BEFORE AN INDEPENDENT HEARINGS COMMISSIONER FOR WAITOMO DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991 ("Act")
AND	
IN THE MATTER	of an application to vary resource consent RM050019 by Taumatatotara Windfarm Limited under s127 of the Act

LEGAL SUBMISSIONS ON BEHALF OF TAUMATATOTARA WINDFARM LIIMITED RESPONDING TO MINUTE 1

27 SEPTEMBER 2023

Counsel: G K Chappell

FOUNDRY CHAMBERS | M 0273034757
| Level 4, Vulcan Buildings, Vulcan Lane,
| A P O Box 1502 | DX CP 19020 | Auckland 1140
E gillian@chappell.nz | W www.chappell.nz

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MAY IT PLEASE THE COMMISSIONER

1. INTRODUCTION

1.1 This hearing concerns a resource consent application made by Taumatatotara Windfarm Limited ("T4") to the Waitomo District Council to vary Resource Consent RM050019 which authorises the construction and operation of a utility scale wind farm at Taumatotara West Road, Taharoa ("the Existing Consent").

1.2 The application for variation ("Variation Proposal") further to s127 of the RMA seeks to:

(a) halve the number of consented turbines from 22 to 11;

(b) reduce the on-site roading proposed; and

(c) increase the tip height of the remaining turbines from 121.5 metres to 172.5 metres.

1.3 These legal submissions respond to Minute 1 of the Commissioner dated 12 September 2023 addressing the following issues:

> 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 Taumatatotara 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.

1.4 Before addressing these questions it is necessary to outline the nature of and background to the application in some detail.

2. BACKGROUND TO THE APPLICATION

2.1 Ventus Energy (NZ) Limited first obtained a consent to construct a 22-turbine wind farm at Taumatatotara West Rd, Te Anga in 2008, ("the Original Consent"). The full history of the consent is set out in the AEE (p5).

2.2 In 2011 Ventus Energy (NZ) Limited applied for a change of conditions of the Original Consent to increase the turbine height of the northern 11 turbines to 121.5m. This was approved as a s127 variation, without notification that same year ("the Existing Consent"). The Council was subsequently notified that the Existing Consent had been transferred to T4.

2.3 Around the time of the grant of the Original Consent, there was a significant drop in the wholesale electricity market associated with the 2009 global financial crisis which put the windfarm's construction on hold. Subsequently, windfarm technology underwent rapid changes enabling greater efficiency in relation to transportation and generation capacity.

2.4 By 2019, with an improved outlook for wholesale electricity prices and consequent viability of wind farm projects, the Existing Consent was now ready for implementation. However, even greater efficiencies in technology and construction suggested that the turbines should be replaced with larger diameter turbines in part, because these generate power more effectively, but also because older design smaller turbines were becoming more difficult to source.

2.5 Two applications were made to change the conditions of the Original Consent. The first (lodged 25 September 2019) sought a change to the tip height of all 22 turbines. The Council was unsure as to whether this application should be considered under s127 or s88. It provided a view on this by way of letter dated 20 August 2019. In response to these concerns and others raised by various parties the Applicant revised its proposal in a new application lodged 9 July 2020 ("the Variation Proposal"). This is the current application which proposes to reduce the number of turbines from 22 to 11. The letter from Stuart Ryan, Barrister, dated 25 November 2020 addressed the Variation Proposal and proposed that the s127 issue be resolved by a commissioner. Commissioner Hill

was duly appointed and determined that notification was required in a decision dated 23 September 2021.

2.6 Further issues associated with the Covid-19 pandemic and ongoing consultation resulted in delays between the notification decision and the date of notification, which was subsequently notified on 30 March 2023 as "an application to vary conditions". The Applicant understood that the matter had been resolved as a s127 variation as no communication to the contrary was received, and has proceeded with its application on that basis with the matter now scheduled for hearing.

3. THE CONSENTED T4 WINDFARM

3.1 The Existing Consent authorises a maximum of 22 turbines with a tip height of 121.5m for the northern 11 turbines and 110m for the balance. Each turbine consists of a supporting tower, nacelle, (housing all the generating componentry), hub (the blades to the generating drive train) and rotor blades (the blades which capture the wind resource). The overall height of each turbine is measured to the vertical blade tip and represents an aggregate of the hub height and rotor radius.

4. THE VARIATION PROPOSAL

4.1 The Variation Proposal is to simultaneously surrender the southern 11 of the maximum 22 turbines and increase the tip height above existing ground of the 11 remaining northern turbines from 110m to 172.5m. There is no change to the positioning of the remaining turbines from the consented locations.

4.2 It is important to note that the Existing Consent authorises a "maximum" of 22 turbines, so a reduction in the number of turbines would not trigger a need for variation. As such, the key aspect of the Variation application is the increase in size of the turbines / rotor blade diameter. The mitigation for the increase in size of each turbine is the reduction in the maximum number of turbines that can be constructed.

