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Ref:

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Peter O'Brien
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Dear Peter

WIND TURBINES ON RESERVE LAND

1. I understand this opinion is required because Greater Wellington (GW) is considering erecting a series of wind turbines on Belmont Regional Park or on land held by GW under the Wellington Regional Water Board Act 1972 (WRWBA) for the purpose of generating electricity to be supplied either to the national grid or to an energy supply company. The issue which arises is what powers does GW have to establish wind turbines on either reserves land in Belmont Regional Park or land which GW holds under the WRWBA.
2. Under section 48 of the Reserves Act 1977 (RA), an administering body in whom a reserve is vested may, with the consent of the Minister of Conservation, and subject to such terms as the Minister may impose, grant rights of way or other easements for, inter alia, an electrical installation or work (as defined in section 2 of the Electricity Act 1992). Section 2 of the Electricity Act 1992 (EA) defines an electrical installation as:
 - (a) *All fittings—*
 - (i) *That form part of a system for conveying electricity; and*
 - (ii) *That form part of such a system at any point from the point of supply to a consumer to any point from which electricity conveyed through that system may be consumed; and*
 - (b) *Includes any fittings that are used, or designed or intended for use, by any person, in or in connection with the generation of electricity for that person's use and not for supply to any other person; but*
 - (c) *Does not include any electrical appliance:*

"Work" (the singular) is not defined in section 2 of the EA. However, there is a definition of "electrical works" in section 2 and it would be reasonable to conclude that it is to that definition that section 48(1)(c) of the RA is intended to refer. These are defined as:

- (a) Any fittings that are used, or designed or intended for use, in or in connection with the generation, conversion, transformation, or conveyance of electricity; but
- (b) Does not include—
 - (i) Any fittings that are used, or designed or intended for use, by any person, in or in connection with the generation of electricity for that person's use and not for supply to any other person; or
 - (ii) Any part of any electrical installation.

3. There are some further definitions in section 2 of the EA to which I draw your attention. These are:

“Electricity distributor” means a person who supplies line function services to any other person or persons;

“Electricity generator” means any person who owns or operates a generator connected to distribution or transmission lines;

“Line function services” means—

- (a) *The provision and maintenance of works for the conveyance of electricity;*
- (b) *The operation of such works, including the control of voltage and assumption of responsibility for losses of electricity;*

“Fittings” means everything used, or designed or intended for use, in or in connection with the generation, conversion, transformation, conveyance, or use of electricity.

4. On the basis of these various definitions, it would seem GW has the power, subject to the Minister’s consent and following the proper procedure (to which I shall refer shortly), to grant easements or rights of way over such of the land within Belmont Regional Park as comprises reserve land for the purpose of constructing and maintaining windmills and turbines for the generation and conveyance of electricity. The windmills and turbines would be “*electrical works*” and the transmission lines would be “*electrical installations*” within the meaning of the EA.

5. Although under section 48(1)(c) of the RA, only the distribution and transmission of gas or petroleum (as distinct from its mining) is contemplated the position appears always to have been otherwise with respect to electricity. Prior to the EA coming into force, section 48(1)(c) of the RA provided:

(1) The Minister, in the case of reserves vested in the Crown, and, in the case of reserves vested in an administering body, the administering body with the approval of the Minister and on such conditions as the Minister approves, may grant rights of way and other easements over any part of the reserve for—

- (a) ...
- (b) ...
- (c) *The utilisation of water power or geothermal energy for the **generation and transmission of electric current for heating, lighting, or power purposes** [emphasis added].*

6. The power to grant any such easement or right of way is subject to the provisions of the Resource Management Act 1991 (**RMA**) and to section 48(2) of the RA. The latter provides:

(2) Before granting a right of way or an easement under subsection (1) of this section over any part of a reserve vested in it, the administering body shall give public notice in accordance with section 119 of this Act specifying the right of way or other easement intended to be granted, and shall give full consideration, in accordance with section 120 of this Act, to all objections and submissions received in respect of the proposal under that section.

