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Law and Public Policy: Taming the Unruly Horse?

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WIND POWER CONSENTS IN NEW ZEALAND

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I INTRODUCTION

The United Nations Framework Convention on Climate Change (UNFCCC) was constituted in 1992 and came into force in 1994. The protocol to the framework convention, known as the Kyoto Protocol (37 ILM 1998, 22), was established in 1998, and has come into force (end of 2004). The first commitment period of the protocol is due to commence in 2008 and to run for 5 years until 2012. New Zealand is a party to the Convention and the Protocol. The Protocol imposes varying obligations on signatory countries to reduce greenhouse gas emissions, to a percentage of 1990 levels.¹

In recent years, the Kyoto Protocol has provided a growing focus on the policies of the developed nations to address the mechanisms for reducing greenhouse gas emissions. The United States and Australia, which have not ratified the Protocol, have acknowledged the reality of global warming, and the need to take steps to mitigate the resulting environmental harms. Problems include drought, water shortage, increasing desertification, and loss of glaciers and the Arctic and Antarctic ice caps, plus rising sea levels.²

One consequence of the Protocol is to provide an incentive for reducing CO₂ emissions from coal- and gas-fired power stations. In considering alternatives, the ability to harness wind power for electricity generation has received in many countries strong industry and express or implicit governmental support. In 2005, the countries

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¹ See New Zealand government website <<http://www.climatechange.govt.nz>>. See also Ceri Warnock, 'The Climate Change Regime: Efficiency, Compliance and Enforcement' (2004) 8 *New Zealand Journal of Environmental Law* 99. For the USA situation, see Cass Sunstein, 'Of Montreal and Kyoto: A Tale of Two Protocols' (2007) 31 *The Harvard Environmental Law Review* 1-65.

² IPCC Working Group 1, *Climate Change 2001 — The Scientific Basis* (2001). Klaus Bosselmann, Jenny Fuller and Jim Salinger, *Climate Change in New Zealand: Scientific and Legal Assessments* (NZCEL, 2002) 19.

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with the highest wind power capacity were Germany (18,482mw), Spain (10,027mw), the United States (9,149mw), India (4,430mw), and Denmark (3,122mw). These countries cumulatively produced nearly 80 per cent of the wind energy generated worldwide. The UK produced 1,510mw. In Australia, the output in 2006 was 638mw from 444 turbines, with 130 proposed. In New Zealand, the output was 170mw in 2005 and has increased to 321mw in 2007.³

This article reflects the ALTA 2007 Conference theme of ‘Law and Public Policy: Taming the Unruly Horse?’. It traverses the policy support for wind farms, and the wider environmental and landscape issues arising from the developments. It outlines the objectives and systems of resource management in New Zealand, the evolving legislative and judicial support in the evaluation of wind farms, and assesses recent decisions approving this form of renewable energy. The article concludes with a recommendation that a national policy statement from central government would enhance the planning process and lead to better outcomes in the public interest.

II RESOURCE MANAGEMENT ADMINISTRATION

Within New Zealand, applications for consents to power generation are assessed against the general purposes and provisions of the *Resource Management Act 1991* (RMA).⁴ This codifying statute provides for separate consents to land use activities, property subdivision, discharge of contaminants into the air, use of water resources, and discharges of wastes onto land or water — each to be assessed under a single application process with the aim of arriving at an holistic decision based on environmental effects. The jurisdiction to determine consents is divided between

³ Parliamentary Commissioner for the Environment, *Wind power, people, and place* (PCE, 2006) [3.4.1–3.4.3, 4.1]. Denmark has 5,000 turbines on a land area 1/6th of New Zealand’s area, and produces 20% of its power from wind [3.4.3, 4.2.1]. Presently only 2% of power in New Zealand comes from wind farms, with the potential to increase this output to 14% by 2016. See New Zealand Wind Energy Association website <<http://www.windenergy.org.nz>> at 31 August 2007. See also Imke Sagemuller, ‘Legislative and Policy Regime Governing the Generation of Wind Energy in New Zealand’ (2006) 24 *Journal of Energy & Natural Resources Law* 165, 166. For Australia, see the Department of Environment and Heritage discussion paper, *National Code for Wind Farms* (May 2006) <<http://www.greenhouse.gov.au/renewable/publications/>>. For the UK, see Marcus Trinick, ‘Green on Green: Planning for Wind Energy’ (2006) 34 *Journal of Planning & Environment Law, Occasional papers* 89–113 (125 wind farms established in 2006).