4.3 The key conditions that require variation are conditions 3 and 11:

> 3. The turbines shall have a maximum height of 110 metres measured from the ground to the top of the vertically extended blade tip.

> 11. The wind turbines shall not exceed a rotor tip height of 110 metres above ground level and a sound power of 107.2dBA unless it can be demonstrated by a person specialising in acoustics and accepted by the Manager, Policy and Planning, Waitomo District Council that higher turbine heights or sound power will still comply with the requirements of NZS6808: 1998.

4.4 Condition 5 will be deleted as it relates to turbines 19-22, which are to be removed from the project.

4.5 Through the course of the submission period the Applicant has identified that some further consequential amendments to conditions may be appropriate. In particular, if the application is assessed under s127, the Applicant is prepared to agree on an Augier basis that amendments to the noise conditions are appropriate to refer to the updated New Zealand Standard. It is also prepared to accept some modifications to the ecology conditions to address issues raised by the Department of Conservation, though it also proposes these on an Augier basis.

4.6 Consequential amendments are proposed to:

(a) Condition 1 so that the variation application documents are incorporated in a manner consistent with the way the 2011 variation was incorporated. This is standard practice for a variation consent where the Original Consent lists the documents relied on as part of the Application;

(b) Condition 1A to clarify any inconsistencies, as a matter of good drafting;

(c) Condition 33 requires updating as it referred to an earlier (2011) Civil Aviation Authority (CAA) approval;

(d) Condition 34 to delete references to the removed turbines;

(e) Deletion of advice note 7, which is redundant.

Refinements to the Variation Proposal

4.7 In response to submissions and discussions, the Applicant is proposing refinements to the Variation Proposal to further reduce perceived adverse effects of the Variation Proposal ("the Updated Variation Proposal"). These have been set out in the information provided to the parties on 15 September 2023 and include:

(a) A further reduction in the number of turbines from 11 to 8 (removing turbines 2, 4 and 9);

(b) A minor increase in the maximum diameter of the rotor area from 155m to 163m. This represents a 5% increase in overall height over the Variation Proposal;

(c) A subsequent minor increase in the maximum rotor tip height from 172.5m to 180.5m;

(d) A reduction in turbine swept area of 14% (compared to the Existing Consent).

4.8 It is common practice for applicants to utilise an iterative process involving refinements to applications before they are heard. [1] The changes do not raise any jurisdictional issues regarding the scope of T4's applications, as they:

(a) do not materially alter the scale or intensity of the Variation Proposal (and in fact, overall have further reduced or constrained the Variation Proposal); and

(b) have not altered the character of effects (and in fact have decreased the level of adverse effects); and

(c) are not of a nature that may have altered who would have submitted on the applications. [2]

4.9 No party has objected to categorising the changes as *de minimis*, further to the Commissioner's Minute No 3.

[1] In *Wakatipu Environmental Society v Queenstown Lakes District Council* (C164/04) the Court observed that it is inevitable that applications undergo refinement and that "this is to be expected and encouraged by the Court to obtain the best possible outcome in environmental terms" (paragraph 9). See also the High Court's decision in *Atkins v Napier City Council* CIV 2008-441-000564 which analysed several earlier cases and synthesized the legal tests.

[2] *Te Runanga o Ngati Awa v Bay of Plenty Regional Council*, [2019] NZEnvC 196, (2019) 21 ELRNZ 539, 2019 WL 6888667: Character generally refers to the nature of the effect, while intensity refers to how often it occurs, and scale refers to the degree of the effect. Changes in the character of an effect clearly have the potential to mean that the activity is different in nature, while changes in the intensity and scale of an effect mean that the activity, whatever its nature, operates in a manner that has greater or lesser effects.

5. POSITIVE EFFECTS OF THE VARIATION PROPOSAL

5.1 There are a number of positive effects comparing the Existing Consent with the Variation Proposal and the updated Variation Proposal:

(a) There is a significant reduction in the number of turbines over the Existing Consent (from 22 to 11/8 respectively). The removal of 11/14 respectively turbines will:

(i) remove those turbines from the landscape and ameliorate concerns regarding the landscape and visual effects of those structures; [3]

(ii) reduce the visual effects (if any) associated with earthworks in relation to the turbines;[4]

(iii) reduce the amount of roading, earthworks and effects on the road network required because of the reduction in the number of heavy loads as well as aggregate and concrete trucks associated with fewer turbines;[5]

(iv) remove those turbines previously located in the vicinity of proposed SNAs of regional significance (turbines 17-22), resulting in a net ecological benefit;[6]

(v) reduce impact on the wetlands and streams between turbines 11 and 22.[7]

(vi) reduce the potential for aviation effects.