7. For convenience, I also set out the provisions of sections 119 and 120 of the RA.

19. *Notices—*

[(1) Where this Act requires anything to be publicly notified or refers to public notification, the subject-matter shall, unless this Act specifically provides otherwise, be published as follows:

(a) Where the notification relates to a National reserve or proposed National reserve, or any part thereof, it shall be published—

- (i) Once in the Gazette; and*
- (ii) Once in a newspaper circulating throughout the area in which the reserve or proposed reserve is situated; and*
- (iii) Once in each of 2 daily newspapers published in the Cities of Auckland, Wellington, Christchurch, and Dunedin; and*
- (iv) In such other newspapers (if any) as the Minister directs:*

(b) Where the notification relates to any other reserve or proposed reserve, it shall be published—

- (i) Once in a newspaper circulating in the area in which the reserve or proposed reserve is situated; and*
- (ii) In such other newspapers (if any) as the administering body decides:*

Provided that any notification under section 16(4) of this Act relating to a nature reserve or scientific reserve or a proposed nature reserve or scientific reserve shall be published in the manner specified in paragraph (a) of this subsection:

Provided also that where under this subsection a notification is required to be published in a newspaper circulating in the area in which the reserve or proposed reserve is situated and there is no such newspaper, the notification shall be published once in the Gazette.]

(2) Subject, in relation to Maori land owned in multiple ownership, to section 71 of the Maori Affairs Amendment Act 1974, a notice required by this Act to be given to any person may be sent by registered post to the last-known place of abode or business of that person, and shall be deemed to have been delivered when in the ordinary course of post it would be delivered. If any such person is absent from New Zealand, the notice may be sent to his agent, and, if he has no known agent, the notice may be given to him by publishing it in a newspaper circulating in the district in which the land the subject-matter of the notice is situated.

(3) Every notice by the Minister under this Act shall come into force on the day of the date thereof or on such later date as may be specified in the notice.

120. *Rights of objection and of making submissions—*

(1) *Subject to sections 13 and 47 of this Act, where pursuant to any requirement of this Act [(except sections 24, 24A, and 41)] the Minister or any administering body gives public notice of his or its intention to exercise any power conferred by this Act—*

(a) *Any person or organisation may object to the Minister or administering body, as the case may be, against, or make submissions with respect to, the proposal; and*

(b) *Every such objection or submission shall be made in writing, and shall be sent to the Minister or administering body at the place specified in the notice and before a date specified in the notice, being not less than [1 month] after the date of publication of the notice: and*

[Provided that, where the date of publication of the notice falls within the period commencing with the 10th day of December in any year and ending with the 10th day of January in the next succeeding year, the date before which objections and submissions shall be made shall be not earlier than the 10th day of February next following that period:]

(c) *Where the objector or person or organisation making the submission so requests in his or its objection or submission, the Minister or administering body, as the case may be, shall give the objector or that person or organisation a reasonable opportunity of appearing before the Commissioner (in the case of a notice given by the Minister) or, as the case may be, before the administering body or a committee thereof or a person nominated by the administering body in support of his or its objection or submission; and*

(d) *The Minister or the administering body, as the case may be, shall give full consideration to every objection or submission received before deciding to proceed with the proposal; and*

(e) *Where the action proposed by an administering body requires the consent or approval of the Minister and is recommended to the Minister for his consent or approval under any provision of this Act, the administering body shall send to the Minister with its recommendation a summary of all objections and comments received by it and a statement as to the extent to which they have been allowed or accepted or disallowed or not accepted.*

(2) *Every public notice to which subsection (1) of this section applies shall specify the right to object or make submissions conferred by this section and the place to which and the date by which any objections or submissions are to be sent.*

(3) *The person or administering body or committee before whom or which any person appears at any hearing in support of any objection or submission shall determine his or its own procedure at the hearing.*

8. The procedure set out in section 48(2) of the RA is not required if the provisions of section 48(3) can be satisfied. They provide:

(3) *Subsection (2) of this section shall not apply in any case where—*

(a) *The reserve is vested in an administering body and is not likely to be materially altered or permanently damaged; and*

(b) *The rights of the public in respect of the reserve are not likely to be permanently affected—*

by the establishment and lawful exercise of the right of way or other easement.