⁴ *Resource Management Act 1991*(NZ) s 104.

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regional councils in respect of air and water issues, and territorial authorities (city and district councils) in respect of land use approvals. Certain significant activities within the coastal marine area (below high water springs mark) may be reserved for decision by the Minister of Conservation.⁵ In respect of a major development having a national impact, the Minister for the Environment may 'call in' the application, to be determined by a Tribunal or the Environment Court.⁶ Otherwise, the process allows for a first-level hearing by a consent authority appointed by the local authority, with a subsequent right of appeal on the merits to the Environment Court.⁷

The assessment process is underpinned by a hierarchy of possible policy statements and plans which may need to be taken into account. The *RMA* provides for a top level of 'national policy statements' (there being no statements formally issued to date in 2007). The Minister for the Environment is responsible for the issue of 'national environmental standards', of which there are presently 14, relating to air pollution, and several pending standards.⁸ Below the Ministry level, the 12 regional councils throughout the country are required to propose and approve regional policy statements, and may issue 'air, land, water' regional plans. Coastal plans are mandatory in respect of coastline areas.⁹

Within the regional areas, a district or city council is required to have a district plan. This plan will normally be in a zoning format with certain performance standards. The plan will include the details of rules as to permitted activities, and will provide for resource consents to be assessed at levels variously defined as controlled activities, restricted discretionary activities, discretionary activities, or a residual class of non-complying activities. Technically, a plan can rule out development under a prohibited activity category, in justifiable situations.¹⁰ In practice, the district plans

⁵ Ibid s 119. The powers of the Minister are circumscribed: *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252.

⁶ *Resource Management Act 1991* (NZ) ss 140–150AA (inserted 2005).

⁷ Ibid ss 88, 104, 120. See Kenneth Palmer, 'Decision-Making under the Resource Management Act 1991 (NZ)' (Paper presented at the Australasian Law Teachers Conference, Victoria University, Melbourne, 4-7 July 2006) <<http://www.alta.edu.au>>.

⁸ See Ministry for the Environment website <<http://www.mfe.govt.nz>>.

⁹ *Resource Management Act 1991* (NZ) ss 30, 60, 64, 65.

¹⁰ Palmer, above n 7.

are likely to provide for wind farms as requiring a discretionary or non-complying activity consent.

III *RESOURCE MANAGEMENT ACT 1991* PURPOSE

The purposes of the *Resource Management Act 1991* are fundamental to the assessment of any application for a wind farm development. The purposes in the *RMA* are set out in ss 5 to 7. Section 5 states the overriding purpose:

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while: (a) sustaining the potential of natural and physical resources ... to meet the reasonably foreseeable needs of future generations, and (b) safeguarding the life supporting capacity of air, water, soil, and ecosystems, and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

In considering whether a proposal (plan or application) may promote sustainable management of resources under s 5, the provisions in s 6 set out certain matters of 'national importance' which must be addressed. For the purposes of wind farm applications, the following s 6 matters (summarised) could be relevant:

- (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development;
- (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development; ...
- (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga (sacred or valued cultural items or issues) ...

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In planning the siting of wind farms within New Zealand, being an elongated island country, it is likely that the farms will be proposed for locations near the coastal foreshore, or inland on the higher ranges or hilltops. All these locations potentially bring up the matters of national importance referred to above. A significant contributor to the national economy is tourism, and visitors are attracted to the 'clean green image' framed by a background of pristine coastlines, mountains and landscapes. Large wind farms are likely to be inimical to this image.

The cases confirm that landscape amenity detraction may be an important issue. In *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council*,¹¹ the Environment Court addressed the application of s 6(a) and (b). An outstanding landscape was interpreted to mean conspicuous, eminent, especially because of excellence, or remarkable. A natural landscape may include pasture following land clearance, exotic tree species, and wildlife, as against man-made structures, roads and machinery. The Court declared broadly that there could be three levels of landscapes. First, outstanding natural landscapes that are romantic landscapes representing mountains and lakes; secondly, Arcadian landscapes with some houses and trees and low-level development which could be called 'visual amenity landscapes'; and thirdly, other landscapes which would normally encapsulate the urban areas in a district.¹²

Applying these guidelines, the need to protect an outstanding landscape may be a ground for refusing consent to any obtrusive structures or development. For example, in *Gannet Beach Adventures Ltd v Hastings District Council*¹³ the Court declined to allow a 24 accommodation unit resort to be established adjacent to a gannet colony on the iconic Cape Kidnappers.