(b) The reduction in the number of turbines, with an increase in the size of those remaining turbines means that more electricity will be generated with reduced environmental effects. This is a more efficient use of natural and physical resources. [8]

(c) When the Updated Variation is considered in the aggregate;

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[3] See memorandum from Mike Moore, dated 13 September 2023 Appendix 6 to letter of 15 September 2023
[4] Ibid at page 2
[5] See memorandum from TES dated 12 September 2023 at appendix 8 to letter of 15 September 2023.
[6] Ecological Effects Assessment - at Appendix 7 to letter dated 15 September 2023 and report of 10 August 2021 (section 11)
[7] Refer to the T4 s92 Response dated 10 December 2020
[8] Refer to the AEE. This will be addressed further in evidence.

(i) the overall height of the proposed 8 turbines is 48% more than the same 8 turbines in the Existing Consent;

(ii) however, the overall rotor area will be reduced by 14 % compared to the Existing Consent's total rotor area. This will reduce the extent of rotor area that may impact on bats and avifauna.

5.2 The potential effects of the Variation Proposal are addressed in the AEE and technical reports submitted with the application. Memoranda have also been provided in advance of the preparation of the Section 42A report on a "will say" basis by the noise, landscape, ecology and traffic experts assessing the differences in effects between the Proposed Variation and the Updated Variation Proposal. Their conclusions are consistent with the changes being assessed as de minimis. These matters will be further addressed in the evidence to be circulated by T4 prior to the hearing.

5.3 The potential for adverse effects is addressed in section 8.

6. TESTS FOR DETERMINING WHETHER THE APPLICATION IS A VARIATION

6.1 Section 127 provides that the holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of consent.

6.2 Section 127(3) provides that ss 88 to 121 of the Act apply, with all necessary modifications, as if –

(a) the application were an application for a resource consent for a discretionary activity; and

(b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

6.3 Section 127(4) provides that "For the purposes of determining who is adversely affected by the change or cancellation the consent authority must consider, in particular, every person who made a submission on the original application and may be affected by the change or cancellation.

6.4 Section 104(1)(a) requires consideration of "*any actual and potential effects on the environment of allowing the activity*".

6.5 Accordingly, further to an application under s127, the "effects" to be assessed pursuant to s104 refer to the difference between those effects that have been consented by the Existing Consent and the effects of the Variation Proposal.

Caselaw

6.6 There are two leading Court of Appeal cases dealing with consent variations: *Body Corporate 970101 v Auckland City Council* [9] ("the Body Corporate Case") and the more recent case of *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* ("the Water Bottling Case"). [10]

6.7 The Body Corporate Case concerned a consented single apartment complex where a variation to that unimplemented consent was sought to replace twin towers of the same height. Opposing parties argued that it was an entirely different building or buildings and represented a new development. The Court of Appeal held that it was a s127 variation.

6.8 The case establishes that the proper comparison under s127(3) of adverse effects is between those which might occur if development proceeded pursuant to the original consent and those which may occur as a result of the variation. References to the "original consent" are to the existing consent, as the variation in question was the first variation to the "original consent".

6.9 Blanchard J delivered the judgment of the Court of Appeal, on appeal from a decision of Randerson J. Key passages are set out below:

> [36] In his judgment Randerson J said that whether an application is truly one for a variation or in reality seeks 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 include a comparison between the activity for which the consent was originally granted and the nature of the activity if the variation were approved. The terms of the resource consent were to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent: 'The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow'

[9] CA64/00, 17 August 2000, (2000) 6 ELRNZ 303, [2000] 3 NZLR 513, [2000] NZRMA 529, 2000 WL 35500953

[10] [2022] NZCA 598, (2022) 24 ELRNZ 487, [2023] NZRMA 280, 2022 WL 17403059

(para [73]). From none of this did we understand counsel for the appellant to dissent.

[37] Randerson J said that the consent authority should compare any differences in the adverse effects likely to follow from the varied purpose with those associated with the activity in its original form. Where there was 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' (para [74]), particularly where it is sought to expand or extend an activity with consequential increase in adverse effects …

[45] Section 127 permits an alteration to a condition but not an alteration to an activity. The question of what is an activity and what is a condition may not be clear cut and will often, as the Judge recognised, be a matter of fact and degree. In differentiating between them the consent authority need not give a literal reading to the particular wording of the original consent.

[46] It is preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation.

