BEFORE THE ENVIRONMENT COURT

Decision No: [2012] NZEnvC 213

ENV-2010-WLG-000041 and 000042

IN THE MATTER of appeals under Cl 14 of Schedule 1 to the Resource Management Act 1991

BETWEEN MIGHTY RIVER POWER LTD
NZ WIND ENERGY ASSOCIATION INC

Appellants

AND THE PORIRUA CITY COUNCIL

Respondent

Court: Environment Judge C J Thompson
Environment Commissioner K Prime
Deputy Environment Commissioner C Blom

Hearing: at Wellington 5 and 6 September 2012

Counsel: D G Allen and M L Mulholland for the appellants and for Genesis Energy Ltd and Meridian Energy Ltd - s274 parties
J A White for Energy Efficiency and Conservation Authority - s274 party
P D Tancock for Pauatahanui Futures Society, Preserve Pauatahanui Inc, Pauatahanui Residents Assn, Moonshine Valley Residents Assn, W & S Estment, R & P Segal, T Cooper and A Elliot - s274 parties
J G A Winchester and H P Harwood for the Porirua City Council

---

DECISION ON APPEALS

Decision issued: 8 OCT 2012

The appeals are declined and the Council's decision is confirmed, with the exceptions noted at para [50].

Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] Proposed Plan Change 7 (PC 7) to the Porirua City District Plan was notified on 22 September 2007 and the Council's decision on the submissions received was made on 24 February 2010. PC 7 was directed at the possibility of commercial (defined as more than 20kW production per site) windfarms[1] in the District and made specific provisions intended to manage issues of noise, visual amenity and the like. These appeals are against some of those provisions. It is to be noted that the Council's decision pre-dated the coming into effect of both the New Zealand Coastal Policy Statement 2010 (NZCPS) and the National Policy Statement for Renewable Electricity Generation 2011 (NPSREG) and we shall discuss the significance of those documents later.

The appellants' positions

[2] With one exception, the positions of the two appellants, Mighty River Power Ltd (MRP) and the NZ Wind Energy Association (NZWEA), can be dealt with together. Their shared concerns are, first, the imposing of a *non-complying* activity status for windfarms that have a turbine which:

- is within 700m of a zone boundary;
- is within 700m of the boundary of a site not part of the windfarm.

Secondly, they are concerned that Objective C4.2A, Policy C4.2A.3 and Rule D4.1.4(j) refer to the aim of protecting or not compromising the ... *development potential* and *use and development of the rural land resource*.

[3] NZWEA also appeals against the imposition of *non-complying* status if a turbine is within a *Landscape Protection Area as defined in the District Plan*. The two s274 party power companies, Genesis Energy Ltd and Meridian Energy Ltd, support the appellants' positions.

[4] Overall, they see a *non-complying* status as overly restrictive and unrelated to actual or potential adverse effects, among other defects. Further, they point to the fragmented nature of landholdings in the *Rural* zone of the District, where only c16% of lots are bigger than 40ha and c76% are less than 10ha. That would mean,

[1] Unless otherwise indicated 'windfarm' refers to projects of this scale

they say, that a windfarm developer will be forced to aggregate landholdings well beyond the actual windfarm boundaries so as to provide a 700m buffer and thus avoid the more restrictive terms of a *non-complying* status.

[5] The Objective, Policy and Rule contain, they say, phrases which are undefined and incapable of assessment by a potential windfarm developer; are contrary to case law and good planning principles, and are contrary to the NPSREG, because, as they see them, they are designed to ... *frustrate windfarm development.*

[6] The s274 parties, Genesis Energy Ltd and Meridian Energy Ltd, supported the positions taken by the appellants.

The Council's position

[7] The Council is generally content with PC 7 as it stands, regarding it as achieving a reasonable balance between recognising the benefits of developing renewable energy resources, and the managing of adverse effects at both a district-wide level and at an immediate vicinity level.

[8] On the second concern of the appellants, the Council's consultant planner has recommended that Policy C4.2A.3 should be deleted from PC 7 as it is agreed to be contrary to Policy D of the NPSREG. That policy was in these terms:

> C4.2A.3 To recognise the potential for tension between wind farms and the use and development of sites within their vicinity and to protect the use and development of the rural land resource by appropriately avoiding, remedying or mitigating the impacts of wind farms.

