IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2006-454-879

BETWEEN	FRIENDS OF TURITEA RESERVE SOCIETY INCORPORATED Applicant
AND	PALMERSTON NORTH CITY COUNCIL Respondent

Hearing: 30 April, 2 and 4 May 2007

Counsel: K Johnston and C R Jurgeleit for Plaintiff
J O Upton QC, P J Reardon and J W Maassen for Defendant

Judgment: 25 July 2007 at 2.15 pm

JUDGMENT OF BARAGWANATH J

This judgment was delivered by Justice Baragwanath on 25 July 2007 at 2.15 pm pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Date:……

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Introduction

[1] This case concerns an area of 2600 ha within the Turitea Reserve of over 3500 ha which is situated near the northern end of the Tararua Ranges. The city of Palmerston North lies just over 11 km to the west and north-west of the reserve's main ridgeline. Its description in the statutory Turitea Reserve Management Plan as "a highly significant landscape feature for the Palmerston North City area" was borne out on a view on 4 May. It runs generally north-east/south-west at a height of about 500 m and is clearly visible from the city which is at about 30 m above sea level. The competing interests in this case concern, for the plaintiff, preservation of the reserve portion of a magnificent landform from further incursion of the wind turbines that are in evidence on other parts of it and, for the defendant Council, provision of a source both of energy and of revenue to be used for reserve purposes.

[2] The case is confined to the legality of use of the reserve for generation of energy by wind turbines. This Court is not concerned with issues of resource management which, except on any issues of law, are for the Council and perhaps the Environment Court.

[3] The Council is the registered proprietor of the reserve, of which the 2600 ha comprises a water supply catchment which in January 2003 was classified under the Reserves Act 1977 as a "local purpose reserve (water supply and protection of indigenous flora and fauna)".

[4] Because of its use as a water supply area the reserve is not open to public access. The reserve derives in part from a Council purchase in 1889 when the original dam was constructed. A large addition was made in 1905 when the purpose of the reserve was changed from "growth and preservation of timber" to "water supply". A second dam was built in 1907. The 30 m Upper Dam was completed in 1957 and the Lower Dam was enlarged in 1998. The water treatment plant was updated in 1999. The reserve supplies 60% of the city's water. Hence the first of the purposes for which the reserve was classified in 2003.

[5] In the 1960s as a result of the degradation by possums and other pests the canopy of the native forest collapsed. Since then the Council has undertaken a pest control programme. There has been significant renewal of indigenous flora and fauna; hence the second of the 2003 classified purposes. Both purposes remain.

[6] In 2004 the Council received an unsolicited approach from various energy companies which were interested in developing a wind farm on the reserve. It was informed that the ridgeline of this part of the Tararua Ranges is regarded as in the top 5% of wind sites world-wide and is three times more consistent than the average location in continental Europe. On 30 September 2005 it entered a wind farm development agreement and carbon credits with a State enterprise, Mighty River Power Ltd.

[7] On 30 October 2006, acting under s 24(a) of the Reserves Act, the Council approved a change of purpose of the reserve by resolution adding as its first purpose "renewable electricity generation". It also changed the Turitea Reserve Management Plan (s 41). The applicant challenges the decision to make such changes by application for judicial review which asserts that:

a) the decision was ultra vires (beyond the power of) the Council and made for an improper purpose;

b) the Council's decision was biased by reason of the contracts of 30 September 2005 with Mighty River which included agreement to pay to the Council substantial payments so as to fetter its statutory discretion and pre-determine the issue it was required to decide; alternatively its decision was unreasonable and thus unlawful; and

c) in breach of its obligations – under s 82(1)(c) of the Local Government Act 2002, its own consultation policy and the common law – the Council failed properly to consult the community.

Contention 1 – Vires: can a wind farm be established on the local purpose reserve?

The legal setting

[8] The Reserves Act does not define the meaning of its term "local purpose" which applies to the Turitea Reserve and it is necessary to consider whether the proposal falls within that concept.

[9] Section 23 must be substantially reproduced:

> **23 Local purpose reserves**
>
> (1) It is hereby declared that *the appropriate provisions of this Act shall have effect, in relation to reserves classified as local purpose reserves* for the purpose of providing and retaining areas for such local purpose or purposes as are specified in any classification of the reserve.
>
> (2) It is hereby further declared that, *having regard to the specific local purpose for which the reserve has been classified, every local purpose reserve shall be so administered and maintained* under the appropriate provisions of this Act that—
>
> > (a) *Where* scenic, historic, archaeological, biological, or *natural features are present on the reserve, those features shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve*:
> >
> > …
> >
> > (b) *To the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.*
>
> (3) Where a local purpose reserve is vested in a local authority or where the administering body is a local authority, it may from time to time, by public notice, prohibit access to the whole or any specified part of the reserve, and in that case no person shall enter the reserve or, as the case may be, that part, except under the authority of a permit issued by the local authority.
>
> …
>
> (emphasis added)

[10] Section 24A empowers a council to change the purpose for which a local purpose reserve is vested in it by notice in the Gazette. Before making such change

it is required to publicly notify the change or purpose, specifying the reasons for the proposal. Anyone claiming to be affected by the proposed change of purpose can give written notice of objection to the proposed change and the grounds to the Council, which is required as soon as practicable to consider all objections lodged.

[11] Section 23 is to be read within the context of the Act as a whole. Section 3 is headed "General purpose of this Act" and provides:

> (1) It is hereby declared that, subject to the control of the Minister, this Act shall be administered in the Department of Conservation for the purpose of—
>
> > (a) *Providing, for the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing—*
> >
> > > (i) Recreational use or potential, whether active or passive; or
> > >
> > > (ii) Wildlife; or
> > >
> > > (iii) Indigenous flora or fauna; or
> > >
> > > (iv) Environmental and landscape amenity or interest; or
> > >
> > > (v) Natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, *community*, or other special *features or value*:
> >
> > (b) Ensuring, as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape which in the aggregate originally gave New Zealand its own recognisable character:
> >
> > (c) Ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands, lakeshores, and riverbanks, and fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.
>
> (2) In the exercise of its administration of this Act, the Department may take any action approved or directed from time to time by the Minister so far as it is consistent with this Act or is provided for in any other Act and is not inconsistent with this Act.

[12] The authority of the Minister and the Department of Conservation provides an overlay to the Council's ownership and control of the reserve. By s 24 the

Minister has power to revoke the reservation or to change the classification or purpose of the whole or part of the reserve.

(1) May "community purpose" include non-conservation and non-amenity purposes?