…

[48] The approved activity in this case consisted of the use of a defined space (the original building envelope) for residential occupation in separate units or apartments. The exact shape and dimension of the units in which that activity could be carried on, including their number, was delimited by the conditions attaching to the approval of the activity. A change, for example, in the number of apartments is therefore merely a change to the conditions, so long as those apartments are to be constructed within the same overall space or envelope as was delineated by the original building plans. Accordingly the changes proposed in this case were changes to conditions within s 127 notwithstanding that a different (twin tower) building emerged. This did not of course mean that the applicant was free to seek under that section any necessary approval to re-position the building on the site or to change its use to something other than residential apartments. That would have involved a change in the activity, in the former example, as to such part of the site as was not approved by the original consent for the locating of the single tower building. But within the building envelope, changes could be made to the features and dimensions of the building and its component parts—apartments, parking spaces and common areas—including the creation of separate structures (if indeed the twin towers are to be viewed as such)." (Emphasis added)

6.10 The Water Bottling Case concerned an application to vary a resource consent for a water bottling plant. The Environment Court (by majority) had considered the application was a s127 variation, and this was upheld in the High Court, though this aspect of the decision was overturned by the Court of Appeal.[11]

6.11 The context of the Water Bottling Case is important. The original activity authorised was the establishment of a mineral water bottling plant. This contrasted with the proposal for variation which incorporated a number of new activities on the site including industrial blow-moulding facilities - which would require steam boilers, cooling towers and a chimney stack - two new high-speed bottling lines, a new two-storey building of 16,800 m^2 to house those activities, three new cooling towers, and a new container and transport depot allowing for storage and movement of containers. The application was to replace four conditions of consent with 69 new conditions. The substantial differences between the activity for which the variation was sought and the existing consent are set out in a table in **Appendix One**. The Court of Appeal found that these amounted to an entirely new activity on the site.

6.12 With reference to the obiter dicta of the High Court in the Body Corporate decision as to the number of apartments being within the "same space or envelope" (referred to in paragraph 48 above), the High Court in the Water Bottling Case cited with approval a previous High Court decision (*Water View Property Ltd v Gardner*) which had observed:

> "A word of caution is necessary about the part of that paragraph [i.e. [48] *of Body Corporate decision*] dealing with variations involving a land use outside the consent building envelope. It should not be applied too rigidly. Many such changes do not materially change effects on the environment and can be dealt with under s 127, as happens in practice..."[12]

6.13 The High Court in the Water Bottling Case observed that the point being made in the Water View case reflected the statutory amendments to s127 since the decisions in the Body Corporate cases. The Court of Appeal in the Water Bottling Case did not address this point, and nor did it rely on paragraph 48 of the Body Corporate decision.

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[11] ultimately this did not affect the outcome.

[12] *Water View Property Ltd v Gardner* 2016] NZHC 2247

6.14 The Court of Appeal, in the Water Bottling case, after reviewing the amendments to s127 since the Body Corporate case, concluded that s127 should not be used to authorise a completely new activity under the guise of changing the conditions to which the original activity was subject. Section 127 is designed to authorise an application to change or cancel conditions attached to the activity for which consent was originally granted.[13] It is about managing the same activity rather than the same "kind" of activity.[14] The Court identified the problem in that case lay with the nature of the principal condition that had to be changed, which was the condition requiring that the site be developed "generally in accordance with the application and plans submitted". It said that the activity originally consented to would be essentially replaced and that as the conditions would be substantially changed, they would control what is really a new activity.[15]

6.15 Other relevant cases that have considered whether an application is a new activity include:

(a) The 2016 Pan Pac case, where the discharge point for a pipe discharging effluent to sea was moved 2km from its original location and the size of the proposed mixing zone increased substantially. The Court found that this was not a variation as the changes were of "such substance as to take the new proposal outside the ambit of the existing approval on a purely jurisdictional basis."[16]

(b) *Warbrick v Whakatane District Council*:[17] a Planning Tribunal case where an application to vary a consent to extend the opening hours of a McDonald's restaurant which would have resulted in an activity of a materially different character, was held not to be a variation. This case was subsequently criticised by the High Court as likely to have been in error. [18]

6.16 Other principles to be gleaned from caselaw include that if a variation falls within the scope of the original consent, a council is not entitled to apply

[13] Supra FN 13 at [186]
[14] Supra FN 13 at [187]
[15] Supra FN 13 At [191}
[16] *Maungaharuru-Tangitu Trust v Hawkes Bay Regional Council* [2016] EnvC 232 at [132]
[17] *Warbrick v Whakatane District Council* [1995] NZMA 303 (PT)
[18] *Body Corporate 970101 v Auckland City Council*, HC Auckland M1725/99, 8 March 2000, (2000) 6 ELRNZ 183, [2000] NZRMA 202, 2000 WL 34557597 at [46]

new plan provisions notified after the grant of the original application, though this position might be altered if there is a difference between the effects of the variation and the original grant of consent and whether there might be an adverse impact on the objectives of the operative plan or a subsequently notified proposed plan.[19]

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 judgment.[21]

7. APPLICATION OF THE LEGAL TESTS TO THE T4 APPLICATION

7.1 It is appropriate to define the activity and then distinguish it from the conditions attaching to the activity.

7.2 The Applicant maintains that its application is clearly for the same activity, with an overall reduced scale. The Original Consent authorised specific “activities” comprising "the installation, operation and maintenance of no more than 22 twenty-two horizontal axis wind turbines” and associated ancillary activities. The subsequent 2011 application for variation did not alter the authorised activities but sought to increase the maximum consented height of 11 northernmost consented wind turbines to 121.5 m from 110 meters. This application was treated as a variation. The current

[19] Supra FN 9 at [37]
[20] The Court of Appeal in the Bottling Case did not directly address this issue, which suggests that this test remains for consideration.
[21] Supra FN 18 at at [90]

application is different only to the extent there is an associated reduction in turbines.