We agree with that position, so that part of the appellants' second issue can be put aside. We also agree with the Council's position that, with Policy C4.2A.3 removed, Policy C4.2A.2 should be consequentially amended to clarify that turbines within Landscape Protection Areas, and turbines within 700m of a zone boundary or the boundary of a site not part of the windfarm, will be inappropriate in some locations.

The opposing s274 parties

[9] The four societies, and the named individuals, are all s274 parties to the appeals and wholeheartedly support the Council's decision and its position in defending the provisions of PC 7 as they stand.

The scope of the appeals

[10] Some issues of scope did arise in the course of evidence and submissions, but they can be discussed quite briefly. The law on scope is well-traversed and clear: - see eg *Vivid Holdings Ltd* [1999] NZRMA 468 and *Transit NZ v Pearson* [2002] NZRMA 318 (HC).

[11] First, PC 7 was not intended to deal with anything other than commercial scale windfarms: - in particular it was not intended to have anything to do with domestic or community scale wind energy generation. The Council recognises that its Plan will be required to have objectives, policies and methods to provide for enterprises of that scale (see Policy F of the NPSREG) but PC 7 is not the vehicle for doing so and as a matter of law it cannot be amended to do so now.

[12] Secondly, there is no suggestion in the notices of appeal that the Court should abandon PC 7 entirely. The relief sought is confined to the issue of *non-complying* activity status, and any necessary consequential amendments that might flow from decisions about that status.

[13] Thirdly, there is no suggestion in the notices of appeal that the Objective of PC 7 should be amended, as was sought in the appellants' evidence, to explicitly refer to the national significance of renewable energy generation. There is not scope to do that – we do not agree with the somewhat faint suggestion that it might be seen as a consequential or incidental amendment. It is more fundamental than that. We do observe though that the explanation appended to the Objective (see Appendix A) is explicit in its reference to such national significance, so the position is quite clear in any event.

The scheme of the District Plan and PC 7

[14] The scheme of the District Plan is that those activities not specifically identified as *controlled*, *restricted discretionary*, *discretionary*, *non-complying* or *prohibited,* default to being *permitted,* subject to compliance with specified standards. If the activity cannot meet the *permitted* standards it becomes a *discretionary* activity. Pre- the advent of PC 7, windfarms were not separately identified in the Plan, but they would not have met *permitted* standards – eg the maximum *permitted* structure height in the *Rural* zone is 10m, which would be well short of any current commercial turbine. They would, therefore, have been a *discretionary* activity. The only activities which are identified in the pre- PC 7 District Plan as *non-complying* in the *Rural* zone are activities which emit an objectionable odour; offensive trades; vehicle yards, and subdivisions to lots less than 5ha in area. Pre-PC 7 there were no activities identified as *non-complying* in Landscape Protection Areas.

[15] PC 7 affects the *Rural* zone of the District Plan, and its scheme is that where no windfarm structure, including a turbine, is located in a *Landscape Protection Area,* or within 700m of a zone boundary (excluding district boundaries), or a boundary of a site that is not a windfarm, the activity status is *discretionary.* – Rule D4.1.4(vii). Where a turbine (or other windfarm structure) is within 700m of such a boundary, or where one or more turbines is located within a *Landscape Protection Area* (of which there are six, already established in the District Plan and not affected by PC 7) the status is *non-complying* – Rule D4.1.5(vi).

Objective C4.2A, Policies C4.2A.1, C4.2A.2 and Rule D4.1.4(j)

[16] In full, these provisions of PC 7 are:

> Objective C4.2A To recognise the potential of the Rural Zone for renewable energy development, in particular wind farming, while ensuring that adverse effects on the environment, including on the use and development of the rural land resource, are appropriately avoided, remedied or mitigated.
>
> Policy C4.2A.1 To recognise the benefits of the development of renewable energy resources and the natural advantages that the Rural Zone provides for wind energy in particular.