[13] The vires point includes the important question whether the adjective "community" governing "special features or value" in s 3(1)(a)(v) permits a purpose that is at odds with the major theme of s 3. That provision, which gives control to the Minister of Conservation, may be summarised as conservation orientated (see the definition in s 2 of the Conservation Act 1987 of "conservation":

> **conservation** means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations:)

or amenity orientated (see the definition in s 2 Resource Management Act 1991 of "amenity values":

> **amenity values** means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.)

[14] Section 5 of the Interpretation Act 1999 requires that the meaning of a statute be deduced from its text and in the light of its purpose. In his *Statute Law in New Zealand* (3rd ed) Professor Burrows QC states at 156:

> *Noscitur a sociis* – It is imperative that a particular word whose meaning is under consideration be read in the context of the other words of the section in which it appears. Its exact meaning may be coloured by those other words.

Noscitur a sociis means a word is known by the company it keeps. Reading simply the text of s 3(1) it would be easy to construe "community" as within a statutory class of conservation or amenity values. The further Latin tag *eiusdem generis* – "of the same kind" – can also be used to interpret words as having generally the same sense as that of their neighbours. Community values could if necessary be read down to refer to community values *related to conservation*.

[15] But the insight of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) that before presuming to construe a contract the Court must examine the factual matrix, applies and with stronger force to the construction of a statute. Similarly with the legal matrix. As Bennion *Statutory Interpretation* (4th ed) states at 505:

> …an Act is a legal instrument. It forms part of the body of law… [there is need for] particular knowledge as to the enactment which is the unit of enquiry, for example concerning the relevant factual outline. At the end of it all it is the legal meaning that the interpreter must seek.

[16] Just as it is now accepted that Maori concepts cannot be understood simply with the aid of a dictionary, so legal concepts cannot be defined, but must be examined in the light of their actual use: HLA Hart *Definition and Theory in Jurisprudence* (1954) 70 LQR 37; DR Harris *The Concept of Possession in English Law* in AG Guest (ed) "Oxford Essays in Jurisprudence" (1961) at 69. It is therefore necessary to stand back and examine the role that community reserves play in New Zealand law.

[17] The Reserves Act 1977 is the latest of a series of measures extending back to the Public Reserves Act 1854. It empowers the Minister of Conservation to acquire private land for reserve purposes (s 12). The Minister is required (s 16) to classify reserves according to their principal purpose into recreational (s 17), historic (s 18), scenic (s 19), nature (s 20), scientific (s 21), Government purpose (s 22) and local purpose reserves (s 23). Section 16 reserves may be further classified by the Governor-General as a National reserve (s 13).

[18] Section 40 charges the body administering the reserve, here the Council, with administering, managing, and controlling the reserve:

> …so as to ensure the use, enjoyment, development, maintenance, protection, and preservation, as the case may require, of the reserve for the purpose for which it is classified.

[19] Section 61 empowers the administering body of a local purpose reserve:

> …to do such things as it may from time to time consider necessary or desirable for the proper and beneficial management, administration and

> control of the reserve and for the use of the reserve for the purpose specified in its classification.

Section 61A recognises that a local purpose reserve may be for aerodrome purposes.

[20] Sections 78 and 80 require that revenue from s 61 be held by the Council and applied for the purposes of the Reserves Act and expended only in acquiring, administering, maintaining, improving and developing the reserves under its control.

[21] Reserves created prior to 1 April 1978 were subject to the Reserves and Domains Act 1953 which the 1977 Act replaced. Section 12 provided that land which had become a public reserve should be held and administered only for the purpose to which it was dedicated. The 1953 Act had replaced the Public Reserves and Domains Act 1928, s 4 of which was in similar terms to s 12 of the 1953 Act. Its predecessor was the Public Reserves and Domains Act 1908, s 3 of which divided all public reserves into several classes. Those for local purposes included gravel pits, quarries and sewage purposes. Like provisions appeared in the Public Reserves Act 1881. The original Public Reserves Act 1854 had empowered the Governor to grant to the Superintendent of a Province land "for purposes of public utility" to be held on trust for the purpose specified in the grant. Similar provisions appeared in the Public Reserves Act 1877.

[22] Judicial notice may be taken of the increase in public concern for the environment over the period covered by the legislation from 1854 to 1977. Although antedating the Brundtland Report "Our Common Future" published in 1987, in which year New Zealand enacted the Conservation Act, and also the Resource Management Act 1991, the Reserves Act clearly reflects the enhanced importance of conservation and amenity issues. It does not however follow that the basic functions of local government, recited specifically in the statutes of 1881 and 1908 and more generally in later legislation, were to be performed outside the scope of the Reserves Act. Gazette notices since 1997 record change of the purpose of a reserve in Dunedin from "local purpose reserve (coastal conservation)" to "local purpose reserve (wastewater treatment and drainage works)" and the purpose of land to be acquired as "Local Purpose Reserve Stormwater" (Tauranga), "local purpose reserve (landfill)" (Queenstown-Lakes) and "local purpose reserve (quarry and landfill)"

(Kaipara). The obvious continued need for such basic amenities, the absence of any alternative statutory regime, and the precept that legislation is presumed to conform with common sense, together satisfy me that such functional activities fall within the concept of "community… features or value[s]" in s 3 and within that of "local purpose" in s 23. "Community values" is therefore not to be confined to conservation values.

[23] Provision of a quarry, a landfill and a wastewater treatment and drainage works is in each case fairly to be characterised as fulfilling a community purpose. So too, in my opinion, can the generation and supply of electricity. Local government legislation from 1908 has expressly empowered local authorities to generate and distribute electricity: Municipal Corporations Act 1908 s 277(1), Municipal Corporations Amendment Act 1913 s 34, and Municipal Corporations Act 1920 s 281. While in 1918 the Electric Power Boards Act created specialist bodies for the generation and distribution of electricity, the power of local authorities to generate and supply electricity continued even though some transferred their electricity business to an electric power board: see *Gore District Council v Power Company Ltd* [1996] 1 NZLR 58.

[24] The repeal of the Municipal Corporations Act 1954 by the Local Government Act 1974 omitted provision for the generation and supply of electricity by local authorities but that power was reinstated by the Local Government Amendment Act 1979 s 5(20). The Energy Companies Act 1992 required local authorities to transfer all assets used in connection with any electricity undertaken to one or more energy companies. In exchange, shares in those companies were vested in the local authority. Councils were able to choose whether to hold the shares or sell them. These events occurred under the prescriptive regimes of the Municipal Corporations Acts and the Local Government Act 1974. The Local Government Act 2002 replaced the detailed restrictions on powers of local authority and conferred a general power to "promote the social, economic, environmental and cultural well-being of communities…" (s 10).