7.3 Although the Water Bottling Case refers to the change of the condition requiring the site to be developed generally in accordance with the application and plans submitted, as pivotal, it is submitted that the extent to which this is a relevant test is one of fact and degree, as most applications for variation will require an amendment to this general condition, as was the case with the Applicant's 2011 Variation.

7.4 The "activity" approved by the Original Consent as varied by the 2011 Existing Consent was for a windfarm of up to 22 turbines and associated activities. The conditions limited the tip height and rotor diameter. A change to the tip height and diameter conditions, as proposed here, is therefore a change of conditions, in the same way as it was in 2011 when the previous application was granted under s127. Very few of the consent conditions require alteration and those that do, do not require substantive changes.[22]

7.5 The Water Bottling case is readily distinguishable from the T4 application as the windfarm activity authorised by the Existing Consent is not changing. It is still a windfarm, not, say, a windfarm plus solar panel farm. It is plainly the same activity and not a replacement of the consented activity.

7.6 Nor is the windfarm a materially different activity from the Variation Proposal or the Updated Variation Proposal in the way that the Water Bottling Case was found to be, having morphed into a significant industrial processing plant; Instead, the Variation Proposal and Updated Variation Proposal are overall, for a smaller scale windfarm that generates a similar amount of electricity. The reduced number of turbines are in the same location as the original consented turbines. There are significantly fewer turbines, though the rotor diameters are larger. To mitigate the increase in the maximum tip height and corresponding diameter increase, the Applicant proposes to relinquish 14 of the 22 turbines. This reduces the overall scale of the activity as the total rotor area decreases by 14%.[23]

[22] Those consent conditions that are offered on an Augier basis should not be included.
[23] Further to the Updated Variation.

8. WHAT ARE THE EFFECTS ASSESSED AGAINST?

8.1 When s88 is modified by s127(3)(b), the information required under s88 (2)(b) "relating to the activity including an assessment of the activity's effects on the environment" is deemed to refer to an assessment of "the effects of the change" on the environment. Similarly, s 104(1)(a), which refers to having regard to "any actual and potential effects on the environment of allowing the activity" is deemed to refer to any actual and potential effects on the environment of the "effects of the change". In the context of s127, the Body Corporate case is authority for the proposition that the consent authority should compare the differences in the adverse effects likely to follow from the varied proposal with those associated with the activity in its original form.[24]

8.2 When considering the term "environment" pursuant to s104, the Hawthorn case directs that the "environment' embraces the future state of the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.[25], [26][27]

8.3 The Environment Court has cautioned against Hawthorn being applied "like a statute", and has encouraged a "real world" approach to assessing the relevant environment which appropriately recognises the context of each proposal.[28]

8.4 Thus, though there are some nuances, in a practical sense there is little difference between the s104 assessment as modified by s127, and the s104 assessment using the Existing Consent as representing the Existing Environment.

8.5 The relevant aspect of the proposal for the purpose of determining effects is the increase in rotor area and the proposed height of the turbines and the extent of mitigation of these effects by reducing the number of turbines.

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[24] Supra FN 18 at [73] to [74] upheld by the CA on this point.
[25] *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 , [2006] NZRMA 424 at [84]
[26] It is further noted that a land disturbance consent was granted by Waikato Regional Council on 18 August 2020 (AUTH141827.01.01), with a lapse period of 10 years (2035). This consent authorises earthworks associated with the development of the 11 turbine windfarm including construction of tracks and wind turbine platforms.
[27] The s95 notification report dated 17 September 2021 concluded that it was not fanciful to suggest that the varied consent could be implemented. (page 11)
[28] *Otway Oasis Soc Inc v Waikato Regional Council* [2020] NZEnvC 169.

8.6 As a result, any consideration of effects is limited to those effects relevant to the difference between:

(a) The Existing Consent for a maximum of 22 turbines with a tip height of 121.5m for turbines 1-11 and a tip height of 110 for turbines 12-22, and an inferred rotor diameter of 120m and 110m respectively; and

(b) Either:

(i) the Variation Proposal (turbines 1-11 at a height of 172.5m, and a rotor diameter of 155m, with turbines 12-22 surrendered); or

(ii) The Updated Variation Proposal (only eight turbines - 1, 3, 5, 6, 7, 8, 10, 11 – with a tip height of 180.5m and a rotor diameter of 163m).