Policy C4.2A.2 To manage the adverse environmental effects of wind farms on the Rural Zone and the City as a whole, by recognising that wind farms have the potential to cause significant adverse effects on the environment, particularly in terms of landscape, ecology and amenity values, noise (including any low frequency noise) and traffic and may be inappropriate in some locations.

Rule D4.1.4 Discretionary activities

Any one or more of the following are discretionary activities: ...

(vii) Wind farms where no turbine is located within a Landscape Protection Area or within 700 metres of:

a) A Zone boundary (excluding district boundaries); or

b) The boundary of a site that is not part of the wind farm. ...

Assessment Criteria

In considering whether to grant consent to an application for resource consent made under Rule D4.1.4(vii) and, if granted, what conditions to impose, Council will have specific regard to (but will not be restricted to) the following criteria: ...

j) Impacts on the use and development of sites within the vicinity of the wind farm;

[17] The objective and the policies each have quite extensive explanations, methods of implementation and principal reasons attached. We will not set them out in full in this main body of the decision, but they are all in Appendix A. It does not take detailed scrutiny of them to see that the importance of renewable energy generation is amply reflected and is to be given full consideration in coming to decisions. They also reflect, rightly, that renewable energy generation, important as it is, does not sweep all before it and that other interests and values also must be considered. There is nothing in the wording of those provisions that causes us concern.

Non-complying status generally

[18] There are many activities that have *non-complying* status in many District Plans, and for good reason – usually because the receiving environment is regarded as delicate or vulnerable and/or the activity in question is particularly noisome or noisy, or in some other way likely to produce significant adverse effects. The consequence of a *non-complying* status arises when an application is made for a resource consent, and s104D must be addressed. It provides:

> ... a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of—
>
> (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
>
> (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
>
> (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

[19] It is to be noted that only one of the *gateway* tests must be met. So *non-complying* status will not prevent a particular windfarm proposal being advanced as having adverse effects that are not more than minor, even if it did have, say, one turbine within 700m of a neighbour's boundary. If that argument succeeded, then the proposal will not fall foul of one of the *non-complying* threshold tests, and indeed would probably not fall foul of either of them. If the neighbouring owner/occupier gave written consent to the proposal, the effect on that land, even if more than minor, would be subject to s104(3)(a)(ii) and would not be taken account of at all. So long as the proposal passes one of the gateways, it may then move on to be considered under s104 where, as well as effects, the full range of Part 2 issues will be considered. Once that point is reached, the proposal is subject to the same scrutiny as a *discretionary* activity.

[20] The planners called by the parties agreed, in the course of expert witness conferencing, and in evidence, that it is almost inconceivable that any windfarm would have adverse effects on the environment that would be minor, or less. That is the nature of the beast. The argument then advanced by Mighty River Power's consultant planner, Ms Christine Foster, is that any activity in the Plan's Rural zone with more than minor adverse effects will also almost certainly be contrary to the Plan's objectives and policies, for instance:

> Rural Zone: Policy C4.1.3 – 'To ensure that activities within the Rural Zone do not detract from the character or quality of the rural environment';

Rural Zone: Policy C4.1.6 – 'To ensure that non-primary production activities do not make it necessary to upgrade rural roads beyond the level needed to service rural and recreational activities';

Rural Zone: Objective C4.2 – 'To avoid or reduce the adverse effects of activities on ecosystems and the character of the Rural Zone';

Rural Zone: Policy C4.2.4 – 'To encourage the maintenance and enhancement of the ecological integrity and natural character of the Rural Zone';

Chapter C9 Landscape and Ecology: Policy C9.1.5 – 'To protect the visual and ecological character of the Rural Zone'; and

Chapter C9: Policy C9.1.11 – 'To protect the natural character of the Coastal Scarp north of the Pukerua Bay settlement'.

[21] The appellants argue that because a windfarm is so unlikely to pass either *gateway*, the *non-complying* activity status should be removed, and a *discretionary* status substituted for it.

[22] There seems to us to be questionable logic in arguing that if an activity is almost certain to have more than minor adverse effects, and will almost certainly be contrary to the objectives and policies of the Plan, then it should be given a less rigorous activity status than *non-complying*, just so that it can seek to avoid the consequence of its adverse effects and its conflict with the Plan.

