BEFORE THE COMMISSIONER ON BEHALF OF THE DUNEDIN CITY COUNCIL

UNDER	the Resource Management Act 1991
IN THE MATTER	an application for resource consent of LUC-2015-469
BY	Blueskin Energy Limited
	Applicant

CLOSING SUBMISSIONS FOR BLUESKIN ENERGY LIMITED

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MAY IT PLEASE THE COURT:

Introduction

1. I propose to run through this reply in the following manner.

   (a) Set out the details of the application to ensure clarity about what is being proposed.

   (b) Discuss the evidence in reply prepared to address questions and issues raised during the course of the hearing.

   (c) Specifically discuss the matters identified in the Hearing Panel Guidance.

   (d) Final summary and closing comments.

What is being applied for?

2. A number of submitters in opposition complained that they were not clear about exactly what consent was being sought for. It is true that the application has undergone some changes and refinement during the course of the resource consent process. However, these changes have been in response to concerns raised by submitters. In each instance change has been made to reduce potential effects. To ensure that there is absolute clarity about where things are at I intend to list the components of the proposal.

3. 3 wind turbines that will not exceed 90m from ground level to blade tip. This has been reduced from 125m which was originally sought in the application.

4. The 3 turbines are capable of generating 2.4MW of electricity when operating at full capacity.

5. 3 Turbines are proposed at the following GPS locations:

Turbine	*GPS location*	*Platform elevation*
South-East Turbine	S45°41.486’ E170°34.957’	*399masl*
North-East Turbine	S45°41.412’ E170°34.957’	*395masl*

North-West Turbine	S45°41.355’ E170°34.939’	*406masl*

To allow for any unexpected foundation constraints BEL would like to be able to move from these locations by up to 30m. Although, if movement is required BEL will not move any of the turbines closer to the dwellings at 22 and 90 Pryde Road.

6. The turbines will be no closer than 679m from 22 Pryde Road, 471m from 90 Pryde Road and 580m from 110 Porteous Road. For all other dwellings the distance is greater than 900m.

7. Gravel tracks will be formed from Porteous Road to the turbine platforms (indicative layout is shown in the report from Mark Walrond of Geosolve Figure 1 and 2). The track will be formed by scrapping top soil and putting compacted gravel in place.

8. Some minor road widening of Porteous Road will be required to allow the turbines to be manoeuvred to the site. BEL has investigated this and is confident that this work can be completed within legal road reserve. The intersection with SH1 will also be required.

9. Transmission infrastructure will be located underground within the site. There are two possible options for transmission lines (See **Appendix 1**). Option A is the shorter option, but requires approval from a neighbouring land owner. If such approval is not forthcoming the lines will be installed underground to Porteous Road before being installed overground within road reserve and connecting to the existing OtagoNet network.

10. The Turbines will be finished in RAL7035, the name of this colour is 'light gray'.

11. Each Turbine requires a medium intensity light to be installed at hub height. The lights will be shielded on the horizontal plane to obscure them from locations below. The CAA rules require this light to flash between 20 and 60 times per minute.

12. The Turbines will be finished with a Matte treatment to avoid blade glint.

13. No residential dwellings fall within the shadow sweep path of the turbines. Small sections of pastoral land within the adjoining properties will receive some shade. However, this is relatively minor (between 30 and 400 hours per annum depending on the exact location). A copy of the shadow flicker analysis is attached to Ms Lucas's evidence at Appendix 1. Further to that the estimated shadow effects assume clear skies 100% of the time which is of course not the reality.

14. The wind monitoring at the proposed site indicates a capacity factor of 35%. This is considered good for a wind farm. New Zealand wind farms have particularly good generation capacity with the average capacity factor for wind generation in New Zealand being approximately 40% compared with 30% internationally. Other generation sources have varying capacity factors as follows:

Generation type	**Capacity Factor**
North Island Hydro	45%
South Island Hydro	55%
Solar	14%
Thermal Generation (oil, gas, coal)	60-80%

15. Once operational the wind farm will displace 966 tonnes of carbon dioxide per annum through a corresponding reduction in thermal generation (this is equivalent to the carbon sequestered annually by approximately 70 hectares of forest).

16. Noise modelling of the proposed development indicates that the 40dB noise limit within NZS6808:2010 may be breached at the notional boundary of 90 Pryde Road. Evidence from Dr Chiles demonstrates that if that modelled breach were to be borne out following pre construction noise monitoring BEL can adopt measures to ensure that potential breach does not eventuate by throttling the power output at the nearest turbine.

17. All turbine models considered by BEL are free of Special Audible Characteristics.

18. BEL's financial modelling demonstrates that the company will return profits in the order of $100,000 per annum to BRCT for use on local community initiatives. The financial modelling undertaken by BEL has been highly conservative to ensure that the projects viability is adequately tested and robust enough to withstand a variety of potential market influences. BEL is confident in the financial viability of the project and would not be pursuing it if it was not genuinely capable of generating the projected returns to BRCT and therefore the community.