[25] I accept the submission of the Council that, given that power, read with s 14 requiring councils to aim for "sustainable development", sustainable generation and

supply of electricity fall within the public purposes of both the Local Government Act and, read in accordance with the precept that a statute is always speaking, the Reserves Act as well.

[26] Similar issues have been considered by the Environment Court in *The Outstanding Landscape Protection Society Inc v Hastings District Council* EC W24/2007 13 April 2007 Judge C J Thompson. In that case the Environment Court set aside a resource consent granted by the Council for the erection and operation of a wind farm on a hilltop described as a very distinctive landform with significant Maori spiritual dimension. The case is cited for the Judge's observation:

> 34. Achieving a balance between regional electricity consumption and regional generation from renewable resources is a worthy target and one that eases some pressures on the transmission system and the losses that are incurred. It also internalises the environment effects - the region suffers the effects but gains in benefits.

[27] The losses are those of electricity when it is transmitted over long distances contrary to the stated purpose of the Energy Efficiency and Conservation Act 2000:

> To promote, in New Zealand, energy efficiency, energy conservation, and the use of renewable sources of energy (s 5).

Statutes are no longer considered in isolation but, where reasonably possible, as forming part of a wider and seamless public policy.

[28] Section 7 of the Resource Management Act 1991 provides to similar effect:

> 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, should have particular regard to –
>
> (ba) the efficiency of the end use of energy:
>
> …
>
> (j) the benefits to be derived from the use and development of renewable energy.

[29] I am satisfied that it would be competent for Council itself to establish a wind farm for the purposes contemplated in the present case.

[30] It follows that wind turbines established by the Council for *local* power generation would fall within ss 3 and 23. Whether the proposed wind turbines fall within those provisions raises further issues.

[31] Two submissions are made by the applicant. One is that to be a "local purpose" that purpose must be public and not private which it is not, because the proposal is to grant a lease over the reserve to the State-owned enterprise Mighty River Power Ltd, a wind farm developer which would erect and operate the project. That point, which requires examination of the arrangement with Mighty River, is examined at [53] ff.

[32] The other, now to be considered, is that the purpose is not local because the electricity produced will be fed into the national grid.

(2) Is the proposed renewable electricity generation a "local purpose" even though it is to be fed into the national grid?

[33] Under the Local Government Act 2002 the Council now has substantially plenary jurisdiction in respect of local decision making. The question here is whether (resource management considerations aside) a modern council, with its authority to undertake commercial transactions and to ensure the efficient and effective use of its resources in the interests of its locality, should be treated as authorised to carry out such a project on a reserve or as prohibited from doing so. The physical location of the turbines is local. The exercise would entail the use of the Council's own land resources. As will appear there is a substantial cash return to the Council which must in law be applied to Council reserve purposes. The decision is one which its members have resolved is a proper exercise of their stewardship and for which they will be accountable to ratepayers at the next elections.

[34] The applicant contended that such commercial use on the reserve is not a local purpose and is inconsistent both with the policy of the legislation and with the actual decision made by the local authority, which does not refer to private commercial activity.

[35] The Council's response is fourfold:

a) any purpose that it is lawful for a local authority under the Local Government Act 2002 to perform is a "local purpose";

b) because the revenue of a wind farm will be applied under ss 78 and 80 for local reserve purposes, that fulfils a local purpose;

c) the generation and supply of electricity has historically been and remains a proper purpose of a local authority and is thus a local purpose;

d) the combination of local generation and local supply promotes regional self-sufficiency and is thus a lawful local purpose even though the electricity will pass through the national grid.

[36] To answer the present question requires identification of why the Reserves Act distinguishes "local purpose" from other kinds of purpose.

[37] While it dates from 1977, the Reserves Act applies to circumstances as they arise (Interpretation Act 1999 s 6). Bennion states at 762:

> It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed… While it remains law, it is to be treated as *always speaking*. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat is as current law.

[38] The issue must therefore be viewed in the light of the Local Government Act 2002 which reformed the purpose of local government and the role of local authorities. Section 10 further states:

> **10 Purpose of local government**
>
> The purpose of local government is—
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and

(b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

Section 11 states:

11 Role of local authority

The role of a local authority is to—

(a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and

(b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment.

[39] Sections 10 and 11 apply to a local authority performing a function under another enactment to the extent that the application of those provisions is not inconsistent with the other enactment (s 13).

[40] As was summarised in *Waitakere City Council v Brunel* [2007] NZRMA 235:

[57] Sections 10-14 of the LGA 2002 provide:

- The purpose of local government is (a) to enable democratic local decision-making and action by and on behalf of communities; and (b) to promote the social, economic, environmental and cultural welfare of communities in the present and for the future.
- The role of a local authority is to give effect to such purpose in relation to its district.
- It must exercise its powers wholly or principally for the benefit of its district.
- The foregoing purpose applies to a local authority performing a function under any other enactment unless to do so would be inconsistent with that enactment.
- In performing its role a local authority must conduct its business in an open, transparent and democratically accountable way and must take account of the interests of future as well as current communities.
- It should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district.
- In taking a sustainable development approach it should take into account – the social, economic and cultural well-being of people in communities – the need to maintain and enhance the quality of the environment – the reasonably foreseeable needs of future generations.

> [58] Such precepts are consistent with the purpose of the Resource Management Act 1991 expressed in s 5, to promote the sustainable management of natural and physical resources. Further, by s 7 regard is to be had to the efficient use of natural and physical resources.

[41] The alternative to the characterisation of the proposed use "local purpose" would be that of "Government purpose" falling within s 22, which would require a reclassification by the Minister under s 24 or, conceivably, private purpose. The reasons for rejecting the last appear at [77]-[81]. The present decision concerns the first and second.

[42] There are competing pointers as to how the purpose of "renewable electricity generation" should be characterised. Supporting the applicant's argument is the evidence of its electrical expert, Dr Lermit, who advises that the development of a National Transmission Grid has made the concept of regional (as distinct from national) self-sufficiency obsolete. Except in rare circumstances where transmission links are loaded to their maximum capacity, electricity fed into the national grid will automatically flow to wherever in New Zealand it is being consumed at the time, regardless of where it is being generated. The power supplied to the grid by a particular generator cannot be assigned to any particular location or individual consumer.