Non-complying status in Landscape Protection Areas

[23] The District Plan maps identify Landscape Protection Areas (LPAs) ... *for which specific policies and rules have been formulated to ensure the particular landscape merits of these areas are recognised, and due regard given in the assessment of particular development proposals.* There appear to be eight Landscape Protection Areas in total, being Colonial Knob, Belmont Scarp and Eastern Porirua Ridge, the Aotea Block and the main ridge line running through it, the vegetated gullies between Takapuwahia/Titahi Bay Landscape Area and the Colonial Knob Landscape Area, the vegetated gullies and higher ridges in the Plimmerton area, the vegetated gullies in the Pukerua Bay area, the Coastal Scarp north of the Pukerua Bay settlement, and the Whitby Landscape Protection Area.

[24] It is not the Council's position that the LPAs were settled in a process designed to identify outstanding natural landscapes and features in terms of s6(b). As Mr Boyden Evans, a consultant landscape architect called by the appellants notes, those identified in the Plan do not reflect such landscapes and that is one of the reasons he would not, from a landscape point of view, support the proposed *non-complying* status. That said, Mr Evans did acknowledge in evidence that there are significant overlaps between the LPAs and the Plan's Open Space zone, where windfarms are already a non-complying activity. He acknowledged too that a good deal of the LPAs have high visibility from, or are in close proximity to, the District's urban areas. Based on that background, the Council's submission is that the *non-complying* status in the LPAs adds little further practical restriction, in terms of area, to the placement of windfarm sites in the District. They add too that while the LPAs may not have been identified by state of the art methodology, they were subject to the Schedule 1 process and are unchallengeably part of the District Plan.

Non-complying status in the 700m 'setback'

[25] The first thing to note is, as the Council submits, that the use of *setbacks* from the boundaries of sites is a common and accepted mechanism in District Plans around the country to at least go some way towards internalising the adverse effects of activities on those sites.

[26] It is common ground that the landholdings in the *Rural* zone of the Porirua District are highly fragmented. As mentioned earlier, only some 10% of lots are larger than 40ha, and some 76% are smaller than 10ha. There is a high percentage of rural-residential blocks and a steady flow of subdivisions to lots of around that size. The Council points out that given the necessary size of a commercial windfarm, it is almost certain that a windfarm would not be able to internalise its adverse effects, and that more people will be affected than would occur in less densely populated rural areas. That is pretty much the obverse side of the appellants' complaint, already noted at para [4], that it would be very difficult for them to agglomerate enough land to avoid falling foul of the 700m setback. Notwithstanding the appellants' position, we did note that Mr Alan McKinney, giving evidence for Meridian Energy, acknowledged that where property boundaries align with ridges, as

they tend to do in this district, Meridian's practice would be to negotiate with land owners on either side of the ridge, rather than offset windfarm infrastructure.

[27] It is also not in dispute that, in itself, a 700m setback is *meaningless* (Mr Evans' words) in landscape terms. The distance may bear no relationship to landscape features, to lines of visibility, or other issues. If separation of that distance did happen to alleviate adverse effects on landscape amenity, that would be largely coincidental.

[28] But the distance does have a good rationale in terms of adverse noise effects. Mr Nevil Hegley, who is a consultant acoustics engineer, was called by the Council. Mr Hegley has very considerable experience with windfarm noise, and he was asked by the Council to review the noise aspects of PC 7 in its early stages of development. Mr Hegley took two starting points in his consideration of the proposed terms – the first being the noise produced by a Vestas V90 3MW, being typical of the large turbines used in commercial windfarms. Secondly he considered the sound levels contained in both the 1998 and 2010 editions of NZS6808 Acoustics – wind farm noise. Both editions adopt 40dBA as the limit for windfarm noise before having to rely on the background sound + 5bB to set a limit, with the possibly in the later edition of a 5dBA lower limit where there is a high amenity area.