Further Evidence in response to Submitters

19. During the course of the hearing a number of submitters raised technical matters that are best addressed through evidence from BEL's experts. To that end we have produced the following:

    (a) Reply evidence from Stephen Chiles - This responds to the criticism of the acoustic assessment by Ms Price in her legal submissions. It also addresses the matters raised in the Hearing Panel Guidance.

    (b) Reply Evidence from Dr Craig - This responds to the issues raised by Dr McClellan and Mr Onley and sets out why there appear to be such disparate views between the experts witnesses on the need for site specific bird monitoring to assess potential effects.

    (c) Report from Mark Walrond of GeoSolve to address the concerns raised regarding potential Groundwater effects.

    (d) Further visual simulations from closer proximity to 22 and 90 Pryde Road. These have been produced in an effort to assist you to assess effects from the neighbouring properties.[1]

[1] These will be provided at the reconvened hearing due to unforeseen delays in completion.

Hearing panel guidance

20. For ease of reference I will respond to each of the headings in the letter from the Commissioner dated 23 May 2016.

Groundwater

21. BEL has obtained a considerable amount of geotechnical advice regarding the establishment of the wind farm. A number of submitters have offered conjecture about the potential of this development to interfere with ground water resources. This conjecture has been supported by no evidence and flies in the face of the extensive evidence presented by BEL.

22. When considering the potential risks to groundwater it is necessary to bare in mind the following:

    (a) The site is located on the crest of the hill.

    (b) The proposal will not significantly reduce the area of permeable surface within the site. Access tracks will remain permeable so it is only the turbine platforms themselves (which total approximately 35m^2 each) that will be impermeable.

    (c) Foundations for the turbines will not require significant excavation.

    Therefore there is extremely limited potential for ground water to be intercepted, or even if it were for those effects to have any consequence. The limited change in the permeability of the site also means very limited potential for infiltration patterns to be impacted.

23. Mr Walrond, who has been undertaking detailed geotechnical investigations at the site has prepared a letter to specifically address concerns regarding groundwater. It is submitted that the risks are basically non-existent and any residual risks can be managed by conditions of consent.

Turbine Colour

24. The turbines will be finished in RAL7035. The name for this colour is 'light gray'. It has been used in a number of other locations within New Zealand and BEL has confirmed that it satisfies the CAA requirements. Attached at **Appendix 2** is a trail of email correspondence between my colleague Mr Campbell Hodgson and the CAA confirming as much.

25. I also attach at **Appendix 3** a photo of the Brooklyn Turbine which is an Enercon E53, finished in the proposed colour.

Reverse Sensitivity

26. Mr Clayton and Mr Thom raised concerns about the potential for the turbines to limit their ability to undertake farming activities. In particular their ability to use aerial top dressing methods.

27. We have consulted the CAA rules and can confirm that the turbines will not prevent the adjacent landowners from utilizing aerial topdressing methods. Rule 91.311 sets out the minimum heights and distances for aircraft.

28. The standard requires aircraft to remain above 500 feet above any obstacle and outside a 150m circle from any structures. However, these standards do not apply to a pilot in command of an aircraft during take off and landing or if there is a bona fide purpose for flying within those usual standards. We have confirmed that aerial topdressing or spraying is one such bona fide purpose.

29. We also attach at **Appendix 4** an aerial that depicts distance of 200m (to account for the width of the blades) from the approximate turbine locations. It shows that there is very limited overlap.

30. Therefore, neighbouring landowners will be able to continue to utilise aerial topdressing methods if they wish.

Ecological Effects

31. Dr Craig has reviewed the notes presented by Dr McClellan and the submission from Mr Onley. He has prepared a note in response to their concerns. In essence Dr Craig agrees that there is not a lot of site specific information available. However, he differs from Dr McClellan and Mr Onley about whether it is necessary to gather a large amount of site specific data in order to adequately assess the risks of the proposed wind farms to birds.

32. Further to that he believes that gathering a large amount of site specific data in order to model risks of bird strikes would not yield information that would affect the assessment. It is Dr Craig's view that adequately conservative assumptions have been made when considering the potential bird strike risk. Even when multiple layers of conservatism are built into the assessment the risks of bird strike effects are very minor. It is submitted that the assessment is sufficiently robust to conclude that effects are negligible.

33. It is further submitted that the scale of information gathering suggested by Dr McClellan and Mr Onley are completely out of proportion with the risks presented to birds from the proposed turbines. The type of assessment promoted by them may be appropriate for wind farms such as HMR where there are in excess of 100 turbines. Assessments of that nature are very expensive (hundreds of thousands of dollars) which is out of proportion with the scale of potential effects.

Noise Effects

34. Mr Chiles has prepared a written response to the matters raised in the legal submissions of Ms Price. That response addresses all of the potential issues Ms Price questioned.

35. Mr Chiles also responds to the concern raised in the Commissioners letter regarding audibility and whether this will give rise to adverse effects on amenity values.