In addition to ss 5 and 6, under s 7 of the *RMA* (as enacted in 1991), a consent authority must have particular regard to certain other matters in assessing an application. These matters include (a) the ethic of stewardship, (b) the efficient use

¹¹ [2000] NZRMA 59.

¹² *Ibid* [93].

¹³ [2005] NZRMA 311.

and development of natural and physical resources, (c) the maintenance and enhancement of amenity values, and (f) maintenance and enhancement of the quality of the environment.

Against the background of purpose and conservation principles, an important issue of responsibility for mitigating the adverse effects of climate change arose in 2002 in respect of an application for consent to construct a 400mw gas-fired power station in South Auckland. In *Environmental Defence Society (Inc) v Auckland Regional Council*¹⁴ the Society (EDS) appealed against a consent for the station. It cited the objectives of the Kyoto Protocol, and the need to reduce CO₂ omissions during the commitment periods. EDS submitted that if the station was to proceed, a mandatory carbon sink condition should be imposed. The Court accepted the scientific consensus that the cumulative anthropogenic emissions of carbon dioxide on a global basis contribute to climate change. It stated: 'While it is not possible to definitively quantify, the prognosis is sufficiently serious for us to find that the proposed emissions from Otahuhu C will result, in a cumulative way in an adverse effect of some consequence'.¹⁵ However, the Court doubted the efficacy of the proposed carbon sink condition, which specified the planting of trees at sites selected by the operator, and these areas could of necessity be outside the land jurisdiction of the consent authority. The Court concluded that the emissions issue should be dealt with by central government on a national basis. It upheld the consent to build and operate the power station, but declined to impose the carbon sink condition.

With this outcome, which appeared to disclaim responsibility for gas emissions at a regional or local level, the next step was for central government to promote an amendment to the *Resource Management Act* as outlined in the next part of this article.

¹⁴ [2003] NZRMA 492.

¹⁵ Ibid [88].

IV LEGISLATIVE SUPPORT OF RENEWABLE ENERGY USE

Under the *Climate Change Response Act 2002* (NZ), enacted that year in anticipation of prescribing mechanisms to achieve the Kyoto targets, the government had provided for a carbon trading regime. At the present date (2007) the regime remains under consideration as to the form of implementation. For example, questions of attribution of the value of existing forestry planting have arisen, with proposals to accord credits to future planting only. The differences between private forestry investors and the government continue towards a point of resolution but may influence future land use development, including conversion of forestry to dairy production. The form and scope of any carbon charge regime is likely to be relevant to the support and cost of the various types of energy generation which will be needed to cater for growing consumption demands.¹⁶

More specifically, consequent upon the *EDS* decision, the government enacted the *Resource Management (Energy and Climate Change) Amendment Act 2004*. The purpose was first to introduce additional guidelines in respect of regional and district policies and plans, and for assessing resource consent applications. A second purpose was to clarify the functions of central and local government in relation to climate change.

Concerning objectives, s 7 of the *RMA* was amended to require decision makers to have particular regard to '(ba) the efficiency of the end use of energy; (i) the effects of climate change; and (j) the benefits to be derived from the use and development of renewable energy'. A definition was inserted for 'renewable energy' to include energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave, and ocean current sources.¹⁷ The provisions were intended to encourage the promotion of renewable energy options.

¹⁶ See Ministry for the Environment website <<http://www.mfe.govt.nz/issues/climate/>>. New Zealand contributes 0.2% of the world's greenhouse gas emissions, but ranks 12th on the per capita scale.

¹⁷ *Resource Management Act 1991* (NZ) s 2.

Secondly, to clarify the appropriate content of regional plans, s 70A prescribed that a regional council should not have regard to the effects of an emissions discharge on climate change, except to the extent that the development of renewable energy could enable a reduction of greenhouse gases. In the assessment of resource consent applications involving the generation of emissions of greenhouse gases, an equivalent amendment applied to rule out consideration of this adverse factor and excluded carbon sink conditions on approvals.¹⁸ But in all situations where central government had promulgated a National Environmental Standard regulating the discharge of greenhouse gases, the standard would need to be applied to achieve a consistent nationwide outcome.