[29] Mr Hegley's analysis, which was not challenged, brought him to the conclusion that the received noise from such a turbine in direct line of sight, other things being equal, would be c40dBA at 700m. He did note that there could be a cumulative effect from other windfarm turbines which might increase the noise predicted at 700m from a single machine. Taking potential variations into account though, Mr Hegley considered that 700m ... *is an appropriate trigger distance for a planning boundary and is a point where noise of 40dBA is likely to occur.* He does not regard it as a particularly conservative trigger distance.

[30] Mr Michael Halstead, a consulting acoustics engineer called for the appellants, and who also has considerable experience with windfarms, did not differ from Mr Hegley's view about received noise generally from a turbine at c700m. Where the

two differed is in Mr Halstead's view that a noise assessment prepared in accordance with NZS6808:2010 would be a sufficient and appropriate basis for an assessment of effects, ... *or whether a 700m setback and non-complying status is necessary to ensure a robust and simple analysis by the Council or the Court.* It is his clear view that the assessment in accordance with the NZ Standard is the appropriate course, and will give a result based on actual effects. He does not see that what he describes a ... *generic assumption of windfarm parameters* ... will yield such a result.

[31] We agree of course that setting a 700m setback from boundaries as a planning status trigger is not a substitute for an NZS6808-based assessment of an actual proposal. But nor is it intended to be. If there is a proposal put before the Council, there will have to be detailed analyses undertaken, and the actual and potential effects on neighbouring properties, almost certainly including properties at distances greater than 700m from the nearest turbine, calculated.

[32] The 700m trigger for *non-complying* status has quite another intended purpose. It is intended to signal that proposals with a turbine within 700m of a neighbour's boundary will be subject to a higher degree of scrutiny, and have to meet a sterner test, because of the likelihood that at least one adverse effect – noise – will be more than minor. As it was put in the Council's opening submissions:

> Coupled with a setback or certain locational requirements, the appropriate use of the non-complying activity status indicates to the community where some activities are likely to be less appropriate in certain locations.

We agree to that it is part of a Council's function under the Act to anticipate activities which are likely to require particular attention because of their effects, and to make Plan provisions accordingly. That is a position envisioned by sections 31, 32, 72, and part 2 of the Act.

The appellants' further issues with non-complying status

[33] The planners for the appellants and the Council conferred, in accordance with the Court's Practice Note, before the hearing. They agreed that their first line of advice to a would-be windfarm developer would be to avoid a proposal which involved *non-complying* status, because of the extra work involved and the level of risk that, at the end of it all, the Council or the Court might decide that the effects

were more than minor and the proposal was contrary to the objectives and policies of the Plan.

[34] It is not a coincidence that such a view rather matches the Council's intent in using a *non-complying* status, as we have discussed at para [32] – to signal that the proposal will face more scrutiny and higher tests, so there will inevitably be a higher chance that consent will be declined. If planning advice to avoid a site having *non complying* status is given, it must mean that the planner believes that there is little or no realistic chance of getting through one of the s104D thresholds, or that there is an alternative site or sites carrying a less rigorous status. That is not a reason to say that non-complying status is inappropriate.

[35] It needs to be said also that at least one windfarm proposal has successfully worked its way through the s104D thresholds and then on to gain consent: see eg *Unison Networks Ltd & Ors v Hastings DC* (W 058/2006).

[36] At least one other windfarm proposal has got through a s104D threshold but failed to survive analysis under s104 – which, it follows, it would also have done if it had been considered as a *discretionary* activity: - eg *Outstanding Landscape Protection Soc & Ors v Hastings DC* [2008] NZRMA 8.

[37] *Catastrophic* (adj)– a disastrous end: ruin[2]. This is the level of impact Mr Alan McKinney, wind project development manager for Meridian Energy Ltd, predicts that a *non-complying* activity status for a windfarm with a turbine(s) placed within 700m of a neighbouring boundary will have on a project. We should note that Mr McKinney was careful to say that he did not speak for the whole industry.

[38] We take that to mean that Meridian may have to depart from the self-imposed policy he described to us of never buying land beyond the actual footprint of an intended windfarm, and of never entering into an *affected party* agreement with persons who may be adversely affected by a windfarm. If it holds to those policies, it will have to demonstrate that a proposed windfarm either has adverse effects that

[2] NZ Oxford Dictionary: 2005

are minor, or is not contrary to the objectives and policies of the relevant planning document. How those possible outcomes might translate to a *catastrophe* was not explained, and such hyperbole does not add credibility to the position he attempted to advance.