[43] Adding a new local source of wind generation in Palmerston North will displace supply to the grid from elsewhere but will not benefit consumers in Palmerston North any more than consumers elsewhere in the country. The only real sense in which the proposed wind farm could be said to increase the region's self-sufficiency is that it will result in the region generating that amount of energy that is close to the amount it uses, a purely mathematical ratio: it does not represent actual self-sufficiency. In normal supply conditions electricity generated by the proposed wind farm will not be of any greater benefit to consumers in the Palmerston North region than to New Zealand consumers generally.

[44] In the extremely unlikely event that access to the grid is limited by capacity problems, the proposed wind farm could be of some exclusively local benefit. That would only be so between the time the wind farm is commissioned and 2011 when a Transpower upgrade is completed. It is conceivable that if Palmerston North were to

be isolated completely from the grid, the Mangahao hydrostation and wind farm could be operated together to produce a local emergency supply for the Palmerston North region. But even if that were technically possible, the contribution of the wind farm to the emergency supply (and that of all wind farms in the region) would necessarily be minimal.

[45] The Council by contrast relies on the affidavit of Dr Batstone, transmission manager at Mighty River. He records that Transpower owns the national grid which transports energy from major generating sites to electricity points of off-take. Dr Batstone accepts that the power supply to the grid by a particular generator cannot be assigned to any particular location or individual consumer. Electricity is a perfectly homogeneous product and electricity generated by two different generators injected into the grid cannot be distinguished. But he advises that it is widely accepted that the closer a generator is to a particular consumer or group of consumers the greater proportion of that generator's output is used "by those consumers". He employs the analogy of the national electricity system as a swimming pool. Demand can be thought of as holes in the swimming pool allowing water to escape while generators can be thought of as a variety of hoses pumping water into the pool. Given that the water is completely homogenous it is impossible to say with certainty just how much of the water from a particular hose flows out of a particular hole. But one can be confident that the closer a hose is to a hole the greater its share of outflow.

[46] He considers it would be widely agreed that much of the output from Transpower's existing Tararua 1 and 2 wind farms would be consumed by the people of Palmerston North since those wind farms are directly connected to Powerco's distribution network which also serves the city. While a final decision is yet to be made, Mighty River's preference is to connect the wind farm to the national grid at the Linton substation just over six kilometres to the south of Palmerston North. If the proposed wind farm were connected to the national grid, clearly some electricity generated by wind farm turbines would flow into the local network and be used by the Palmerston North households. Dr Batstone advises that it is unrealistic to establish a local network connection to ensure that its product was delivered to Palmerston North. To do so would require multiple connection lines and make far

less technical and economic sense than a connection to the national grid from which Palmerston North's needs are met.

[47] The Local Government Act requires a local authority to make efficient use of resources (s 14(1)(e)), to undertake any common commercial transactions in accordance with sound business practices and to ensure its prudent stewardship and the efficient and effective use of its resources in the interests of its district or region (sub-clause (g)) and (sub-clause (h)). It must adopt a sustainable development approach which takes into account:

> (i) the social, economic, and cultural well-being of people and communities; and
>
> (ii) the need to maintain and enhance the quality of the environment; and
>
> (iii) the reasonably foreseeable needs of future generations. (sub-clause (f))

[48] If these principles conflict the local authority is to resolve the conflict in an open, transparent and democratically accountable manner (s 14(2)).

[49] As with characterisation in other spheres a broad and substantial approach is required. An example is seen in the conflict of laws. The leading text of that name Dicey, Morris and Collins (14th ed) states the principle at 48-49 para 2-037:

> The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised… As Mance LJ said in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825 (CA) at 27 when dealing with the characterisation of issues:
>
> > The overall aim is to identify the most appropriate law to govern a particular issue. The classes of categories of issue which the law recognises at the first stage [i.e. the characterisation] a man-made, not natural they have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised…

The authors conclude at 52 para 2-045:

> …the way lies open for courts to see common-sense solutions based on practical considerations.

[50] The 1908 Act providing for gravel pits and quarries did not stipulate that their product should be used exclusively within the locality although laws of economics would tend to such a result. There were major localising factors in terms of the presence of the pits and quarries within both the locality and the control of the local authority. Sections 78 and 80 ensure that the benefits of any modern gravel pit or quarry flow to the local authority.

[51] It is my conclusion that in point of substance the decision-making in relation to a wind farm wholly owned and operated by the Council, feeding its electricity into the national grid but with its revenue stream being returned to reserve purposes under ss 78 and 80, plus the swimming pool analogy, together warrant a characterisation as of local purpose rather than as Government purpose.

[52] But as will appear, that is not enough. The purpose must be public.

(3)(a) When a wind farm developer erects and operates the project is the proposal disqualified as being private rather than public?

(3)(b) Was the decision made for an improper purpose because it was motivated by the use of revenue to create an eco-park?

The facts

[53] The Turitea Wind Farm Development Agreement and the carbon credits agreement was executed on 30 September 2005 following procedures considered at [125] ff. The rights granted to Mighty River by the Council under the agreement and under a proposed lease were:

a) an exclusive right to conduct investigations and feasibility studies on the land;

b) a construction licence for the construction of the wind farm;

c) a lease of the relevant area for the construction, maintenance and operation of the wind farm;

d) easements over the land for access, telecommunications and services and electricity transmission.

[54] Mighty River contracted that in partial consideration of the grant of the investigation rights, development fees of up to $650,000 would be paid by Mighty River to the Council as follows:

a) $150,000 plus GST following execution of the agreement;

b) $250,000 plus GST on completion of process of changing the purpose for which the land was held as a local purpose reserve under the Reserves Act 1977 and the management plan for that reserve or revocation of the reserve status pursuant to clause 6.2(b); and

c) $250,000 plus GST on Mighty River obtaining all consents (on terms acceptable to Mighty River acting reasonably) it considers necessary for the wind farm project.