Is the comparison of any differences in adverse effects of the current application to be against the original 2008 consent or the consent as varied in 2011.

8.7 Where a second planning consent variation has been granted in relation to the same matter, it is a matter of interpretation as to whether that consent merely amends or supplements the earlier one or replaces it *in toto*. This must depend on the wording which was adopted in granting the consent, having regard to the circumstances of the case. [29]

8.8 In this case it is clear that the 2011 application was applied for and granted pursuant to s127. The s42A report shows the various consent conditions as struck through which is entirely consistent with the 2008 consent having been replaced.

8.9 As a matter of law, once replaced, the original consent no longer exists. Accordingly, it is submitted that any comparison of effects can only be with the 2011 consent. The wording in s127 does not suggest otherwise.

8.10 Section 127(3) requires ss 88 to 121 to apply with all necessary modifications as if the references to a resource consent and to the activity

[29] *Sutton v Moule* (1992) 2 NZRMA (CA) 41, 51 per Thomas J

were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

8.11 In contrast s127(4) refers to determining who is adversely affected by the change or cancellation by reference to those who made submissions on the "original application". As the effect of a subsequent variation may have been less than minor, it makes sense to refer back to the original application in such circumstances. Otherwise, the original submitters could be ignored due to an earlier variation.

8.12 This difference in language between subsections (3) and (4) makes it clear that while the original consent application may be relevant for the purposes of determining affected parties, when considering the difference in effects between a proposed variation and an original consent, the reference is to "the resource consent".

8.13 Section 87 defines "resource consent" as a consent to do something that otherwise would contravene the relevant sections of the Act. Legally, acting in a manner today that is inconsistent with an "original consent" but not inconsistent with a consent replaced "in toto" cannot amount to a contravention of the Act.

8.14 Had Parliament wished to compare the effects of a proposed variation to the original consent without regard to other variations, it could be expected to have provided explicit reference to "the original application" in s127(3), in a similar manner to s127(4), but did not.

Relevance of exercise of consent

8.15 The question has been asked as to whether there is any relevance that the Existing Consent has not yet been implemented. The Body Corporate case is a good example of a case where a variation was considered in relation to an unimplemented consent. As noted, that case is authority for the principle that under s127 the comparison is "between the activity for which consent was originally granted and the nature of the activity if the variation were approved. In approaching that question, regard may be had to the form of the original application and the terms of the consent granted."[30]

[30] Supra FN 18 at [43].

Other relevant matters

Activity Status

8.16 In terms of activity status there is no difference in this instance between a variation or a fresh proposal as either falls to be considered as a discretionary activity. The Pan Pac and Water Bottling cases are examples of where, the fact that the application was for a variation but assessed as a fresh proposal made no difference to the final grant of consent as the activity status was the same.

Application of Proposed Plan policies and objectives

8.17 However, whether the application is under s127 or a fresh proposal may alter the application of the provisions of the Proposed Plan which did not exist at the time of the original grant of consent or the variation application.

8.18 As noted above, in the *Body Corporate 97010* case, the Court of Appeal agreed with the High Court that a proposed plan may have no application in a s127 application:

> … the legislature could not have intended that a subsequent plan provision could be used to cut down the right preserved by s 9 to continue to use the land in the manner authorised by the original consent. Where the variation sought may properly be considered as falling within the scope of the original grant, the consent authority has no power to apply the proposed plan in a way which would limit the consent holder's ability to exercise the right in the terms originally granted."[31]

8.19 In the matter before you, the proposed plan was not notified at the time of the application. In particular, a number of SNAs have subsequently been proposed by the proposed district plan near the site. The district plan is at an early stage of its development, with further submissions closing in July 2023.

Management of other windfarm variations

8.20 In a rapidly evolving industry, it has been common practice for unimplemented consented windfarms to seek variations to their consent conditions to change the way in which they are implemented. For example, the Harapaki windfarm sought a variation that is very similar to T4s:

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[31] Supra FN 13 at [41]

> The changes being sought by Meridian relate to a reduced (9 turbine) wind farm on the TWF site that Meridian has developed following a detailed review of the consented wind turbine size and layout. The changes sought relate to a reduction in wind turbines (from 15 to 9) an associated reduction in wind farm roading, earthworks and electrical cabling, an increase in turbine size (with scope to install two sizes of turbine), a consequential increase in the size of wind turbine foundations and the need for some portions of electrical cabling on cable trays above ground rather than being undergrounded as originally consented.