[39] Mr McKinney also fears that, even if the developers overcome their aversion to treating with adjoining landowners/occupiers at all, they will be held to ransom by persons from whom land is to be purchased, or from whom approval is sought. On top of that, the appellants point to s104(4), which indicates that a person giving written approval may withdraw it before the date of hearing or, if there is no hearing, before that application determined.

[40] On the first point, we would have thought that major power companies, who will be the likely developers of windfarms, have more than enough commercial and financial experience and heft to look after themselves in negotiations. For the second, a fear of a last minute recanting of a written approval could, we would have thought, be assuaged by appropriate contractual terms.

The planning documents

New Zealand Coastal Policy Statement

[41] There was a suggestion from the appellants that PC 7 was in some way at odds with the New Zealand Coastal Policy Statement 2010. We have to say that we did not grasp the rationale for this assertion, and we put it aside.

National Policy Statement for Renewable Electricity Generation

[42] We have mentioned the NPSREG already, and noted that PC 7 was notified well before the NPS was *Gazetted.* It is hardly surprising therefore that it does not reflect every facet of the NPS. We have mentioned too that issues of scope will not permit a rewriting of the Plan Change in the course of this proceeding. Our clear view is that there is nothing in PC 7 as now presented (ie without Policy C4.2A.3) that conflicts with the NPS in any event, and the Council is well aware that it may proceed to take further steps to bring its planning documents into full compliance with the NPS by May 2013.

Part 2 RMA

[43] No issues were raised about matters of particular concern to Maori in terms of s8. Nor, as mentioned earlier, was it contended that the Landscape Protection Areas were assessed for the purpose of recognising them as outstanding natural features and landscapes in terms of s6(b). No other nationally important s6 issues were raised. There are though matters in s7, to which decision-makers are to have particular regard, which do arise. The relevant portions of s7 are these:

> 7 Other matters
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) kaitiakitanga:
>
> (aa) the ethic of stewardship:
>
> (b) the efficient use and development of natural and physical resources:
>
> ...
>
> (c) the maintenance and enhancement of amenity values: ...
>
> (f) maintenance and enhancement of the quality of the environment:
>
> (g) any finite characteristics of natural and physical resources: ...
>
> (j) the benefits to be derived from the use and development of renewable energy.

[44] Kaitiakitanga, stewardship, and the maintenance and enhancement of amenity values and the quality of the environment are largely indistinguishable concepts in the context of these appeals. All are focussed towards the preservation and protection of what is good and valued in the environment, both for our own benefit, and that of generations to come. Efficient use and development of resources, and the awareness of the finite characteristics of resources are focussed towards the wise use of what is available, recognising that it may not be efficient to use or develop resources in a way that adversely impacts on other facets of the environment. The benefits to be derived from using and developing renewable energy sources are of course significant here, but they have no weighting that puts them in a privileged position ahead of any or all of the others. They are all to be considered and weighed, with the ultimate judgment being made against the purpose of the Act, as expounded in s5, the sustainable management of resources, being - ...

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 (excluding minerals) 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 our view the Plan Change conforms with Part 2. It points out the factors to be weighed in considering s7 in particular and conforms with the section in not purporting to weight any of them ahead of the others. Further, it gives a measure of clear indication, if not certainty, to the affected community represented by the s274 societies, and to the individual parties, of the Council's approach to the possibility of this sort of infrastructure be introduced to the area.

Issues for consideration in Plan appeals

[45] Drawn from the *Eldamos Investments Ltd v Gisborne DC* (W47/2005) and *Long Bay–Okura Great Park Soc v North Shore CC* (A78/2008) decisions and the decisions which have refined them since, a working set of issues to be considered in dealing with Plan appeals is this:

(A) An objective in a district plan is to be evaluated by the extent to which it:

(1) Is the most appropriate way to achieve the purpose of the Act (section 32 (3)(a)); and

(2) Assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (section 72); and

(3) Is in accordance with the provisions of Part 2 (section 74 (1)).