36. The evidence before you clearly sets out that the NZS standard for Wind Farm noise can (and will) be complied with. The modelling has been undertaken with a high degree of conservatism, including:

    (a) Modelling predicts sound levels under moderate downwind conditions in all directions.

    (b) No terrain screening effects are incorporated into the model, ie. the modelling is based on there being no terrain screening effects at all.

    (c) The noise generated by the turbines (at full power) has a 1dB safety margin.

37. Further to that there are a number of options available to BEL to reduce noise output if necessary to achieve compliance with the proposed conditions. The risks of modelling being inaccurate lies with BEL, not with the neighbours. If the modelling has underestimated noise levels then BEL will need to reduce power output to achieve the standards.

38. A number of submitters pointed to other wind farms where noise issues arose following construction, particularly the Te Rau wind farm in Palmerston North. The issue in that case was the presence of special audible characteristics. The turbine options being considered by BEL have all been tested to ensure they do not generate noise with special audible characteristics. Therefore you can be confident that the issues that arose in that instance will not arise here.

39. Equally, the conditions proposed by BEL will ensure that comprehensive background noise data is collected prior to construction allowing the modelling results to be confirmed and any adjustments to turbine power output applied prior to operation commencing. The wind farm will then be monitored to ensure that when it is operational it is complying.

40. The final matter raised in the Commissioners letter related to the potential adverse effects that may accrue despite compliance with the NZS standard and conditions of consent. As I stated in my opening

submissions the RMA is not a no effects statute. Mr Chiles has highlighted how the proposed conditions provide a much greater degree of noise protection for neighbours than the permitted activity standards in the Plan. The threshold for adverse effects is not audibility. The proposed conditions will ensure that WHO standards for sleep disturbance are complied with and will protect the health and wellbeing of neighbours. It is further considered that when considered objectively the proposed conditions will also ensure noise levels that will not unduly affect amenity.

41. This is consistent with the findings of the Environment Court in numerous wind farm cases where it has determined that compliance with the NZS provides an appropriate level of protection from noise effects, both in terms of noise and the amenity effects of noise.[2]

Road Access

42. BEL has confirmed that access to the site can be obtained without requiring works within land adjoining road reserve. As the Commissioner will be aware, if works within land owned by a third party was required it is up to the consent holder to secure that. If they cannot, then they cannot implement the consent. The grant of the resource consent does not give BEL any rights to carry out work on land outside of its control. The risk of getting it wrong lies entirely with the applicant.

Decommissioning Bond

43. BEL does not support the imposition of a bond for the removal of the turbines. It is not considered necessary and would be an inefficient use of capital for this project. The reason it is not considered necessary is because there is significant value in the materials from which the turbines are constructed. The value of these products (metal predominantly) is greater than the costs of removing them. Therefore, if BEL were to become insolvent and cease operating the turbines the reality is that any creditors or liquidators would want to

[2] Re *Meridian Energy Ltd* [2013] NZEnvC 59 at [283], [288], [309]. Counsel notes that the Courts discussion of noise effects in this case is comprehensive and may provide assistance to the Commissioner [178]-[309].

remove the materials in order to realise the value of the company's assets.

44. BEL does however agree to a condition that would require the removal of the turbines if they were to cease operating for generation.

Information Gaps

45. I have set out above the key aspects of the proposal in order to clarify matters. BEL is of the view that there is no uncertainty about what is proposed.

Other matters raised by submitters

The receiving environment

46. Before you undertake your assessment of the effects of this activity you need to assess what the receiving/existing environment is. This is a combination of the real environment on the ground and the legal environment.

47. The Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) considered that the 'environment' includes the future state of the environment as modified by the utilization of permitted activity rights, and the implementation of resource consents granted and likely to be implemented. The environment does not include the effects of resource consent that may be applied for in the future.

48. Brenda Thom submitted that there is a 'subdivision' of Thom owned land in close proximity to the turbine site. She also indicated that Mr Thom intended on building his retirement home at the top end of his farm. Whilst I am sure their concerns about this a real, these activities are not part of the receiving environment that you must assess the effects of this application against.

49. The Thoms do not hold a subdivision consent, nor has one been applied for. Neither has Mr Thom obtained consent for a further dwelling. Therefore it is submitted that his submission in that regard must be entirely disregarded.

Assessment of Alternatives

50. An assessment of alternatives may be considered under section 104(1)(c). However, in accordance with clause 1(b) of Schedule 4 alternative assessment is only required where the effects of an application are assessed as significant. Where such a conclusion is not reached the application must be considered on its own merits.

51. Consistent with the conclusions from Mr Farrell the proposed activity does not give rise of significant effects when considered in the round. Therefore it is submitted that an assessment of alternatives is not required by law.

52. However, if you were to conclude that the findings of Di Lucas, Mr Moore and Mr Knox triggered the need for an assessment of alternatives it is submitted that an adequate assessment has been undertaken.

