two positions might seem inconsistent, we do consider they are reasonable in this case for the following reasons:
 - (a) Our analysis above in relation to the Objectives and Policies concludes that Objectives and Policies have legal effect once notified and have been drafted following the National Policy Statement, compared to the Operative District Plan which has no equivalent Objectives and Policies.
 - (b) The Landscape Overlay has no legal effect until decisions are made on submissions (section 86B RMA). Rule 1.2.1 of the Proposed District Plan identifies those rules that the Environment Court has approved to have legal effect from notification. These are the only rules, in addition to the Objectives and Policies that have any legal effect until decisions are made on submissions. Therefore we consider that the location of the Significant Natural Landscape Line has no legal effect at the present time until decisions are made on submissions in accordance with section 86B RMA.
 - (c) The proposed new landscape line in the Proposed District Plan is put forward to replace the essentially equivalent line which currently remains in full force in the Operative District Plan.
 - (d) We understand that there are submissions opposing the landscape line in the Proposed District Plan.
20. For these reasons we consider that it is reasonable for the Commissioner to provide the new landscape line no weight.

Landscape Provisions

21. We consider that the structure of the Dunedin City Operative District Plan is that the provisions of the Landscape Overlay apply only to activities proposed to occur within that Landscape Overlay.
22. We point out some of the aspects of the Plan that lead us to this conclusion:
23. Page 1:3 provides:
 - (i) *In the first instance users should refer to the District Plan Maps. These will show the zoning of the land and any special provisions that apply to the property...*
 ...
 - (c) *If the property is shown as being within a landscape area, then the provisions of the Landscape Section (14) will apply.*
24. This description is located in Section 1.2 of the Plan entitled, "How to use this Plan". This guidance refers to the provisions of the Landscape Section applies to "the land" and "the property". We note this does not refer to the "site", being defined as a title. The "grey" area that arises is the Plan does not specifically state what is intended when the Landscape Overlay applies to only part of a property, as is the case here (and not to the part where development is proposed).

25. We have considered the Landscape Section itself and highlight the following provisions:

26. The description in 14.5.2 provides:

The areas included are the most highly visible seaward facing slopes adjacent to the coast...

The ocean coast of the Otago Peninsula has been excluded, as the natural landscape character of that area is protected under the...

All areas included as 'Coastal Landscape Preservation Areas' are to a greater or lesser degree characterised by a...

27. "Method 14.4.2 Maps" provides:

Landscape management areas have been identified on the District Plan Maps.

28. These provisions describe the areas that are included or excluded from the Landscape Overlay. We consider that the Plan intends for the Objectives, Policies and Rules of the Landscape Overlay to apply to activities proposed on land located within the Landscape Overlays. This view is supported by the fact the Landscape Overlay is drawn to reflect the landscape (as would be expected) and not to follow property boundaries. We therefore consider that because the proposed turbines are located outside the Landscape Overlay, then the Objectives, Policies and Rules of the Landscape Overlay do not specifically apply to this proposal, including when assessing the gateway test in section 104D.

Confidential Information

29. Section 42 RMA enables the Commissioner to consider whether to accept evidence and make an order prohibiting or restricting publication of any information supplied to the Commissioner in the course of the proceedings. To do so it would be necessary to determine:

(a) The order is necessary to avoid the disclosure of a trade secret or unreasonable prejudice to the commercial position of the applicant; and

(b) In the circumstances the importance of avoiding such disclosure outweighs the public interest in making the information available.

30. We point out that such an order applies only for the duration of the proceedings.

31. This section is silent on whether the information needs to be made available to submitters as part of the proceedings. We tend to the view that if the information is material to the decision, in accordance with the usual principles of natural justice, submitters should be entitled to have a copy of the information that is provided to the Commissioner as part of the hearing. We therefore recommend that either:

(a) The Commissioner returns the confidential information to the applicant pointing out that he cannot receive it without providing it to all parties (and making an order precluding its disclosure for the duration of the proceedings); or

(b) Receive the information, circulate it to submitters and make an order prohibiting the release of that information for the duration of the proceedings. The implications of doing this will be that once the proceedings have concluded, then any submitter would be free to dispense the information because the protection order would have lapsed at that time. We recommend that prior to adopting this option the Commissioner should check that the applicant still wants the information to be considered on this understanding.

32. Therefore we recommend that if the applicant has concerns over the commercial sensitivity of the information in the current form then the only practicable option is for the Commissioner to

adopt option (a) above and return the information to the applicant pointing out that to take it into consideration, it will need to go to all parties.

Yours faithfully
Anderson Lloyd

A handwritten signature in black ink, appearing to read "m. garbett".

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