(B) A policy, rule or other method in a district plan is to be evaluated by whether:

(1) It is the most appropriate way to achieve the objectives of the plan (section 32 (3)(b)); and

(2) It assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (section 72));

(3) It is in accordance with the provisions of Part 2 (section 74 (1)); and

(4) (If a rule) it achieves the objectives and policies of the plan (section 76 (1)(b)).

In particular:

- Each objective is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act;
- The policies are to implement the objective and the rules are to implement the policies;
- Each proposed policy or method (including rules) has to be examined having regard to its efficiency and effectiveness and to whether it is the most appropriate method for achieving the District Plan objectives – taking into account benefits and costs and the risk of acting or not acting;
- In making a rule, the Council must have regard to the actual or potential effect of activities on the environment.

[46] Considering the Objective, we have no doubt that of the alternatives offered in evidence and submissions, the Council's proposal is the most appropriate to achieve the purpose of the Act. It explicitly recognises the potential for renewable energy generation in the zone, and recognises the need to achieve a balance between that and other values. Similarly, it assists the territorial authority to carry out its functions to achieve the purpose of the Act.

[47] The Objective accords with Part 2 of the Act, in our view. That is discussed at paras [43] and [44].

[48] The Policies, Rules and other methods set out in PC 7 are, we think, the most appropriate of those put forward to achieve the Objective of the Plan Change, and to assist the territorial authority to achieve the purpose of the Act, and they themselves accord with Part 2 of the Act, as discussed in the paragraphs just referred to. In so doing, the Rules also achieve the Objectives and Policies of the Plan Change.

Section 290A – the Council's decision

[49] Section 290A requires the Court to have regard to the first instance decision in considering an appeal. That does not create a presumption that the decision is correct, but it means that it must be given genuine consideration. In this case we have come to the clear view that we agree with that decision, so no more need be said about it.

Result

[50] For the reasons we have set out, we agree with the proposed provisions of PC 7 – with the agreed deletion of Policy C4.2A.3 and consequential amendment to Policy C4.2A.2. With those exceptions, the appeals are declined and the Council's decision is confirmed.

Costs

[51] It is the general practice of the Court not to award costs on appeals against Plan provisions, and we do not encourage any application here. But as a matter of formality we shall reserve costs. Any application should be lodged within 15 working days of the issuing of this decision, and any response lodged within a further 10 working days.

Dated at Wellington this 8th day of October 2012

For the Court

C J Thompson
Environment Judge

Appendix A Explanations, Methods of Implementation and Principal Reasons

Objective C4.2A Explanation

Explanation

The Rural Zone has been recognised as encompassing environments that are potentially suited to the development of renewable energy resources, particularly commercial scale wind farms, due to the scale and characteristics of the Zone. Government energy policy, expressed in the New Zealand Energy Efficiency and Conservation Strategy (2007), adopts a target for renewable electricity generation of 90% by 2025. It is a matter of national significance that renewable energy, particularly wind generation, is developed and that the benefits of wind generation are recognised.

While the benefits of renewable energy generation from commercial scale wind farms are recognised, so too are their potential to generate adverse effects on the environment, including, but not limited to, landscape, ecology and amenity values, noise (including any low frequency noise) and traffic. The likely scale and location of wind farms can mean that these adverse effects may not be able to be internalised within the wind farm site and may impact on the development potential of sites in the vicinity and on the use and development of the rural land resource.

The broader, and national, regional and local, benefits need to be weighed against the potential adverse, and local, effects of the development of renewable energy resources. This requires careful assessment and the retention of Council's discretion to grant or refuse any application for resource consent ensures that full consideration can be given to this on a case-by-case basis.

Policy C4.2A.1 Explanation

This policy recognises the local, regional and national benefits of renewable energy development and regional and central government policies that seek to reduce dependence on non-renewable energy generation in favour of renewable energy generation. The potential benefits of renewable electricity generation activities are of national significance. The City is recognised as having environments with a very good wind resource. The Rural Zone, in particular, contains potentially favourable locations for wind farms based on topography and land contour. The Zone also provides larger undeveloped spaces that potentially offer some degree of isolation from sensitive land uses. However, at the same time, it should be recognised that many of these large spaces are becoming increasingly fragmented.