Parallel in time, various government ministries and agencies were developing policies and strategies supporting the increased use of renewable energy. The Energy Efficiency and Conservation Authority issued a review of wind energy potential, a national energy strategy, and guidelines for local authorities in respect of wind power consents.¹⁹

V DECISIONS APPLYING 2004 AMENDMENTS

Prior to the 2004 amendments, the first applications for commercial wind farm approvals had been received, and had been approved by district councils. The wind farms related to developments totalling 357 wind turbines in the Tararua Range area, in the lower inland part of the North Island. The area was not considered an

¹⁸ Ibid s 104E. These provisions initially caused uncertainty as to the weight to be given to a development which may increase greenhouse gases. In *Genesis Power Ltd v Greenpeace New Zealand* [2007] NZCA 569 the Court confirmed that the emission of greenhouse gases would not be a relevant consideration in assessing an application for a resource consent. But government policy resulted in the proposed recommissioning of a coal power station to be abandoned.

¹⁹ Energy Efficiency and Conservation Authority, *Review of New Zealand's wind energy potential to 2015* (EECA, 2001); Energy Efficiency and Conservation Authority, *National Energy Efficiency and Conservation Strategy* (EECA, 2001); Energy Efficiency and Conservation Authority, *Guidelines for Local Authorities: Wind Power* (EECA, 2004); all available at <<http://www.eeca.govt.nz>>. For the complex strategy in the UK to promote wind energy, see Marcus Trinick, above n 3. See also Barry Barton, 'Renewable Energy in New Zealand' (2005) 23 *Journal of Energy & Natural Resources Law* 141.

outstanding natural landscape, and experienced strong wind velocities. The applications were all approved by the local authority, with no appeals.²⁰

Following the 2004 amendments, other applications in that locality have been made. One application was settled on appeal by a consent order. Another application for 40 turbines was granted to the extent of 31 units, considering impacts on landscape values or potential effect on aviation safety.²¹

A A Genesis Power Appeal

The first wind farm case taken to appeal before the Environment Court was *Genesis Power Ltd v Franklin District Council*.²² The project site was the Awhitu Peninsula, being an area on the western coastline south of Auckland City. The application was for 18 turbines, and was initially declined by two commissioners on behalf of the District Council. The grounds for declining the application were the adverse visual effects on the landscape, impact on local Maori, and adverse effects on equestrian activities near the site. The appeal by Genesis Power was supported by the Energy Efficiency and Conservation Authority, the Auckland Regional Council on the basis of benefit for the large urban population, the Environmental Defence Society which considered wind power to be preferable to greenhouse gas options, Mighty River Power Limited (another power company), and Greenpeace New Zealand Inc which supported compliance with the Kyoto Protocol. An Equestrian Environmental Protection Society, whose members used the adjacent beachfront for exercising horses, and an indigenous Maori tribe (iwi), concerned about cultural sensitivity of the site, opposed the appeal.

The parties advanced differing viewpoints as to whether approval would result in sustainable management, as defined under s 5. The opposing parties considered that the matter of national importance under s 6(b), the protection of outstanding landscapes, would be compromised, and under s 7(c), the maintenance and

²⁰ See Richard Fisher, 'Wind Energy in New Zealand: Regulatory and Policy Lessons to Date' (2005) 9 *New Zealand Journal of Environmental Law* 307, 320. See also Parliamentary Commissioner for the Environment, *Wind power, people, and place* (PCE, 2006) [3.4.1].

²¹ See Richard Fisher, above n 20, 321.

²² [2005] NZRMA 541.

enhancement of amenity values, would not be satisfied. The parties supporting the consent relied on the relevant matters added in 2004 under s 7, namely (i) the effects of climate change and (j) the benefits to be derived from the use and development of renewable energy.²³

The Environment Court identified the positive effects, that electricity was a vital resource, that the country needed more diverse electricity generation beyond hydro sources which were problematic in dry years, that coal and gas generation could have adverse effects contributing to climate change, that national energy policy was to pursue options for renewable energy, and that the wind resource was renewable energy of indefinite supply. Further advantages included security of supply as a back-up to other sources, potential reduction in greenhouse gas emissions, a reduction of dependence on the national grid and in transmission losses from more distant sources, wind speed reliability with an annual variation of 10 per cent, development benefits for industry, and a contribution to renewable energy targets.²⁴

The negative environmental effects were visual detracting from the landscape and natural character, noise affecting recreation and the equestrian activities, and cultural effects on the indigenous people. The bird strike risk was not seen as significant.²⁵

After assessing the evidence, the Court found the proposal would have numerous positive effects consistent with the national interest. The visual amenity effects would not be significant, and the site was not an outstanding landscape. The noise effects would be minor, and impacts on equestrian activities were unlikely to affect management and safety. The effects on the Maori people could be protected by conditions if heritage items were discovered. The Court observed that to decline the wind farm application on the grounds of adverse effects on the landscape could have serious implications for the wind farm industry as the majority of sites had similar characteristics.²⁶

²³ Ibid [28]–[60].