[55] If a lease were granted, the rent payable would be the greater of the minimum royalty of $480,000 plus GST per annum reviewable periodically and a royalty calculated according to a formula expressed in terms of kilowatt hours. The agreement provided for Mighty River to provide technical information to the Council following receipt of which the Council would decide either to proceed with the wind farm on the land or decide that it would not so proceed. In its original form the agreement contained the following clause (emphasis is added to the following passages):

> **5.2 Council's Obligations**
>
> If the Council elects to proceed with a Wind Farm, *Council will at its own cost:*
>
> *(a) take all actions necessary to change the purpose for which the Land is held as a local purpose reserve under the Reserves Act 1977 to a purpose which will accommodate the Wind Farm Project, or if*

required, revoke the local purpose reserve classification of the Leased Land with the approval of the Minister of Conservation;

(b) *change, in accordance with s 41 of the Reserves Act 1977, the management plan for the local purposes reserve over the Land so as to authorise the use of the Land for a Wind Farm;*

(c) *complete any special consultative procedures required by the Local Government Act 2002 to enable the wind farm project to proceed and any other statutory procedures required; and*

(d) *take all actions necessary under the Reserves Act (s 48) to provide easements to Mighty River over the easement area.*

…

[56] On 30 October 2006, the day on which the Council approved the change of purpose of the reserve, the Council and Mighty River agreed to vary the agreement. Clause 5.2 was amended by the deletion of (2)(a) and its replacement with:

(a) *take all actions necessary to:*

(i) *change the purpose for which the Land is held as a local purpose reserve under the Reserves Act 1977 to a purpose which will accommodate the Wind Farm project; or*

(ii) *undertake an alternative process provided for in clause 5.2A to enable the use of the Land for the Wind Farm Project…*

[57] A new clause 5.2A was inserted:

5.2A

If it is finally decided by a court of competent jurisdiction that the purpose for which the Land is held as a local purpose reserve under the Reserves Act 1977 cannot be changed to a purpose which will accommodate a Wind Farm Project, then Council will use its best endeavours, in consultation with Mighty River, to proceed with alternative measures in order to achieve the original intention of the parties as outlined in this Agreement. In this clause, "best endeavours" include Council using every effort to obtain the agreement of the Minister of Conservation and the Crown to revoke the reserve classification and to, immediately following revocation, transfer the Land to Council under the Land Act 1948, provided that nothing in this clause shall require the council to take any step that involves loss of ownership and/or control of any part of the Land or deprive the council of the benefit of any revenue that it would otherwise be entitled to under this Agreement.

[58] The grant of lease was conditional upon:

> (a) the grant of the Resource Consent on conditions acceptable to Mighty River, provided that Mighty River will not unreasonably object to any conditions which are consistent with those normally imposed on wind farms in the Manawatu region;
>
> (b) *revocation of the reserve classification of the Leased Land or alternatively the change by Council, on terms acceptable to Council and Mighty River, of the purpose for which the Land is held as a local purpose reserve under the Reserves Act 1977 to a purpose which will accommodate the Wind Farm Project*;
>
> (c) *the change by Council on terms acceptable to Council and Mighty River of the management plan for the local purposes reserve over the Land so as to authorise the use of the Land for a Wind Farm;…*

[59] The amendment on 30 October 2006 added further conditions of the grant of the lease:

> **6.2 Conditions**
>
> *The grant of the Lease in clause 6 is conditional upon:*
>
> *(a)…*
>
> *(b) Council completing the process contemplated in clause 5.2(a) to enable, on terms acceptable to Council and Mighty River, the use of the Land for the Wind Farm Project.*

[60] The agreement further provided:

- Mighty River would pay up to $200,000 plus GST to extend the scope of technical and other studies to assist Council in developing an eco-park.

- It would pay up to $30,000 plus GST per annum, that sum to increase annually according to an agreed formula, to support conservation, ecological and management initiatives relating to the Turitea Reserve, Hardings Park and other associated facilities owned by Council.

- It would upgrade roads within the reserve at a cost of up to $400,000 plus GST; for the purposes of an eco-park it would fund the construction by Council of public toilet blocks; shelters, public viewing platforms and

other similar structures as determined by Council; up to a maximum cost of $240,000 plus GST.

[61] The Council gave warranties and imposed terms:

10.1 ***Council to support***

The Council agrees in its capacity as landowner (and subject to clause 17.2) to:

(a) support any application by Mighty River for the grant, renewal, variation or continuation of any Consent necessary to give effect to Mighty River's rights under this Agreement including a subdivision consent for the Lease;

(b) support Mighty River's negotiations with Adjacent Owners, as requested by Mighty River; and

(c) provide such written evidence of this support (and any consent or approval) as Mighty River may reasonably require.

10.2 ***Council not to oppose***

The Council agrees in its capacity as landowner (and subject to clause 17.2) that it will not, either directly or indirectly:

(a) object to, oppose or impede:

(i) any application by Mighty River for the grant, renewal, variation or continuation of any Consent necessary to give effect to Mighty River's rights under this Agreement, including without limitation a subdivision consent for the Lease;

(ii) *any action taken by Mighty River to give effect to Mighty River's rights under this Agreement*; or

(iii) the granting to Mighty River of any lease, restrictive covenant or easement necessary for the Wind Farm Project or the Investigations; or

(b) fund, facilitate, assist or promote any other person, entity or group to take any action that would be in breach of this clause 10 if done by the Council.

10.3 *Nothing in this clause 10 prevents Council in its statutory capacity imposing reasonable conditions in any Resource Consent to protect indigenous flora and fauna and to mitigate any other adverse effects of the Wind Farm Project*.

…

12.2 Limitation of Council's Liability

(a) Council in its statutory capacity shall not have any liability to Mighty River for any direct losses, expenses, claims or liability whatsoever and irrespective of the cause including negligence, if the Wind Farm Project is delayed or prevented as a result of an adverse outcome of a statutory process which Council is required to complete in its statutory capacity or any failure of the Council to comply with any statutory process, Council having acted in good faith.

(b) The liability of Council (other than in its statutory capacity) for breach of this contract or for any negligent act or omission shall be limited to $3,000,000 in aggregate during the term of this Agreement. This limitation of liability shall not apply to deliberate acts or omissions of Council that breach this Agreement.

…

17.2 Council as Statutory Authority

Council has certain public or statutory functions as a territorial authority outside this Agreement. Council's obligations under this Agreement cannot fetter Council undertaking its public or statutory functions, and the proper exercise of those functions will not be a breach of this Agreement. Without limiting this clause it is acknowledged that the Council may undertake consultative procedures under various statutes and shall be under no obligation to make a decision that enables the Wind Farm Project to proceed.

…

17.17 Alternative Outcomes

(a) *The parties acknowledge that there is some uncertainty as to whether the legal outcomes contemplated by the Conditions and the Project Timeline can be achieved in the way or form intended by the parties as set out in this Agreement.*

(b) Therefore, if at any time during the term of this Agreement it is not possible to achieve an outcome in the way or form intended by the parties, then the parties will work together in good faith and endeavour to achieve (as far as is possible) substantially the same outcome by alternative means or in an alternative form, with any necessary amendments to this Agreement.

[62] The parties also entered into an agreement dealing with carbon credits.

[63] It may be inferred that Mighty River would not only have a lease and exclusive licence to site its wind turbines on the reserve but would be at liberty to generate and, after payment to the Council of rental and other contracted sums, retain such net cash flow as the market might bear.