53. Mr Willis set out in his evidence the investigations into possible sites that had been undertaken.[3] Those investigations included the following sites:

    (a) Mopanui Ridgeline- This site was considered less desirable by local Iwi due to the cultural significance of the application (had this application site been selected it would have triggered the need to assess matters of cultural significance under section 6). The site was also more difficult to access, located at greater distance from transmission infrastructure and had a less consistent wind resource.

    (b) Double Hill - Landowner access was not forthcoming, wind resource was less than optimal and residences were located in very close proximity. Access to transmission was also not as good as other locations.

[3] Refer to section 6.2, page 13 Blueskin Resilient Communities Trust *Final Report to EECA Distributed Generation Fund* April 2010, attached at Appendix A to the evidence of Mr Willis.

(c) Mt Kettle - Landowner was supportive although access was ultimately not obtained. The wind resource at the site is very turbulent and the profile less than adequate for generation purposes.

(d) White Road/Doctors Point – This site is located within the coastal environment and close to the Eco Sanctuary. The area is also used reasonably frequently by paragliders and hang-gliders. The site had poor connectivity to network infrastructure with significant upgrades of the 11kV lines being required.

54. The High Court in *Meridian Energy Ltd v Central Otago DC* [2010] NZRMA 477 (HC) concluded that an assessment of alternatives requires a description of other possible locations for the activity. It does not require a full analysis of the alternative locations (including cost benefit) to satisfy the legal requirements.

55. It is also not necessary for an applicant to demonstrate that the site selected is the best site.

56. It is submitted that BEL has completed an adequate assessment of alternatives. Whilst is it not required, it is submitted that this assessment demonstrates that the proposed site is the best site for the proposed wind farm.

Landscape Management Review Report

57. A number of submitters referred you to the Boffa Miskell Landscape Management Area review[4]. It is submitted that you should not have any regard to this report, for the following reasons:

(a) It was prepared almost a decade ago - the assessments may now be obsolete.

(b) The report has been overtaken by the 2GP process and the findings in it were never tested in a section 32 analysis.

[4] Ms Ozanne for example provided a plan of the Porteous Hill Significant Landscape Area.

(c) You have received numerous assessments of the relevant landscape specifically for the purpose of this application.

58. You have more than enough direct and specific evidence presented through this hearing that means reference to other general materials is not required. The Landscape Management Review should not be given any weight in the assessment of this application.

Property Values

59. Concerns were raised by some submitters regarding the effect of the wind farm of property values. No evidence was presented to you on what this impact (if any) might be. It is submitted that this consideration is not relevant to your assessment.

60. As has been discussed by the Environment Court, effects on property values are not effects in and of themselves. They may provide a mechanism for measuring the impact of an environmental effect.[5] You have no evidence demonstrating an impact on property values therefore the actual effects are more important to your assessment.[6] Further, if you were to consider impacts on property values as a distinct effect it would result in a double counting of the actual environment effects which would be inappropriate.

Carbon Accounting

61. Ms Price raised issues relating to carbon accounting. She considered that you should take into account the carbon cost of manufacturing the turbines when assessing the benefits of the renewable electricity created by this application. With respect, I disagree. The application is for the establishment and operation of wind turbines, not their manufacture. Therefore carbon cost of manufacturing is not relevant to your assessment.

62. In *West Coast ENT Inc v Buller Coal Ltd*[7] it was held by majority (Elias CJ dissenting) that the adverse effects of the end use of

[5] *Foot v Wellington CC* EnvC W073/98.
[6] *Wilson v Dunedin CC* [2011] NZEnvC 164.
[7] [2013] NZSC 87, [2014] 1 NZLR 32

burning coal is irrelevant when assessing a new coal mine against section 7(i)[8]. In that case resource consent had been applied for to establish a coal mine. The Supreme Court held at [172] that a consideration of effects under section 104(1)(a) does not extend to the greenhouse gas discharges that arise from the end use of the coal to be extracted.

63. Similarly in this case the "carbon cost" of manufacturing the turbines is not relevant to your decision. The application is not for the manufacture of wind turbines, it is for their operation.

64. Therefore, it is only the effects of the operation of the turbines and their contribution to increased renewable energy supply within the New Zealand electricity network that is relevant. That is a beneficial effect specifically highlighted and to be achieved in accordance with the NPSREG.

The Assessment Process

Section 104D

65. Firstly, I agree with the legal opinion of Mr Garbett at paragraphs 2-8. He has accurately set out the legal position regarding section 104D(1)(a). Given the conclusions of Ms Lucas, Mr Moore and Mr Knox regarding landscape effects on the most proximate neighbours this proposal cannot pass through the first section 104D gateway.

66. Therefore, in order for this application to progress to an assessment under section 104 it must pass through the second section 104D gateway. In this regard I also agree with legal opinion of Mr Garbett at paragraphs 16 and 17[9].

67. As set out in opening submissions the threshold for finding a proposal "contrary to" the objectives and policies is a high one. Contrary to means an application must be opposed to in nature, different or opposite to the aims of the objectives and policies of the relevant

[8] Which requires particular regard to be had to the effects of climate change.
[9] The same point was raised in my Opening Submissions at paragraph 16.

plan.[10] It does not mean that the application needs to be consistent with the objectives and policies of the Plan and the assessment must take the objectives and policies as a whole.[11] This means that finding an application contrary to one or two provisions may not be fatal when considered in the round.