Method of Implementation

District Plan policies and rules specify that wind farms are a discretionary activity in the Rural Zone, subject to certain criteria about their location. Any applications will be assessed against a range of assessment criteria that includes the recognition of the potential contribution of wind farms to achieving national, regional and local energy policy objectives, amongst other matters.

Principal Reasons

Central and regional government policies, along with an amendment in 2004 to the Resource Management Act, emphasise the importance of the development and use of renewable energy resources. More specifically, this includes:

- Central Government policies in relation to climate change and energy, which seek a reduction of greenhouse gas emissions in accordance with New Zealand's Kyoto Protocol obligations, increased energy efficiency and an increase in the supply of energy from renewable sources. These policies are included in te New Zealand Energy Efficiency and Conservation Strategy (NZEECS)(2007),. These strategies set a target of New Zealand generating 90% of its electricity from renewable energy sources by 2025.
- Section 7(j) of the Resource Management Act that requires Council to have particular regard to the benefits derived from the use and development of renewable energy.
- Section 7(i) of the Resource Management Act that requires Council to have particular regard to the effects of climate change.
- The Wellington Regional Policy Statement that seeks reduced energy demand, increased energy efficiency, the management of non-renewable sources and the development of renewable energy sources.

The Wellington Region, including Porirua City, is recognised as having a wind resource that is suitable for renewable energy generation. Given its characteristics, the Rural Zone has the most potential of any environment in the City for commercial wind farm development. Other zones in the City do not offer the natural advantages that the Rural Zone does. Other Zones also provide for activities that are sensitive to, and incompatible with, the development of commercial wind farms. Domestic scale turbines will require assessment against the performance standards of these zones.

Policy C4.2A.2 Explanation

This policy recognises the importance of the development of renewable energy resources, while recognising that the development and use of wind farms, as the most likely type of renewable energy generators, have the potential to cause significant adverse effects on the environment, particularly in terms of landscape, ecology and amenity values, noise (including any low frequency noise) and traffic. These potential adverse effects and the inability of some wind farms to be able to internalise or substantially mitigate some of those effects means that a wind farm, or part thereof, may be inappropriate in some locations.

Method of Implementation

District Plan policies and rules provide for wind farms as a discretionary activity in the Rural Zone where criteria relating to separation from other Zones, separation from adjacent properties and exclusion from Landscape Protection Areas are met. This category of resource consent allows the Council to either refuse the application, or grant consent and impose conditions in order to avoid, remedy or mitigate adverse effects on the environment. The rule includes specific assessment criteria to guide Council's consideration of any applications for resource consent.

Wind farms that do not meet the separation and exclusion criteria will be considered as noncomplying activities.

Principal Reasons

Given the likely scale and the generally elevated location of wind farm developments, they may be unable to internalise all potential adverse effects that they may generate within the wind farm site. The consequential scale of effects generated on the surrounding environment will vary widely depending on the location of the wind farm and the characteristics of the surrounding area, including such factors as topography, screening and background noise.

The nature of the topography and geographical layout of the City means that any wind farm will potentially be visible throughout the City. Any application for resource consent for a wind farm will need to include an assessment of the visual impact of the wind farm within the landscape and the appropriateness of the location. The discretionary activity criteria specifically excludes wind farms from being located within Landscape Protection Areas to reflect that it would be unlikely that wind farms would not significantly compromise the recognised high landscape and amenity values in these areas.

The adverse effects associated with noise (including any low frequency noise) and shadow flicker may be able to be mitigated at a distance of 700m from the closest wind turbine. The status of wind farms as a discretionary activity rule reflects this by requiring a separation distance of 700m from adjacent Zone boundaries and boundaries with properties that do not form part of the wind farm site. As a discretionary activity, any wind farm will be subject to a full and rigorous assessment. Where the separation distance is not met, it is less likely that significant adverse effects will be able to be appropriately avoided, remedied or mitigated and a non-complying activity status reflects this.