The applicant's submissions

[64] Section 2(1) defines "reserve" as "any land set apart for *any public purpose*" (emphasis added). The applicant submitted that the use of the reserve for "renewable electricity generation" by a private corporation for profit is not a public purpose.

[65] Section 2(2) provides:

> Any land, whether Crown land or not, shall be deemed to be set apart for a public purpose within the meaning of this Act if it is granted, reserved, or set apart or purchased or given or dedicated in any lawful manner… *for the use, benefit, enjoyment, safety, or defence of the people of New Zealand or the inhabitants of any district or locality therein*.

[66] It will be recalled that s 3(1) states the general purposes:

> (a) Providing, for *the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing—*
>
> …
>
> (v) …*community*, or other special *features or value*.

[67] The public purpose is summarised in the Long Title:

> An Act to consolidate and amend certain enactments of the General Assembly relating to public reserves, to make further provision for their acquisition, control, management, maintenance, preservation (including the protection of the natural environment), development, and use, and to make provision for public access to the coastline and the countryside

[68] As Mr Johnston submitted, the public theme reverberates throughout the Act:

- The central role of the Crown and the Ministry of Conservation in the administration of all reserves is evident throughout the legislation. As earlier noted, 3(1) provides:

  > …subject to the control of the Minister, this Act shall be administered in the Department of Conservation…

- By s 16 the Minister has responsibility for classifying all reserves whether existing immediately before the commencement of the Act or created afterwards, even though when the reserve is controlled or managed by an

administrative body the Minister may not make such classification without consulting that body.

- Section 78 dealing with financial provisions requires revenue arising in respect of any dealing with a reserve be applied either as directed by the Minister or, where the reserve is vested in or controlled by the administering body, held by that body and applied for the purpose of the Act and solely for reserve purposes (s 80).

[69] I therefore accept the applicant's submission that all reserves must be established and maintained for public purposes and in particular for the public purposes expressly described in s 3(1).

The Council's submissions

(1) Mighty River a State-owned enterprise

[70] The Council's first submission is that as a State-owned enterprise Mighty River is owned on behalf of the public. Its only shareholders are the Minister of State-Owned Enterprises and the Minister of Finance. The Council cited *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 328 where Keith J examined the scope of the Executive Government of the Crown in its executive capacity. Having recounted the central Crown agencies, the ministries and departments, he said that Parliament had clearly identified a second group of public bodies, namely State-owned enterprises established under the Act of that name in 1986 providing that it is an Act to promote improved performance in respect of government trading activities. Accountability is placed on the boards and managers of the new companies. Ministers are distanced from their day to day operations and State-owned enterprises are required to pay income tax. Their principal objective is to operate a successful business and to be as profitable and efficient as comparable businesses that are not owned by the Crown (s 4(1)(a)). The nature of their operation is commercial; where the Crown wishes a State enterprise to provide goods or services the Crown must recoup the cost (s 7).

Discussion

[71] State enterprises are in a very real sense public because they are publicly owned and their directors are appointed by the shareholding ministers. But a state enterprise is a paradigmatic commercial operation. The shareholding ministers do not include the Minister of Conservation. The website of the Crown Company Monitoring Advisory Unit records that Mighty River Power was formed in 1999 following a break-up of Electricity Corporation of New Zealand Ltd. It is New Zealand's third largest generator, in terms of total assets. Its retail brand Mercury Energy supplies over 300,000 retail customers.

[72] The distinctive character of a Crown trading entity has been recognised in the context of state immunity under principles of conflict of laws and public international law. In the leading case *The Philippine Admiral* [1977] AC 373 (PC) at 380 counsel for the successful respondents formulated the central issue of sovereign immunity as whether there was use for public purposes. Use in the ordinary course of trade is not a "public use". The ordinary course of trade means the normal course of trade, i.e. in the competitive markets of commerce: *The Cristina* [1938] AC 485, 498. Public use, by contrast, implies possession by the Government for public purposes.

[73] That formulation was accepted by the House of Lords in *I Congreso* [1983] 1 AC 244, cited with approval in *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 at 288 per Cooke P.

[74] I consider that there is a direct parallel in the present context. The "public purpose" contemplated by the Reserves Act is purposes of the Crown and of local authorities *in that capacity*. It has been noted that the Reserves Act places at the fore the role of the Minister of Conservation. When speaking of public purpose it does not provide a vehicle for conventional trading operations which fortuitously are being performed by the State enterprise. There is no difference in principle between the proposed establishment of a wind farm by Mighty River and by a competitor which is wholly privately owned.

[75] I therefore do not accept the Council's first submission. The next question is whether it may lawfully contract with Mighty River, as it has purported to do.

(2) The Reserves Act envisages the use of parts of the reserve for private purposes

(3) Public benefit constitutes a lawful purpose

[76] These arguments can be considered together.

The Council's submissions

[77] The Council submits that the applicant has confused purpose with activity; that a local purpose may be fulfilled by a private activity. So s 72 expressly permits the leasing of a reserve to a private person for the purpose of a development or management programme.

[78] It argues that the public purpose of producing electricity may be performed through the agency of a private power company, and a fortiori a State enterprise.

The applicant's submissions

[79] Mr Johnston cited *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 (CA) decided by Gleeson CJ, Kirby P and Samuels JA. The issue in that case was whether the use of land in a national park for the purpose of a school of business administration was one authorised by the National Parks and Wildlife Act 1974. The Court held that it was not. Buildings at South Head had been erected for defence purposes within the Sydney Harbour National Park. The buildings had become dilapidated and an offshoot of an American university proposed to carry on a business there of conducting post-graduate courses in business administration. The respondents relied on statutory provisions similar to those in the Reserves Act to grant licences to occupy or use lands within a national park. Gleeson CJ observed at 715 that the Act did not in terms directly authorise the use of land for any particular purpose. The appellant

Council submitted that the powers were controlled by the nature and scope of the legislation conferring them and were to be understood as powers to advance the object of that legislation. They were to be deduced from the Long Title, the scheme of the legislation and other provisions stating the objectives of a plan of management of a national park. That argument was accepted by the Court of Appeal. Gleeson CJ stated at 717:

> An analysis of what is involved shows that it is not the School's use of the land or the building that is claimed to promote, or to be ancillary to, the enjoyment of the park by the public; it is the price which the School has been and will be prepared to pay for that use, which will in turn provide financial assistance for the improvement of the building and the development of the park, that is relied upon. That is not a permissible approach to the problem. It is the use of the land that is to be judged by reference to the objects of the Act, not the motives which lie behind the decision to permit that use.