68. Ms Price pointed you to *Queenstown Central Ltd v. Queenstown Lakes District Council* as authority for the notion that a finding that an application was contrary to one objective was sufficient to prevent an application passing the section 104D(1)(b) gateway. Whilst that does appear to be the Court's conclusion in that case it is submitted that the case is an outlier[12]. Ms Price acknowledges that in her paragraph 3.13.

69. It is my submission that the orthodox legal position remains the correct one. The reason for this was neatly summarised by the Court in *Re P & I Pascoe Ltd*[13] where the Court stated:

> *"in applying the 'contrary to' test, there has been some division of judicial opinion as to whether the relevant objectives and policies should be read as a whole and a decision made on an overall basis, or whether the test is failed if the proposal is found to be 'contrary to' even one objective, or one policy. If the legislature had meant to impose a test requiring that a proposal must not be 'contrary to' even one single objective or policy, it could have, and would have, used a phrase in subsection (1)(b) such as … 'will not be contrary to any objective or policy…'. But it deliberately used the plural … 'the objectives and policies…'. We consider the meaning of that phrase to be plain and straightforward. It follows that we prefer the approach taken in decisions such as Calverley v. Kaipara DC [2014] NZEnvC 182 and Akaroa Civic Trust v. Christchurch CC [2010] NZEnvC 110, which hold that the objectives and policies should be considered as a*

[10] *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 80.
[11] *Re P & I Pascoe Ltd* [2014] NZEnvC 255 at [123].
[12] Another division of the High Court in *Man o' War Station Ltd v. Auckland CC* [2011] NZRMA 235 (HC) did not reach the same conclusion as in *Queenstown Central.*
[13] Refer n11 above.

whole, and a judgement made about the 'contrary to' test on that basis".

70. In completing your assessment under section 104D(1)(b) the objectives and policies of section 14 of ODP are not relevant to your analysis. I made this submission in my opening and this has been supported by the legal opinion prepared by Mr Garbett.[14] Therefore the evidence from Mr Head and Mr Brown in this regard should be disregarded.

71. The evidence from Mr Brown and Mr Head regarding the rural objectives and policies should also be considered very cautiously. Their assessments come from a landscape/amenity perspective and do not appear to give due consideration to all relevant aspects of the activity relative to the objectives and policies of the plans. For example, policy 6.3.12 which addresses conflict between land uses that affect rural amenity. The policy discusses adverse effects on rural amenity as well has the ability for land to be used for production. The proposed activity may have effects on amenity, but it does not compromise the productive capacity of the land (and in my view enhances it). This has not been acknowledged by Mr Brown in his assessment of the policy which in my submission is symptomatic of the narrow perspective from which the analysis has taken place. In essence, the assessment has up weighted the importance of the landscape and amenity matters rather than taking into account all relevant aspects of the proposed activity.

72. Mr Moore and Mr Knox both discuss the effects of the proposed development on rural character. In this regard I draw your attention to Mr Moore's paragraph 11(b). In essence the turbines allow the natural landform and rural land use patterns to remain. Whilst the turbines will be an obvious addition to the landscape, ultimately they will not alter the rural character of the area to any significant degree[15].

73. Mr Farrell at paragraph 95 of his Brief of Evidence completes a comprehensive assessment of the proposal against the relevant

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[14] Refer to paras 21-28 of the Anderson Lloyd Legal Opinion.
[15] Brief of Evidence of Michael William Moore, Appendix 1 page 38-41.

objectives and policies of the ODP. This assessment correctly takes into account all of the aspects of the proposal. He finds the application to be consistent with most of the relevant objectives and policies. This conclusion is generally supported by the conclusion of Mr Sycamore in the section 42A report. Mr Sycamore did not resile from this assessment following the conclusion of the submitters' presentations.

74. Both Mr Farrell and Mr Sycamore reach the same conclusions regarding the 2GP.

75. Therefore the evidence from the expert planning witnesses is that the proposal is not 'contrary to' the objectives and policies of the ODP or PDP and you may consider the application under section 104. It is submitted that this is the right conclusion.

Section 104 Assessment

76. In my opening submissions I addressed the matters I considered relevant to your section 104 assessment. I do not propose to reiterate those submissions again. The matters identified in my opening continue to be the issues that you must assess and to that extent I refer you back to those opening submissions.

77. There are some further matters that I wish to address following the submitters presentations.

Effects assessment - adequate information

78. It has been suggested to you that there is insufficient information to enable an adequate assessment of effects, particularly in relation to ecological effects. It is submitted that this is not correct.

79. Before assessing the information provided by BEL it is helpful to reflect on what the duty of an applicant is. The Court in *Director-General of Conservation v Marlborough District Council*[16] (the DOC Case) provided a concise summary of this when it stated at paragraph 41:

[16] EnvC Christchurch C113/2004, 18 August 2004.