9. Whilst I consider it is likely that the creation of any such easement or right of way would not be likely to permanently affect the rights of the public in respect of the reserve or that it would permanently damage the reserve, it is possible that the visual effects could be such that the reserve might be materially affected by the creation of such an easement. Moreover, it is likely that the erection of windmills for the generation of electricity is not a permitted activity under the Hutt City Council's district plan and publication notification would therefore be required in any event. Any further consideration of the project should therefore allow for public notification and consultation under both the RA and the RMA.
10. The position is less satisfactory under the WRWBA. Under section 43 of the WRWBA, GW (or its predecessors) may, by notice in the Gazette, set apart any land vested in it or under its control as a water collection area or a forestry area. Existing land is therefore likely to have been set apart as either a water collection area or a forestry area, though it is possible some land may have been acquired under the WRWBA or for the purposes of the WRWBA without having been set apart as either.
11. The powers with respect to water collection areas and forestry areas differ. Under section 52 of the WRWBA, GW may grant permits for the temporary occupation of any water collection area or forestry area provided that is not prejudicial to forestry or the supply of water. Clearly a permit for temporary occupation would not provide any basis for the construction and operation of wind turbines. Under section 53 of the WRWBA, GW has power to grant a licence, in respect of a forestry area (but not a water collection area), a licence not exceeding 21 years (with one right of renewal not exceeding 21 years) for, inter alia, any industrial purpose. In my opinion, the construction and operation of a wind turbine would be an industrial purpose within the meaning of the WRWBA. The word "*industrial*" is not defined in the WRWBA but it is likely to be construed having regard to the use to which it was commonly put when the WRWBA was enacted. At that time, the word "*industrial*" was commonly used in district schemes under the Town and Country Planning Act 1953 to describe activities which were to be contrasted with residential, commercial or rural activities. The construction and operation of a plant to generate electricity would have been seen as an industrial activity. Similarly, such an activity would have been seen as "*industrial*" for health and safety purposes. The fact that any venture to instal a wind turbine would be a commercial operation does not detract from the description of that activity as "*industrial*". In that regard it is no different from a factory, the paradigm example of an industrial purpose. The turbine "*manufactures*" electricity for consumption in the same way as a factory manufactures a product for consumption.
12. There are some further features about section 53 of the WRWBA which might make its use unattractive to any power generating company. Under subsection (4), no compensation is payable on the termination or expiry of the licence for any improvements erected on the land, though the licensee would be entitled to remove them. Under subsection (5), at any time within the last year of the licence, GW has the right to purchase any buildings, plant and machinery at a price to be fixed by arbitration (in default of agreement). GW would not be competent to contract out of these rights or

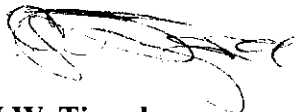
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waive them at this stage.

13. For the sake of completeness, I should note that there would be no impediment to the grant by GW to a power generating company of an easement over or lease of land not set apart as either a water collection or forestry area.
14. A residual question would arise in respect of any land held under the WRWBA. That is simply whether the purposes for which the land was acquired and is being held could be said to be advanced by the grant of any easement or lease for power generating purposes. Such a purpose would have nothing to do with the purposes of and the duties of GW under the WRWBA. If any such land had been acquired under the Public Works Act 1981 (or its predecessors) an issue may arise about the rights of former owners or their successors in title to have the land offered back to them (as it would be difficult to justify the erection of wind turbines on land taken for forestry purposes).
15. In the light of all of the above, I suspect the problems in establishing a wind farm on land held under the WRWBA is likely to be more problematic than in doing so on reserve land.
16. In summary:
 - 16.1 The grant of an easement over reserve land for the purposes electric power generation is authorised under section 48 of the RA (subject to compliance with the statutory requirements which include the consent of the Minister of Conservation).
 - 16.2 The grant of an easement for such purpose over land set apart as a water collection area under the WRWBA is not authorised.
 - 16.3 The grant of an easement for such purpose over land set apart as a forestry area under the WRWBA is authorised under section 53 of the WRWBA (subject to the limitations described in paragraph 12 above) but may create the difficulties referred to in paragraph 14 above.
17. If there are any further matters, please do not hesitate to contact me.

Yours sincerely
OAKLEY MORAN



J.W. Tizard