8.21 This application was assessed and processed by the Hawkes Bay District Council as a variation without notification.

Focus on integrated management

8.22 The legal submissions for the Council dated 18 September 2023 but received by the Applicant on 26 September 2023[32] refer to the Summerset Villages case[33] as authority for the proposition that it is relevant to focus on the integrated management of effects. The full quote from the cited paragraph in that case is as follows:

> [76] In these circumstances, some provisions of the Plan are met by particular features or design outcomes. In this way, the general expectation for amenity can be more precisely achieved. This means that changes to any one element or condition may compromise or increase an outcome provided elsewhere in the proposal. 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 can properly see the consent and conditions as entire. Thus the change of one element may add cumulative effects or otherwise compromise the original consent. In such cases it is appropriate for the authority or this Court on appeal to require that the consent itself is integrated and entire. Any change (more than minimal) has the potential to defeat the integrated outcome sought in the consent and conditions.

8.23 The case is referring to an integrated consent relating to a significant multi -storey, multi-building retirement village in an urban location which required a large number of consents. The caution with respect to s127 relates to the way in which an "integrated" consent may be chipped away at. Ultimately the Court decided that there was no need to include an advice note that any amendments to the consent would not be treated as

[32] Due to a council administrative error.

[33] *Summerset Villages (St Johns) Ltd v Auckland Council* [2019] NZEnvC 173

s127 variations. It is submitted that this is not relevant to the present application, particularly in circumstances where the application has been fully notified.

Aspects of the proposal relevant to determining any differences in adverse effects.

8.24 The positive effects of the Variation Application and Updated Variation Application have been addressed in section 5 above.

8.25 Theoretically, the differences in rotor diameter and tip height of the remaining turbines have the potential to create effects that are greater than the effects associated with the Existing Consent. In formulating the Variation Proposal, careful consideration has been given to some of the concerns raised by submitters, which has resulted in the Updated Variation Proposal to further mitigate any potential adverse effects of the Variation Proposal. These matters will be addressed more comprehensively in evidence. In the meantime, the Applicant's various technical reports that formed part of the AEE and the memos addressing the Updated Variation all conclude that the effects of the Variation Proposal are minor or less than minor, or can be adequately mitigated.

8.26 Potential adverse effects of the Variation Proposal, assessed against the Existing Consent and associated mitigation are addressed below. It is noted that the notification report also assessed the extent of effects for the purpose of notification. However, the notification report was not able to consider the positive effects of the activity and it is not clear how effects were assessed (ie as against the Existing Environment or the environment without implementation of the consent). Accordingly, in light of the different tests to be applied, the notification report determined that notification was appropriate.

Landscape and visual effects

8.27 The Variation Application included a first assessment by WSP, which was later updated further to three s92 requests.[34] Mr Moore, a registered landscape architect with substantial experience in assessing windfarm applications has subsequently undertaken a further independent assessment of the landscape and visual effects. He concludes that in

[34] The original consultant employed no longer works for WSP.

areas to the north of the site, the larger turbines will have minimal impact on rural character, landform legibility and landscape pattern. The overall assessment is that the effects of either the Variation Application or Updated Variation will be positive and that where there are adverse effects arising from the difference between the existing consent those effects will be no greater than minor.

8.28 Conversely, the notification report referred to the report of Mr Manseagh had concluded that the potential adverse effects would be "low or moderate" at House 26, 28 and 22. It was the categorisation of "moderate" as being "more than minor" that led Commissioner Hill to conclude that notification was required.

8.29 However, a "low or moderate" landscape effect does not translate to a material adverse effect for the purpose of s127, particularly when positive effects are considered. As it is a question of fact and degree, it is submitted that the variable position of Mr Manseagh and the positive effects associated with the reduction in turbines, errs in favour of a conclusion that there is no material adverse effect.

Ecology

8.30 In response to further information requests, the Applicant commissioned WSP to collect more on site data to supplement the original data provided with the original application. A further report was later obtained from Dr John Craig and Dr Simon Chapman, with review by Dr Mark Bellingham (10 August 2021). The experts adopted a conservative approach to assessing effects and concluded that the Proposed Variation to the consent conditions would have clear positive effects for ecology.[35]

8.31 The Variation proposal is not expected to significantly change those impacts on native bats and avifauna. Any adverse ecological impacts arising from the amended proposal would also occur when the Existing Consent is implemented".[36]

[35] Ecological Effects Assessment - Section 11 dated 10 August 2021.

[36] Memo from S Chapman dated 10 April 2021 in response to s92 request.

Geotechnical Stability

8.32 This was addressed in the AEE at page 17 which concluded that there will be no increase in geotechnical stability effects associated with the taller towers.

Turbine Foundations

8.33 This was addressed in the AEE at page 17 which concluded that there will be no increase in effects from the larger pads.

Transportation

8.34 Transportation effects were also addressed in the AEE. The Variation Proposal will remain subject to the original consent conditions 21-28. The Traffic Engineering Solutions Limited memorandum of 12 September 2023 concluded that the Updated Variation Proposal would have positive effects with the reductions in the number of turbines and effects on the road network and confirmed that no changes were required to the consent conditions.

