BEFORE AN INDEPENDENT HEARING COMMISSIONER FOR WAITOMO DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991 (Act)

AND

IN THE MATTER of an application by Taumatatotara Wind Farm Limited to change conditions of a land use consent for the Taumatatotara Wind Farm

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LEGAL SUBMISSIONS OF COUNSEL FOR WAITOMO DISTRICT COUNCIL REGARDING PROCESSING OF THE APPLICATION UNDER s88 OR s127 OF THE ACT

Dated 18 September 2023

TOMPKINS | WAKE

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Introduction

1. Minute 1 of the Independent Hearing Commissioner for Waitomo District Council (**Commissioner**) issued on 12 September 2023 (**Minute 1**) invites legal or planning submissions from any party regarding:

   (a) 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 Resource Management Act 1991 (**the Act**).

   (b) the relevance of the previous modifications to the consented proposal as set out in the second bullet point of Minute 1; and

   (c) any other relevant matters that would assist determination of this issue.

Legal tests

2. Section 127 of the Act provides that the holder of a resource consent may apply to a consent authority for a change or modification of a condition of the consent. Sections 88 to 121 apply, with all necessary modifications, as if the application were an application for a resource consent for a discretionary activity.

3. The issue of whether an application is for a change of conditions under section 127 or for a new consent under section 88 was considered by the High Court and the Court of Appeal in *Body Corporate 970101 v Auckland City Council*.[1] The High Court (in a decision which was upheld on appeal) stated that:

> [73] Whether an application is truly one for variation of the condition under s127 or whether in reality it is seeking consent to an activity which is materially different in nature, is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations to the determination of this issue will include a comparison between

[1] (2000) 6 ELRNZ 183 (HC) and (2000) 6 ELRNZ 303 (CA).

> the activity for which consent was originally granted and the nature of the activity if the variation were approved…
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> [74] It is trite that a principal focus of the RMA is the control of adverse effects of activities on the environment. In deciding whether an application for variation is in substance a new application, the consent authority should compare any differences in the adverse effects likely to follow from the varied proposal with those associated with the activity in its original form. Where the variation would result in a fundamentally different activity or one having materially different adverse effects, a consent authority may decide the better course is to treat the application as a new application. That will particularly be the case where the application for variation seeks to expand or extend an activity with a consequential increase in adverse effects.

4. The approach in *Body Corporate* has been considered and applied in a number of subsequent cases. By way of example of the application of the approach in *Body Corporate*:

   (a) In the *Body Corporate* case, the Court held that a change in the number of apartments in the proposed apartment complex was merely a change to conditions, so long as those apartments were to be constructed within the same overall space or envelope as the original building plans.[2]

   (b) In *Water View Property Ltd v Gardner*, the High Court found that an increase in lots in a subdivision is more likely not to come within s127, given the resulting intensification of development with associated increased effects on the environment.[3]

   (c) In *Maungaharuru-Tangihu Trust v Hawke's Bay Regional Council* the Environment Court found that moving the proposed discharge 2km from the area originally approved and expanding the size of the mixing zone are changes of such substance as to take the new

[2] Ibid at 1, at para [48] of the CA decision.

[3] [2016] NZHC 2247 at para [45]. As this proceeding involved an application for summary judgment the Court was not required to make a finding on the issue.

proposal outside of the existing approval, even though the new proposal probably reduced the potential adverse effects.[4]

5. The purpose of s127 was considered recently by the Court of Appeal in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*[5] where the Court stated that:

> [187] We do not consider that Parliament intended s127 to be used to authorise a completely new activity under the guise of changing the conditions to which the original activity was subject. We think the "activity" that continues subject to a changed condition must be the same activity that was taking place subject to the cancelled condition. In our view, it is not appropriate to treat "activity" in this context as if it embraces an activity which might be described as the same "kind" of activity…
>
> [188]…The legislative history does not sit comfortably with the use of the section to introduce a substantially modified activity with an entirely new suite of conditions, as has been found acceptable in the present case. It is of course correct in one sense to say the kind of activity is the same, but the increased intensity and scale of the activity compared with that for which consent was originally granted is discordant with the idea that all that is being changed are the conditions of consent.

6. For these reasons, the Court of Appeal disagreed with the conclusion reached in the Environment Court, and upheld in the High Court, and found that the result of the application to extend the water bottling plant to increase the maximum bottling capacity and introduce two new bottling lines and a plastic bottle manufacturing plant was that "*the activity originally consented to will essentially be replaced*."[6]

7. Having regard to the approach in *Body Corporate*, the application of that approach in subsequent cases, and the recent elucidation by the Court of Appeal, I submit that the following legal tests apply:

[4] [2016] NZEnvC 232 at para [132].
[5] [2022] NZCA 598.
[6] Ibid at 5, at para [191].

(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.

Relevance of previous modifications to the consented proposal

8. Minute 1 raises three specific questions regarding the application of the legal tests to the resource consent currently held for the Taumatatotara Wind Farm, as the original consent granted in 2006 was varied in 2011. These questions are considered in turn below.

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?

9. I submit that the potential adverse effects of the current application should be compared to the adverse effects of the activity for which consent is currently held, which is the 2011 consent. This is the resource consent which could be implemented today, if the applicant chose to do so. While the quotation from *Body Corporate* in paragraph 3 refers to the

activity in its "original" form, in that case no previous change to conditions had been approved.

What aspects of the proposal are relevant to determining any difference in adverse effects?

10. I submit that all potential adverse effects of the modified proposal are relevant to assessment of the differences in the character, intensity and scale of adverse effects. This may also include any new adverse effects of the modified proposal which were not considered as part of the existing consent.[7]

What is the relevance of whether the consent for which variation is now sought, has been exercised or not?

11. Section 127 enables an application to change a condition of a resource consent, whether or not the resource consent has been implemented. An example is the *Body Corporate* case, where a proposal for a single apartment building was replaced with an application for twin towers within the same building envelope.

Any other relevant matters

12. In making a decision regarding whether the application is for a change of conditions or a new consent, I submit that it is relevant to take into account the purpose of the Act and, in particular, its focus on integrated management of effects. In *Summerset Villages (St Johns) Ltd v Auckland Council*[8] the Court stated:

> [76] … The use of repeated s127 or other applications has the ability to derogate from the finely balanced outcomes of an integrated consent and the finely crafted conditions. In these cases the Court may properly see the consent and conditions as

[7] For example in *Primeproperty Group Ltd v Wellington City Council* [2022] NZHC 1282 where the High Court found that the Environment Court correctly considered the distracting effect of digital billboards compared to the original consent for static billboards.
[8] [2019] NZEnvC 173.

> entire. Thus the change of one element may add cumulative effects or otherwise compromise the original consent.

13. It is also relevant to consider whether the processing of the application would be different under s88 rather than s127. For example, in *Te Rūnanga o Ngāti Awa*, the Court recorded that the application was processed as a discretionary activity in any event, so that consideration of s127 was of academic interest only.[9]

14. Counsel also records that the Court has confirmed that the form of the application is not determinative of the correct processing of the application; the consent authority has the discretion to identify the correct procedure and to process the application accordingly, provided that all the relevant information has been provided.[10]

Signed this 18th day of September 2023

Theresa Le Bas. Wem Embling

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[9] Ibid at 3, at para [161].
[10] Ibid at 4, at paras [134] and [135].