Kirby P stated at 718-9:

> It is important to approach the issues in the appeal attentive to Parliament's expressed will to reserve derogation from the use of a national park to itself. Unless clearly permitted by statute, conduct which has that effect cannot achieve indirectly that which would not be possible directly without Parliament's express approval.

At 722 he stated:

> The Act does not in some convenient phrase neatly encapsulate and state the purposes which it authorises. It is necessary to draw those purposes, any one of which is sufficient to authorise the development proposed, from an examination of the terms of the several provisions of the Act…
>
> It is useful to remember, at the outset of this task of classification, that the "purpose" to be defined is a planning purpose… Here [the] context is the specification of a limited and exceptional class of case whereby… only with development consent might a development take place… in a national park otherwise reserved "for conservation and recreation purposes" exclusively.
>
> Stated baldly, the establishment of a school of a private university, teaching business management to a small group of persons for a fee, would not ordinarily, at least for planning purposes, be seen as advancing the "objective" of a zone being the preservation and management of national parks "for conservation and recreation purposes". A private university facility would not ordinarily be catalogued as one "for conservation and recreation purposes".

At 729 Kirby P asked:

> Is it possible that the "purpose" of the development might be characterised in a way which would bring it within the "purpose authorised by" the Act because it is one permitting the infusion of funds which could then be used for the park's purposes? Does this mean that a solicitor could establish a quiet office in a corner of a national park, upon a promise to contribute substantially funds which would undoubtedly be useful to develop the park or particular facilities within the park?… Can planning law, which envisages the orderly division of land into zones for different specified uses be so readily undermined by the power of the purse? Can the objective of zones set aside for national parks (being for conservation and recreation purposes) be changed for purposes having nothing to do with conservation and recreation simply because of a promise, incidentally, to provide funds and do certain things of benefit to the park?

The answer given was no.

[80] A case on the other side is *Ski Enterprises Ltd v Tongariro National Park Board* [1964] NZLR 884. The Tongariro National Park Board was constituted by the National Parks Act 1952. Its primary function was to administer, control and manage the Tongariro National Park including the mountain area of Mt Ruapehu. The board granted to the second defendant Ruapehu Alpine Lifts Ltd a right to construct, operate and maintain chair lifts and a T-bar lift on the land under a licence which in addition granted pre-emptive rights to RAL in relation to other areas on the mountain. The plaintiff applied for the right to construct and operate a rope tow in the area known as the national downhill to the west of RAL's exclusive area but within its pre-emptive area. It claimed that the pre-emptive rights were ultra vires the board. This Court held that performance of the Park Board's purposes required it not to fetter its discretion as it had done by the grant of pre-emptive rights and that the second private applicant was entitled to establish its private operation in the park.

Discussion

[81] The distinction between the cases is that in *Woollhara* the entry of the school could not be said to promote the purposes of the reserve any more than a legal office would have done. In *Ski Enterprises* the entry of operators of both the chair lift/T-bar and of the rope tow was held to do so by giving the public ready access to the park.

[82] I have held that the generation of power by means of wind turbines is a legitimate Council purpose.

[83] There is a further question whether the fact that the Council saw as important the application of the revenue from Mighty River towards an eco-park constitutes an improper purpose.

[84] The Council's purpose was to have the wind farm established in order to:

a) put the reserve land to effective use for the intra vires purpose of generating electricity with sufficient local nexus;

b) increase the revenue stream that would be applied to reserve purposes and would allow the creation of the eco-park.

[85] This case is not like *Woollhara* where the initial purpose was ultra vires. Rather, as in *Ski Enterprises*, the purpose of establishing a wind generation facility is comparable to the opening up of the park in *Ski Enterprises*. As in that case the means of achieving the statutory purpose was achieved by recourse to commercial operators. But that is no more unlawful in this case than it was in that. The fact that Ski Enterprises was to operate for profit did not alter the conclusion that its operation constituted a lawful performance of the Park Board's function. The same may be said of Mighty River's commercial operation of the Council's purposes in this case.

[86] Had the purpose of receipt of revenue resulted from an ultra vires purpose the case would have been indistinguishable from *Woollhara*. But coupled with what I have found to be the lawful purpose of electricity generation the second purpose must itself be characterised as lawful. It is therefore unnecessary to enter the area discussed by Paul Craig in *Administrative Law* (5th ed) 559: "[c]omplex cases can arise where one of the purposes is lawful and one is regarded as unlawful".

Contention 2 – Was the Council biased or was its decision unreasonable?

Submissions

[87] The next contention was that by committing itself to Mighty River to receive and by actually receiving both cash and the promise of more in the event of change of the purpose of the resource as well as by other conduct, the Council either was actually biased or could reasonably be suspected of bias and so acted unlawfully. Alternatively its decision was unreasonable and therefore unlawful.

[88] The applicant pleaded that:

a) by entering into the development agreement (especially para 5.2 ([55] above)); and

b) by agreeing to take the payments due to it under that agreement by entering into the carbon credits agreement

the Council fettered the discretion reposed in it by s 24A to determine whether to change the purpose of the reserve.

[89] Further, the Council pre-determined the question whether the purpose of the reserve should be changed, by:

a) clause 5.2 of the agreement;

b) its designation of the amended purpose purporting to enable a renewable electricity generation generally when the Council's purpose was to permit the development of the wind farm to be operated by Mighty River for profit;

c) the promotional and partial nature of a consultation document;

d) failure to disclose to the public certain information known to the Council about the wind farm;

e) failure to disclose to the public certain information known to the Council about potential negative impacts of the wind farm;

f) public promotion and endorsement of the wind farm and the proposal to change the purpose of the reserve on the part of the Mayor and other individual councillors before the decision was taken;

g) the Council's focus throughout the period before the decision was on the benefits to be had from the revenue generated by the wind farm rather than the benefits and detriments of allowing the reserve to be used for the wind farm;

h) the Council's close relationship with Mighty River developed during the period 2004 to 13 November 2006;

i) a "partnership" or "joint venture" of the Council's arrangements with Mighty River for the development of the wind farm;

j) the variation agreement which included clause 5.2A.

Discussion

[90] The evidence supports the particulars of the pleading in sub-paragraphs (a) and (c)-(j) of [89] on which the plaintiff relies. Nor is the fact of the Council's entering into the development including the original clause 5.2 and agreeing to take payments disputed. The Council did receive the initial $150,000 plus GST and, following the change of purpose, the further $250,000 plus GST. The issue is whether those facts establish in law that the Council unlawfully fettered its discretion and predetermined that the scheme change would occur so as to act unlawfully.