²⁴ Ibid [61]–[66].

²⁵ Ibid [67]–[212].

²⁶ Ibid [213]–[228].

The Court considered that the amendments in 2004 were a legislative statement that climate change must be addressed and could be assisted through renewable energy. The Court stated: 'Climate change is a silent but insidious threat that scientists tell us threatens to improperly deprive future generations of their ability to meet their needs'.²⁷ The Court rejected the submission that the benefit from the station would be minor. It concluded that the purpose of sustainable management would be better served by granting the consent than refusing it. The benefits seen in the national context outweighed the site-specific effects.

This robust approval by the Court, applying the legislative policy, has given significant weight to the benefits of wind farms in using green renewable energy as against the protection of landscapes from visual intrusion.²⁸

B Unison Networks Decisions

All applications require assessment on the merits, in accordance with the objectives of the *RMA*, and relevant policies and plans. Several decisions provide further analysis of the visual impact of turbines. In *Unison Networks Ltd v Hastings District Council*²⁹ the Court considered appeals against refusal of consents for a 15 turbine farm by Unison and a 75 turbine farm by Hawkes Bay Wind Farm Ltd. In assessing the evidence as to visual effect, the Court observed:

It is self apparent that landscape issues are matters about which reasonable and informed people may hold conflicting views. It is not possible to say that one view is *right* and another is *wrong* ... It is the case too that the choices are stark; in the nature of things turbines need to be on or near ridgelines, and will often be on skylines, and there is no real prospect of remedying or mitigating their adverse visual effects. Either the activity proceeds, or the effects are avoided by refusing consent.³⁰

In relation to positive effects, the Court observed:

Without resiling at all from those views about landscape and visual amenity, we do need to mention the undoubted view that many people find modern turbines attractive and fascinating. Ms Lucas was moved to describe them as having ... *elegance, a sculptural gracefulness*. She was of course referring to them in that

²⁷ Ibid [225].

²⁸ See Richard Fisher, above n 20, 332.

²⁹ Environment Court, W058/2006, 17 July 2006 (Thompson J).

³⁰ Ibid [68].

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way as individual structures — she was less impressed with them en masse, referring to the proposals as a ... *thicket* ... among other comments.³¹

The Court approved the respective wind farms.

By contrast, in *The Outstanding Landscape Protection Society Inc v Hastings District Council*³² the Court considered an appeal against the grant of consent to Unison Networks to establish another wind farm in the same area with 37 turbines. The site was a distinctive ridgeline known as Te Waka, being a landform with the appearance of the hull and stern of a Maori canoe (waka). No existing structures or high vegetation affected the landscape. The indicative turbines would be Vestas 90 with a potential total height of 130m. Although like consents had been granted, the Court found that the Maori people regarded this ridgeline as ancestral and of special cultural value, and the turbines would book-end the landform with the other consents.

Regarding landscape content, the Court observed:

There seems now to be consensus that landscape comprises more than the purely visual, and encompasses the ways in which individuals and the communities they are part of perceive the natural and physical resources in question. Those perceptions can be coloured by ... *social, economic, aesthetic and cultural conditions*. In the case of Te Waka and its surrounds ... when one knows something of the lore and legends, the landscape becomes more significant and memorable.³³

The Court concluded that the cumulative effects of the turbines would be significantly adverse, and the use of renewable sources of energy on the proposed site would not assist the Maori people or the community at large to provide for cultural and social well-being nor would it sustain the landscape amenity for future generations.³⁴ The Court declined the application.

C Makara Wind Farm

Another detailed examination of resource management issues applicable to wind farms is found in *Meridian Energy Ltd v Wellington City Council and Wellington*

³¹ Ibid [69].

³² Environment Court, W24/2007, 13 April 2007 (Thompson J).

³³ Ibid [46].

³⁴ Ibid [116].

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Regional Council.³⁵ The Court considered an appeal against a grant of consents to Meridian Energy to establish a wind farm known as 'Project West Wind' comprising 70 turbine generators. The site was at Makara on the coast north of Wellington City. The Makara Guardians Group, including local residents, opposed the application. The Energy Efficiency and Conservation Authority, the New Zealand Wind Energy Association, and Greenpeace New Zealand Inc supported the project.