"The duties of an applicant are:

(1) To make reasonable inquiry into adverse effects. What is reasonable depends on the circumstances, e.g. whether section 5(2)(a) and (b) or section 6 matters are involved, the scale of the project; and no doubt, other factors may be relevant;

(2) To answer any request for further information by the consent authority;

(3) To answer any reasonable hypothesis put by submitters in their submission."

80. It is the duty of an applicant to provide sufficient detail so as to allow the adverse effects to be assessed, however an applicant is not required to research all hypotheses relating to adverse effects.

81. The DOC case involved an application for consent to establish a new marine farm. The Director-General of Conservation had argued that there was not enough evidence to suggest that effects on Hectors Dolphins would not be significant. The Court disagreed on the basis that the Applicant had established on the balance of probabilities that:

(a) The site was not a site of particular importance to Hectors Dolphin; and

(b) That more than a scintilla of probative evidence was required for the Court to find that the proposed mussel farm would have adverse effects on the dolphin.[17]

82. The Court found that the scintilla of evidence provided by the Department was insufficient to transfer the burden of proof back to the applicant to prove that the alleged effects would <u>not</u> arise.

83. It is submitted that the same situation arises in this case. The Mitchell/Dixon Report and evidence of Dr Craig establish that the site is not of particular importance to any bird species, nor that the area

[17] Ibid at [26]-[52].

has a particularly abundant bird population. This coupled with information about bird strike incidences at other wind farms BEL has proven on the balance of probabilities that bird strike effects will be negligible.

84. No submitter has produced probative evidence to the contrary. It is important to note that neither Dr McClellan nor Mr Onley go so far as so say that the proposed wind farm will have adverse effects on birds, only that it could. This is not a scintilla of evidence; it is merely suggestion or speculation. Dr Craig has responded to those suggestions setting out how any information collected would be analysed and demonstrating that which ever way you cut it, effects on birds will be negligible.

85. With regard to bird strike effects it is also telling that the Otago Natural History Trust ("Orokonui Eco Sanctuary") filed a neutral submission. Given the significant efforts of that organisation to grow and nurture native bird populations within the area, if there was a genuine risk to bird populations I expect they would have been the first to raise those concerns.

86. It is further submitted that the Court’s approach in the DOC case equally applies to the Clayton and Ryan/Ashby concerns about shadow flicker. Mr Price in her legal submission criticises BEL for a lack of a professional report on the health effects of shadow flicker.

87. As a first step it is necessary to determine whether any submitters would actually be exposed to shadow flicker. As identified in Appendix 1 to Ms Lucas's evidence none of the residences are within the shadow sweep path. Therefore there are no shadow flicker effects on the houses. Small sections of pastoral land sit within the sweep path and will be exposed to between 30-400hours of shade. This calculation is based on clear conditions 100% of the time. Therefore, the actual time where shadow flicker effects will accrue will be considerably less due to adverse weather conditions. Not to mention the fact that the location of the shadow sweep is not occupied by people for most of the time and when it is it will tend to be transient use.

88. The submitters have presented no probative evidence to the contrary. Such as details of the use of the relevant areas of land that would render the applicant's assessment inaccurate. It is submitted no detailed health assessment is necessary because there are no shadow flickers that could cause health effects.

Effects assessment

89. In my submission the only live issue in this case relates to the landscape and amenity effects of the application. I say that for the following reasons:

(a) The evidence from the acoustic engineers confirms that NZS6808:2010 is the appropriate method to assess effects. Dr Chiles has demonstrated with a sufficient degree of certainty that the standard will be complied with. That standard has been accepted by the Environment Court has providing protection from unreasonable effects of noise both in terms of amenity and health.

(b) Whilst the Ecological witnesses do not see eye to eye on the method for assessing effects it is submitted that Dr Craig has demonstrated that which ever method of assessment is adopted the effects on birds will be negligible. The evidence of Dr McClellan and submission from Mr Onley provide no probative evidence to refute that.

(c) Geotechnical assessment from Virginia Toy, GeoSolve and MWH all confirm that the proposal will not give rise to natural hazard effects. It is agreed that detailed foundation design will more than adequately address site conditions.

(d) The assessment from Virginia Toy and GeoSolve also confirms that there are no credible risks to groundwater.

(e) CAA and Airways concerns have been addressed.

(f) The establishment of the turbines will not prevent adjacent landowners from utilising aerial topdressing on their properties.

(g) Shadow flicker effects are negligible and blade glint is addressed.

(h) The wind farm will displace 966 tonnes of carbon emissions per annum whilst generating 2.4MW of electricity and will diversify the source of electricity supply within Dunedin.

(i) Operation of the windfarm will return in the order of $100,000 to BRCT to pursue programmes within the local community.