Aviation

8.35 Following T4's decision to proceed with the Updated Variation, it has applied for an updated determination from the Civil Aviation Authority. It is expected that the approval will be consistent with the existing consent conditions and that these will require further modification to take into account an updated CAA determination.[37] This will be addressed further at the consent hearing.

Acoustics

8.36 Noise assessments provided with the AEE and in the s92 response have compared the sound levels from the turbine layouts at maximum sound power level and identified that the Variation Proposal shows an overall reduction in noise received at each dwelling to the nearest dB. The proposed turbines will not exceed 107.2dB. This analysis has been updated in the Altissimo memo 15 September 2023 and confirms that noise levels at nearby dwellings will not be materially changed and are likely to be slightly reduced as a result of the Updated Variation Proposal

[37] Noting that proposed changes to the version of the consent conditions dated 15 September 2023 should be deleted.

8.37 It was noted in the s92 Response dated 6 July 2021 that no changes are required to the construction noise standards set out in the Existing Consent.

Shadow Flicker

8.38 This was addressed in the AEE where it was noted that the Proposed Variation would have no shadow flicker effects on any dwellings outside the site. [38]

Iwi

8.39 T4 acknowledges that the whenua, and various taonga hold significance to iwi. It also acknowledges that the relationship between the various iwi and hapu parties and natural resources are a "given"[39].

8.40 Consultation with iwi has been ongoing.[40] A cultural impact report to be prepared by Ngati Mahuta has been commissioned. Accidental discovery protocols form part of the Earthworks Consent. While more feedback may be forthcoming in advance of or at the hearing, the Applicant does not anticipate that there will be any more than minor cultural effects arising from the effects of the Proposed Variation or Updated Variation when assessed under s127 or as against the Existing Consent.

9. SUMMARY

9.1 Typically, a determination whether an application is for a variation or for a new activity is made prior to notification. In this case, it is not clear that this has occurred, despite the Applicant operating on this understanding. Nevertheless, the decision maker can decide how to process the applications.[41]

9.2 The Applicant submits that the application meets the legal tests for a s127 variation, with the acknowledgement that whether the effects of the changes are material may require final determination following the receipt of evidence from the other parties.

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[38] AEE page 17
[39] Supra FN 16 at [100].
[40] Refer to the consultation record attached as appendix 1 to the letter of 15 September 2023.
[41] Supra FN 16 at [134]

9.3 Regardless of whether the application is for a variation or a new activity the Applicant considers that the assessment is against the Existing Environment or the Existing Consent and that for all intents and purposes the assessment is the same, subject to the following points:

(a) the ability to consider the provisions of the proposed plan (which is generally not appropriate with a s127 application); and

(b) whether new consent conditions beyond those proposed by the applicant may be incorporated into the consent, rather than being agreed on an Augier basis.

9.4 To assist with management of the issues at the hearing, including the expectations of submitters and other parties, the Applicant invites the Commissioner to make an interim determination that the application is a s127 variation and that in any event the differences are to be assessed against either the Existing Environment or the Existing Consent.

Gill Chappell
Counsel for Taumatatotara Windfarm Limited

Appendix One:

Differences between the activity proposed by Creswell and the Existing Consented Activity

	Existing	**Creswell proposal**
Land use	5.5 ha kiwi fruit orchard plus bottling plant	Bottling plant only (removal of kiwifruit orchard)
Water take (consented volume)	1200 m^3/day, 13.9 l/s **Actual use** (range): 8-26 m^3/day at 0.41-0.94 l/s	Max: 5000 m^3/day at 58 l/s Max: 1,100,000m^3/year
Production capacity	8000 bottles/hr	154,000 bottles/hr
Water bottled (L/yr)	2014/15 1.9 million L 2015/16 1.7 million L	580 million L/yr
Building footprint	1340 m^2	16,800 m^2 plus existing building
Building height	8.4m	12.9 m Chimney stack to 16 m
Impermeable surface	0.27 ha	3.55 ha
Area of versatile soil available for production	5.5 ha	0
Truck movements/day	4	202 (monthly average)
Truck movements/hour	N/A	20/hr (10 hr/day)
Staff	8	60 (30 on-site at any one time, plus contractors)
Containers stored on site	0	234
Container movements	0	462/day, 35/hr (13 hr/day)
Hours of operation	**Consented:** Mon-Sat: 6 am-10 pm Sat: 7 am-1 pm **Actual:** Mon-Fri: 7am- 4:30 pm Sat: sometimes.	**Manufacturing** - continuous **Container operations:** Mon-Fri: 7 am-8 pm Sat: 7 am-5 pm Sun: 9 am-5 pm (no more than 12 times per year) **Truck movements:** Mon-Fri 9 am-7 pm Sat 9 am-2 pm