The development site was spread over 26km of coastline, being an area of sustained strong wind velocity. The height of the proposed Vestas 3 blade turbines (120m) was left open to allow for technological changes. The rural zoning under the Wellington City District Plan provided for assessment of wind farms as a 'discretionary activity'. This status required the Court to have regard to any actual and potential effect on the environment of allowing the activity. The effects could include both positive and negative effects. The Court stated that the environment could be separated into the local environment, and the regional (global) environment which could benefit from energy efficiency.³⁶

The question of noise levels was a significant issue for the residents. The turbine blades would be pitch regulated to minimise noise, which was an improvement on earlier fixed blades. The Court noted that the proposed conditions included a noise management plan that was designed to deal with the sensitive night-time circumstances and possible stopping of certain turbines.³⁷ The Court found that some loss of amenity would be experienced but it would not be severe nor disturb sleep. A condition could be imposed that the noise level at any dwelling should not exceed 30dBA L 95.³⁸

³⁵ Environment Court, W031/2007, 14 May 2007 (Kenderdine and Thompson JJ).

³⁶ *Ibid* [24].

³⁷ *Ibid* [55]. The basic standard for assessing noise in New Zealand is NZS 6808:1998 'Acoustics — The assessment and measurement of noise from wind turbines'. For further discussion, see Richard Fisher, above n 20, 324. See also New Zealand Wind Energy Association website, fact sheet 6 'Sound' <<http://www.windenergy.org.nz>> at 31 August 2007.

³⁸ Environment Court, W031/2007, 14 May 2007 (Kenderdine and Thompson JJ) [65]. See also Energy Efficiency and Conservation Authority, *Guidelines for local authorities: Wind Power* (EECA, 2004) 5.4.1 (noise should not exceed 40dB at boundary).

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Another concern was a claim that part of the area known as Quartz Hill was the largest contiguous, relatively uneroded, 'peneplain remnant' in the region, and the development would have an adverse effect on internationally scientific heritage and education value.³⁹ The peneplain concept applied where a mainly featureless landform of regional extent showed little sympathy with a structure. The Court found that the physical features of interest would remain and be accessible for scientific investigation, and the visibility of the geomorphology would not be compromised.⁴⁰

Concerning issues of visual amenity, effect on the rural character, and construction effects, the Court considered a range of expert evidence. It noted a Scottish study — known as the 'Sinclair-Thompson matrix' — on turbines to 100 metres tall, which acknowledged the intrusive effects of turbines close to a dwelling.⁴¹ The Court assessed in detail the siting of the turbines, the visual effect on the residential properties, the ability of trees to screen the structures, matters of house design, and shadow flicker and blade glint. To mitigate glint, a condition could be imposed to require non-reflective paint.⁴²

Another issue was whether the wind farm would be contrary to the matters of national importance under s 6 regarding protection of the coastal environment, and outstanding natural landscapes. The New Zealand Coastal Policy Statement and the Regional Policy Statement were also assessed. The Court characterised the proposal as sprawling development and detracting from the landscape environment, but the substantive issue was whether it was 'inappropriate development'.⁴³ The Court stated that the project would provide reassurance to the region as to long-term electricity supply, and assist economic and social well-being.⁴⁴

³⁹ Environment Court, W031/2007, 14 May 2007 (Kenderdine and Thompson JJ) [75].

⁴⁰ Ibid [97].

⁴¹ Ibid [112]. Proximity standards may allow 400m separation from dwellings. See Marcus Trinick, above n 3; Energy Efficiency and Conservation Authority *Guidelines*, above n 19. Many turbines have been developed in Scotland, subject to heritage landscape assessment and the effect on the 'Queen's view' from Balmoral Castle.

⁴² Environment Court, W031/2007, 14 May 2007 (Kenderdine and Thompson JJ) [115]–[123].

⁴³ Ibid [279].

⁴⁴ Ibid [301].

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In respect of the District Plan, the development of the wind farm had not been specifically anticipated. The Court considered, following a site visit, that the project would not overwhelm the hinterland's rural character. The underlying rural character would still be perceptible, and effective mitigation by removal of several turbines would reduce any residual landscape impact.⁴⁵

Concerning Maori issues, the Court noted that consultation with Maori had resulted in the project's approval so no adverse submissions were advanced.⁴⁶

The Court traversed the relevant guidelines of s 7 in detail. It noted that the energy in the wind was an untapped resource and the site surpassed other areas of predicted energy yield.⁴⁷ Although the proposal would not maintain and enhance amenity values, the land was not of high quality.