90. In relation to visual effects the evidence presented by BEL concludes that visual effects from 22 and 90 Pryde Road will be moderate to significant whilst the visual effects on the wider landscape will be minor. This conclusion is supported by Mr Knox who prefers the evidence of Mr Moore to that of Mr Brown and Mr Head. Whilst the effect on these neighbours is acknowledged as moderate to significant, as highlighted by Mr Moore, this does not necessarily equate to an effect that is significantly adverse.

91. At the heart of your decision is whether moderate-significant visual effects on proximate neighbours are such that they outweigh the positive effects of the application for BRCT, the Community and Country.

92. You have asked how you should weigh up the adverse effects of a few against the beneficial effects to many. How effects are weighed is matter of discretion that you exercise as the decision maker[18]. The weight an adjudicator gives to a matter to which it is required to have regard or particular regard is a question solely for the adjudicator.[19]

93. In weighing up the competing effects you must be cognizant of the framework within which your decision must be made. Firstly, you must bear in mind that section 104 of the Act is *"subject to Part 2"*.

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[18] *Kennett v Dunedin City Council* (1992) 2 NZRMA 22 (PT), *Stirling v Christchurch City Council* HC Christchurch CIV-2010-409-2892, 19 September 2011.
[19] *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 at [353]. –Please note this case was a judicial review from the decision of a Board of Inquiry on a proposed designation for a motorway over the Basin Reserve. The High Court was discussing whether the Board of Inquiry could consider the adverse effects on non scheduled items of heritage when undertaking its Part 2 obligations.

This means that Part 2 must be considered when assessing the effects. In doing this I urge you to reflect on how the proposed windfarm an will enable BRCT to pursue its vision of creating local climate solutions and facilitating a positive, healthy, secure and resilient future for Blueskin Bay and linked communities. In many ways this vision parrots the purpose of the Act. This benefit is achieved without adverse effects on health and safety.

94. Secondly, the NPSREG provides important guidance on the weight that the various effects must be afforded. It is my submission that you need to assess the proposal through the lens of the NPSREG. At its heart the NPSREG says 'renewable energy is good and New Zealand needs more of it'. This is highlighted in the preamble:

"New Zealand must confront two major energy challenges as it meets growing energy demand. The first is to respond to the risks of climate change by reducing greenhouse gas emissions caused by production and use of energy. The second is to deliver clean, secure, affordable energy while treating the environment responsibly.

The contribution of renewable electricity generation, regardless of scale, towards addressing the effects of climate change plays a vital role in the wellbeing of New Zealand, its people and the environment".

95. The NPSREG recognises that developing renewable generation is a matter of national significance along with the benefits of such generation activities. The NPSREG also specifically recognises the contribution that small and community scale distributed generation has to make to achieve the objective of increased renewable supply.[20]

96. It is submitted that the NPSREG sets a clear expectation that these activities will be enabled. Policy A requires you to 'recognise and provide for the national significance of renewable generation activities, including the national, regional and local benefits…'.

[20] Refer NPSREG Interpretation "renewable electricity generation activities", this definition includes small and community scale projects. Therefore the need to develop these activities is a matter of national significance regardless of scale.

97. It is submitted, in order to give effect to this objective and policy considerable weight must be given to the positive effects of this application. To ignore the benefits would produce an artificial and unbalanced picture of the real effects.[21]

98. Ms Price referred you to the *Motorimu* case[22] and its findings on the concept of dominance. Dominance with regard to visual effects was also considered in *Meridian Energy Ltd v Wellington City Council* [2011] NZEnvC 232 (Mill Creek). It is submitted that considerable care needs to be exercised when applying the Court's assessment in those cases to this case as both preceded the NPSREG becoming operative. When *Motorimu* was determined the NPSREG had not been drafted whilst the Court in Mill Creek could only afford it limited weight because it was only a proposed NPS.

99. In a case more closely aligned to the situation here, the Environment Court weighed the effects of a proposed windfarm on a localised and national basis. In *Re Meridian Energy Ltd*[23] it was held that the positive effects of renewable energy generation was an "overwhelming benefit"[24]. In that case there remained significant adverse effects on neighbours which were unable to be mitigated. As a result the application could not achieve section 7(c) and (f) of the Act. The Court found that it must weigh up the national vs local effects. It decided that even though the turbines would have significant adverse visual effects, the benefits outweighed the detriments in that case. The Court decided to remove 3 turbines which it found had "very significant" visual effects on the surrounding properties.

100. If the same reasoning is applied in this case consent must be granted. The evidence demonstrates that there are only moderate-significant visual effects that remain[25], not "very significant" effects

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[21] *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC) at [444].
[22] *Motorimu Wind Farm Ltd v Palmerston North City Council* EnvC Palmerston North W067/2008, 26 September 2008.
[23] [2013] NZEnvC 59.
[24] Ibid at [545].
[25] All other evidence including (noise, shadow flicker, bird strike) demonstrates effects no more than minor.

that the Court found outweighed the benefits of the proposal. This means that if you are to use *Re Meridian Energy* to guide your decision making, which I submit you should, it will lead you to the conclusion that the application should not be declined on the basis of localised landscape effects only. There are no "very significant" adverse effects in this case.

