

Waitomo District Council

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Taumatotara Wind Farm Limited to vary conditions of a land use consent for the Taumatotara Wind Farm (TWF) that was originally granted consent in 2008 from a site (Section 12 and Section 22 Block V Kawhia South Survey District; Section 1 Survey Office Plan 58558; and Section 2 Block V Kawhia South Survey District) located at Taumatotara West Road, Te Anga.

Minute 5 in relation to the application by Taumatotara Wind Farm Limited

Decision regarding processing of the application under s88 or s127 of the RMA

Introduction

As a result of uncertainty regarding whether the above application should be processed under either s88 or s127 of the RMA, I invited any party to these proceedings to provide legal or planning submissions regarding the following matters:

- What are the relevant legal tests for determining if a modification to a consented proposal should be considered under s127 or as a new application under s88 of the RMA?
- How do those legal tests apply to the current Taumatotara Wind Farm application? Specifically:
 - Is the comparison of any differences in adverse effects of the current application to be against the original 2006 consent or the consent as varied in 2011?
 - What aspects of the proposal are relevant to determining any differences in adverse effects?
 - What is the relevance of whether the consent for which variation is now sought, has been exercised or not?
- Any other relevant matters that would assist my determination on this matter.

I have received legal submissions on these matters from the Applicant and the Waitomo District Council (WDC). This Minute sets out my decision on this matter and the reasons for that decision.

Relevant legal tests

The legal submissions by the Applicant and the WDC both identify *Body Corporate and Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* as the key cases.

WDC summarise the relevant legal tests and their applicability to the application at paragraph 7 of their submission:

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- (a) *The question of whether an application is for a change of condition or a new consent is a question of fact and degree in the circumstances of the case.*
- (b) *Factors that will support a finding that the application is for a new consent include:*
- (i) The application is for a fundamentally different or substantially modified activity;*
 - (ii) The application seeks substantial changes to conditions; particularly if the application seeks to change the condition requiring that the site be developed "generally in accordance with the application and plans submitted";*
 - (iii) The increased intensity and scale of the activity compared with that for which consent was granted is discordant with the idea that all that is being changed are the conditions of consent.*

The Applicant summarises the relevant legal tests at paragraphs 6.17-.18 of their submission:

- 6.17 *The relevant legal tests for assessing that an application is for a s127 variation rather than a new activity, can be summarised as follows:*
- (a) The activity is for the same activity rather than the same kind of activity;*
 - (b) It is the consent conditions that are being changed rather than the activity;*
 - (c) The conditions are not being substantively changed;*
 - (d) The existing consented activity is not being essentially replaced;*
 - (e) The effects of the activity are not materially different (in an adverse sense).²⁰*
- 6.18 *These questions are a matter of fact and degree and involve the exercise of judgement.²¹*

Responses to specific questions

In response to the specific questions asked, both legal submissions agree the consideration of adverse effects is between the Proposed Variation and the 2011 consent ("existing consent") as varied from the original 2006 consent, and that it is irrelevant that the existing consent has not been exercised.

WDC confirmed that any adverse effects are relevant in the assessment, including new adverse effects. The Applicant's submission provided an assessment of various potential adverse effects arising from the proposed Variation.

Other Relevant Matters

WDC identified the focus on integrated management as a relevant consideration, which the Applicant contested. I agree with WDC that the full package of conditions should be considered when considering the application against the existing consent (and the effects on the environment it seeks to manage).

WDC also highlighted whether the processing of the application would differ, or whether the matter is a consideration of academic interest only. The Applicant's submission indicates that the activity status of the application would be discretionary under either scenario. I consider this determination is of more than academic interest only, as it has the potential to affect the scope of assessments and evidence to be provided through the hearing process. In this regard, and by way of example, were the application to be considered under s88 it would require a fresh assessment of the entire proposal, the appropriateness of the site for a wind farm, and all actual and potential effects on the environment.

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WDC also record that the consent authority has discretion to identify the correct procedure and process the application accordingly, provided all the relevant information has been provided.

The Applicant raises that it is common practice for wind farms to seek variations to unimplemented consents to increase the height and reduce the number of turbines.

Decision

On balance, I agree with the Applicant that the activity being sought by way of the application remains the same as that provided for in the existing consent; being to construct and operate a utility scale wind farm and identified ancillary activities at a defined location.

I acknowledge that the reduction of turbines, and increase in height of the remaining turbines, may change the scale of some adverse effects on the environment, however based upon the information provided to date the nature of adverse effects arising do not appear to be materially different to those that would arise from the exercise of the existing consent.

In addition, I consider the application differs from *Te Rūnanga o Ngāti Awa* in that it does not seek additional or significantly different ancillary activities and the proposed changes to conditions appear to remain within the scope of the original activity (subject to the provision of further evidence through the hearing).

I consider the proposed amendments to conditions do not result in a fundamentally different activity and do not result in the existing consent being essentially replaced. I agree with the Applicant that changes to conditions that require the site to be developed "generally in accordance with the application and plans submitted" is a common and necessary change as part of a variation proposal.

Accordingly, I recommend that the application be assessed on an integrated basis as a variation under s127 based upon the information before me. However, given that the potential change in effects requires a consideration of fact and degree, and all the evidence has not yet been heard, I record that I may need to reconsider my conclusion should the evidence compel me to do so.

Contact

Kayla Hemara is the Hearings Administrator for this hearing. All hearing and administrative matters shall be directed to Kayla at Kayla.Hemara@waitomo.govt.nz or (07)8780800.



Stephen Daysh
INDEPENDENT HEARING COMMISSIONER

3 October 2023