Regarding impact on birds and bats, the Court found there would be no plausible basis for concern, and stated: 'It seems unlikely that they would leave their habitat, fly up to largely bare and windy ridgelines, and then fly up another 40 metres or so to come within danger of being struck by a rotor blade.'⁴⁸ But in respect of migration and displacement, the Court acknowledged the need for a baseline survey.

Considering climate change and the benefits of renewable energy, the Court referred to expert evidence and accepted the need to recognise the reality of climate change and to respond to the facts and predictions.⁴⁹ The Government Energy Strategy supported the development. The matters in s 7 were powerful in support of the application.⁵⁰

⁴⁵ Ibid [308], [318].

⁴⁶ Ibid [353]. Maori issues may be important under *Resource Management Act 1991* (NZ) s 6(e).

⁴⁷ Ibid [370].

⁴⁸ Ibid [376]. Bird strike has not been a major issue in the appeals. Bird strike averages 2.9 mortality per year, being much less than predator harm: New Zealand Wind Energy Association website, fact sheet 8 'Birds and Bats' <<http://www.windenergy.org.nz>> at 31 August 2007.

⁴⁹ Ibid [389].

⁵⁰ Ibid [398], [400].

In relation to s 6 matters, the Court concluded: 'The appropriateness of the overall site must in this instance take precedence over the preservation of the natural character of the coastal environment and an outstanding landscape.'⁵¹

The Court finally held that with removal of six turbines to protect local amenities, sustainable management of the natural and physical resources of the area could be achieved. Critical factors in favour of the consent were wind speed on the site (which was unparalleled), efficiency of transmission, and proximity to a large city.⁵² Consent was granted for the remaining 64 turbines. This outcome is site specific, but the reasoning of the decision is clearly supportive of other applications.

VI OTHER PLANNING FACTORS

Where there are competing wind farm proposals, it is open to a court to give priority to the first application which is ready for notification. A consent granted to that application may form part of the landscape to be considered in respect of an adjoining application, and may justify conditions to protect the efficiency of the existing consent.⁵³

A local authority has the power to promote the social, economic, environmental, and cultural well-being of communities, and should take a sustainable approach.⁵⁴ This wide power enables a council to permit or establish a wind farm. The High Court has held that a council can alter the purposes of a water catchment reserve, to facilitate wind farm development in conjunction with a power company.⁵⁵

The power companies negotiate rentals with owners or purchase sites. It is the author's view that the concerns of other persons affected could be ameliorated by a creative use of offers of environmental compensation to mitigate adverse

⁵¹ Ibid [452]. The Court referred to *New Zealand Rail v Marlborough District Council* [1994]

NZRMA 70, 85 (Greig J) on the interpretation of *Resource Management Act 1991* (NZ) s 5 and s 6.

⁵² Environment Court, W031/2007, 14 May 2007 (Kenderdine and Thompson JJ) [584].

⁵³ *Unison Networks Ltd v Hawke's Bay Wind Farm Ltd* High Court, Napier, CIV-2006-441-810, 15 May 2007 (Heath J).

⁵⁴ *Local Government Act 2002* (NZ) ss 10, 11, 12.

⁵⁵ See *Friends of Turitea Reserve Society Inc v Palmerston North City Council* High Court, Palmerston North, CIV-2006-454-879, 25 July 2007 (Baragwanath J).

environmental and economic effects. In practice, developers may negotiate with potential objectors to obtain consents to the proposals.⁵⁶ Legally, consent authorities, and the Environment Court, can impose reasonable conditions providing for compensation for adverse effects relating to noise and visual impact. Precedents exist for this type of mitigating provision.⁵⁷

Generally, blade noise has not been a significant factor in the assessments. Likewise, a concern for migratory or local bird strike has not been a major issue as research indicates a minimal mortality outcome.⁵⁸

VII CONCLUSIONS

At the present date in 2007, no specific direction exists in the law to provide for wind farms as a form of sustainable energy production. A national policy statement could assist the appropriate placement of wind farms. A statement could encourage more coordination and possible corporate cooperation in the competing developments, and mitigate the rule that an application first in time should receive priority.⁵⁹ Existing central government policies appear to take a hands-off approach on energy planning, acknowledging that the commercial power companies are best able to determine sites, having regard to factors of land rights negotiation, economic viability, and landscape impact. In reality, the government is the owner of several of the major companies, and a conflict of interest may exist as to future regulation. The policy vacuum can be compared to the situation in Australia, where the (former) government released a

⁵⁶ The *Resource Management Act 1991* (NZ) s 104(3) provides that a consent authority must not have regard to any effect on a person who has given written approval to the application.