Weight ODP v. 2GP

101. An issue has been raised about how much weight to give the objectives and policies of the ODP and the 2GP when undertaking the assessment under section 104. We have submitted that you should give greater weight to the objectives and policies of the 2GP than might typically be the case when a PDP is so early in the process.

102. The weighting to be afforded to objectives and policies between an operative and proposed plan is only important if different outcomes are achieved under both plans.[26]

103. The operative plan includes objectives and policies that relate to amenity within the Rural zone. These provisions are mirrored to a large extent in the 2GP. However the 2GP also includes specific provisions regarding renewable generation. For example:

    (a) Objective 2.2.2: Energy resilience - Dunedin is well equipped to manage and adapt to any changes that may result from volatile energy markets or diminishing energy sources by having: increased local electricity generation.

    (b) Objective 5.2.1: Network utilities activities, including renewable energy generation activities, are able to operate efficiently and effectively, while minimising, as far as practicable, any adverse effects on the amenity and character of the zone.

[26] *Manger v Banks Peninsula District Council* EnvC Christchurch C114/2004, 19 August 2004 at [97].

104. Given that the ODP does not address the issue of renewable generation (as required by the NPSREG) it is submitted that the 2GP must be given greater weight in your assessment than might normally be the case.[27]

105. This once again highlights the weight that needs to be given to the positive effects of the application.

Conclusion

106. In my submission BEL has demonstrated that the effects of the proposed activity will, for the most part be negligible or minor. The only effects that are greater than this relate to the visual effects of the turbines from the neighbours at Pryde Road. Whilst it is accepted that the visual effects will be moderate to significant, it is submitted that these effects are not necessarily significantly adverse.

107. The question you must then answer is whether those effects are outweighed by the positive effects that accrue as a result of the application. Those being:

(a) A contribution to increased renewable electricity supply consistent with the objectives of the NPSREG;

(b) A project that increases the diversity of supply within Dunedin, increasing the resilience of electricity supply for the city consistent with the objectives of the 2GP;

(c) Increasing the efficiency of the use of land at the site by allowing the wind resource to be captured whilst farming activity will continue;

(d) A reduction in carbon emissions which contributes to New Zealand's international obligations; and

(e) Providing a significant stream of funding to BRCT to enable it to pursue its vision.

[27] Mr Garbett reaches a similar conclusion at para [11]-[15] of his Legal Opinion.

(f) Providing a symbol for the community that represents the proactive manner in which it is facing the challenges that climate change presents.

108. In my submission these clearly outweigh the minimal adverse effects.

109. The evidence presented confirms that no matters of national importance in section 6 arise as a result of this application. The natural character of the coastal environment[28] is not imperilled and none of the affected landscapes are considered to be outstanding[29]. However, the establishment of renewable electricity generation activities is a matter of national significance as highlighted in the NPSREG.

110. As I set out in my opening submissions the application engages a number of matters in section 7.[30] The application almost overwhelmingly achieves the relevant matters in that section.

111. I stated on the first day of this hearing that this application is unique. BRCT initiated the proposal in response to the community's concern about the potential impacts of climate change and a desire to do its' bit to combat it. BRCT has not been prepared to sit back and say climate change is too big a challenge for us. Instead this application demonstrates a willingness to face that challenge and find the opportunities within it.

112. As stated by the Environment Court in *Genesis Power:*

"Section 5 concerns are to ensure present people and communities do not, in pursuit of their well-being, destroy existing stock of natural and physical resources so as to improperly deprive future generations of the ability to meet their needs…Climate change is a silent insidious threat that scientists tell us threatens to improperly deprive future generations of their ability to meet their needs"[31]*.*

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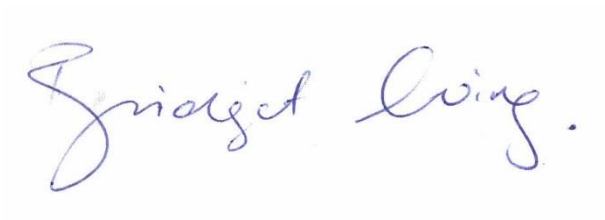
[28] RMA section 6(a).
[29] RMA section 6(b).
[30] Refer paragraph 77 of Opening Submissions.
[31] Ibid at [225].

113. As I have highlighted before BRCT's own vision reflects the purpose of the Act. This application and the activities it will enable will allow BRCT to pursue and embody sustainable management. The cost of this pursuit is not significant and is easily outweighed by the positive effects.

114. It is my submission that granting this consent is the only answer that achieves the purpose of the Act. A failure to do so would be a triumph of personal interest over the greater good, allowing this generation to continue to turn a blind eye to the risks posed by our activities for future generations.

115. This application represents an opportunity to take a significant step towards achieving sustainable management, for Blueskin Bay, but also more widely. Granting consent will send a positive message to other communities within New Zealand that they too can be the masters of their own destiny. For all of those reasons I submit that consent should be granted.



B Irving / C F Hodgson
Counsel for the Appellant

Date: 8 June 2016