⁵⁷ *Alexandra District Flood Action Soc Inc v Otago Regional Council*, Environment Court, C67/07, 24 May 2007 (Jackson J) (conditions on renewal of water consents to protect or compensate owners affected by flooding). Negotiated compensation may be kept confidential. Land users may support wind farms due to rentals, with most opposition from persons not dependent on the land for income: Marcus Trinick, above n 3, [4.2]. See also New Zealand Wind Energy Association website, fact sheet 7 'Farmers and Landowners' for compensation and lease rental information <<http://www.windenergy.org.nz>> at 31 August 2007.

⁵⁸ See New Zealand Wind Energy Association website, fact sheet 8 'Birds and Bats', above n 48.

⁵⁹ See Imke Sagemuller, above n 3, 202–207; Barry Barton, above n 19, 155. See also *Unison Networks Ltd v Hawke's Bay Wind Farm Ltd*, above n 53.

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discussion paper on the need for a National Code for Wind Farms to provide better consistency of process between States.⁶⁰

The concept of integrated sustainable management, as envisaged under the *RMA*, provides support for a more managed approach. In New Zealand, the Electricity Commission has certain functions over transmission routes, and rules and policies apply to safeguard the rights of small operators to integrate into the main supply system without disadvantage. The Commission does not have functions regarding the location of wind turbines, and any mandatory process could be seen to duplicate the role of consent authorities and the Environment Court.⁶¹

A national policy statement could direct that regional and district councils should identify landscapes that are either suited or not appropriate for wind farms. For example, in Wales seven strategic areas have been identified.⁶² By this process, the costs to environmental groups and property occupiers to either support or oppose separate consent applications could be reduced.

The Parliamentary Commissioner for the Environment (NZ) has strongly supported wind farms as producing a desirable form of clean energy and constituting sustainable management. The Commissioner has identified the environmental advantages of wind farms and public support, balanced by the need to properly manage valued landscapes and provide back-up for intermittency of outputs. The Commissioner advocates the benefits of local 'ownership' of projects, as found in Europe, with early consultation and consideration of community-based power systems.⁶³

⁶⁰ Minister for the Environment and Heritage, *Towards a national code for wind farms* (3 May 2006). See also Parliamentary Commissioner for the Environment, *Wind power, people, and place* (PCE, 2006) [4.2.5 Australia]. In Australia a mandatory renewable energy target scheme in 2001 supported wind farm development, with 32 farms producing 470mw benefiting from the system.

⁶¹ See Energy Link and MWH NZ, *Wind Energy Integration in New Zealand* (Ministry of Economic Development: Energy Efficiency and Conservation Authority, 2005) <<http://www.eeca.govt.nz/eeca-library/>>. The Electricity Commission has developed growth strategies for wind power: Parliamentary Commissioner for the Environment, *Wind power, people, and place* (PCE, 2006) [3.4.3].

⁶² Regional councils must indicate in coastal plans sites which may be suitable for aquaculture farms. Regional and district councils presently have the general powers under the *Resource Management Act 1991* (NZ) to identify preferred locations for wind farms. See Imke Sagemuller, above n 3, 205. For Wales, see Marcus Trinick, above n 3, [102].

⁶³ See Parliamentary Commissioner for the Environment, *Wind power, people, and place* (PCE, 2006) [4.3] (80% public support for wind farms). Other relevant reports include Parliamentary Commissioner

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Looking forward, it is predictable that communities and future generations will become accustomed to the sight of wind turbines as a more common feature in an altered landscape. The Parliamentary Commissioner has compared the visual impact of turbines as likely to be less than the past changes to landscapes from commercial forestry.⁶⁴ Although not having the heritage value of traditional windmills, wind turbines have a significant positive utility and environmental value in the harnessing of renewable energy. In keeping with the integrated management of all activities under the *RMA*, the present consent systems, augmented by a national policy statement, should be capable of determining appropriate locations for wind farms and promoting sustainable development outcomes in the public interest.

for the Environment, *Future currents: Electricity scenarios for New Zealand 2005–2050* (PCE, 2005); Parliamentary Commissioner for the Environment, *Get smart, think small — Local energy systems for New Zealand* (PCE, 2006); all available at PCE website <<http://www.pce.govt.nz>>.

⁶⁴ Parliamentary Commissioner for the Environment, *Wind power, people, and place* (PCE, 2006) [3.4.3]. The farms can be seen as positive elements in the landscape because of sculptural qualities, and as symbols of clean, green energy.