[91] The applicant cited *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) where the Court of Appeal upheld the decision of the Chief Justice to issue prohibition against the Council from pursuing the process of stopping portions of streets in the city of Lower Hutt. The Council had entered into a contract with Challenge Properties Ltd that it would:

> …forthwith take all steps necessary to stop those parts of Queens Road and Bloomfield Terrace… If the corporation is unable to stop the said portions of the said streets or either of them by virtue of a contrary decision of a Magistrate's Court this agreement shall be null and void and of no effect.

Focusing on the word "unable" McCarthy P said at 550:

> [That] word … is very important for it gives rise to a solid inference that only a contrary decision of a Magistrate's Court would be allowed to stand in the way of their obligation to close. In entering into this contract… the council placed themselves in a situation where there are valid grounds for believing that they are unable to discharge fairly the duty which the statute has placed upon them…

By contracting absolutely to have the streets stopped the council acted unlawfully.

[92] The applicant submitted that the present case falls squarely within *Bank*. It argued that the amendment of the Variation Agreement showed that the only impediment to a decision by the Council to change the purpose of the Reserve would be the adverse decision of "a court of competent jurisdiction" which is on all fours with the reference in *Bank* to a contrary decision of a Magistrate's Court.

[93] Before considering what response is required from the Court to ensure legality of process in this case it is necessary to stand back and examine the functions confided to the Council by Parliament.

[94] Here the Council is the owner of the land in the reserve. It is required to comply with ss 11-14 of the Local Government Act save to the extent that such course is inconsistent with those under the Reserves Act. I have held that it is within the powers of the Council itself or by another party to cause to be created a wind farm that will be operated by a third party.

[95] As in *Jeffs v New Zealand Dairy Production Marketing Board* [1967] NZLR 1057 (PC) although the Council is interested in the result of the decision (here as land owner), Parliament has elected also to make it the statutory decision-maker under s 24A rather than passing that decision to an independent judicial body such as the Environment Court. The Council may therefore initiate or respond to a proposal which it must determine. The alternative of adopting a sterile or passive approach is inconsistent with the policy of the 2002 Act. So unlike a judge, who would be disqualified for prior involvement in the exercise, the Council is obliged to perform it.

[96] Counsel for the applicant proposed that a mere appearance of bias would suffice to establish its case. I do not agree. Rather, in the present context, the expression "bias" is a misnomer, dragged across from the judicial sphere where it is appropriate. De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed) state:

> **12-049** In some situations it will even be perfectly proper for a public body to make a particular decision for its own pecuniary advantage (as distinct from the pecuniary advantage of individual members or officers).

Certainly in *Steeples v Derbyshire County Council* [1984] 3 All ER 468 an agreement by a local planning authority with a developer that it would be liable for liquidated damages if it failed to use its "best endeavours" to procure planning permissions was invalidated for bias. But De Smith states:

> Later cases, however, have made it clear that the courts will not lightly interfere with a planning decision made on the basis of a pre-determined policy so long as the authority gives genuine consideration to the application.

It cites *R v Amber Valley District Council ex p Jackson* [1985] 1 WLR 298 where the majority party group had met and decided in advance to support an application for a development. Its members were held not to be disqualified from subsequently sitting on the committee which determined the application. Politics were held to play so large a part in local government that, if disqualification was to be avoided, the planning committee would have had to adopt impracticable standards. De Smith continues:

> **12-050** Other cases have held that a local authority was not disqualified from granting a planning permission on a site in which the authority had an interest where the decision was properly considered, was by no means a foregone conclusion and the council had not acted in such a way that it "could not exercise proper discretion".

[97] In *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 52 Tipping J at [47] adopted the following test:

> The full council must come to the meeting at which the… resolution is to be considered with an open mind as to whether the land in question should be sold. The councillors must be prepared to give a fair and open-minded hearing to anyone who appears at the meeting and submits for whatever reason that the land should not be sold. If it could be shown that the council had not approached the meeting on that basis, then the resolution to sell would prima facie be invalid and, subject to any relevant discretionary matters, liable to review... anyone challenging a… resolution on the basis of predetermination or fettering of discretion is required to show actual predetermination or fettering rather than the appearance of the same.

He drew support from similar tests applied in *Franklin v Minister of Town and Country Planning* [1948] AC 87 (HL) and *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 194.

[98] It may be noted that the "open mind" formula has been adopted in s 82(1)(e) of the Local Government Act in the context of consultation ([116] below). It is possible to read *Travis Holdings* as suggesting that "open mind" means "without predisposition". But that was not the test used in *Franklin* by Lord Thankerton who held at 103 that the decision could be challenged:

> …[if the Minister's] mind was so foreclosed that he gave no genuine consideration to [the report and the objections].

Nor, as will appear, was that the test in *CREEDENZ*.

[99] In *Anderton v Auckland City Council* [1978] 1 NZLR 657 Mahon J treated the Council's promotion of a "floating zone" designed to accommodate the developer's project as evidence of actual bias. English authority of the same era is to similar effect: *Steeples v Derbyshire County Council* [1984] 3 All ER 468 (which like *Anderton* cited *Bank*).

[100] But *CREEDENZ*, like *Franklin* before it, took a different approach. That decision, which was delivered under the National Development Act 1979, suggests that "open mind" means a mind that is not closed rather than one that is lacking predisposition. There Cooke J at 179 wrote:

> Realism compels recognition that… the Government had decided that a smelter… was likely to be in the public interest and should go ahead if possible… it is a fair inference… that from an early stage the Government had favoured using the National Development Act for it. Also it is apparent that Aramoana was a site favoured by the Government, and the announcement of its choice by the company in December 1980 was publicly welcomed by the Prime Minister.
>
> None of this means, however, that the Government was irretrievably committed to advising the necessary Order in Council. What can properly be inferred is that when the question arose in April 1981 the Government was already clearly in favour of the company's project and highly likely to decide in favour of an Order in Council.
>
> But it is fallacious to regard that as a disqualification. The references in the amended statement of claim to a real probability or suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental level. Projects of the kind for which the National Development Act is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naive to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.
>
> In relation to [such] decisions… I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether *at the time of advising* the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied. If they did hold that opinion at that time, the fact that all or some of them may have formed and declared the same opinion previously does not make the order invalid. No doubt, if Ministers had approached the matter with minds already made up, the inference would readily be drawn that they could not genuinely have considered the statutory criteria when advising the making of the Order in Council. But the newspaper reports fall short of showing closed minds. And the terms of the Order in Council suggest that the minds of the Ministers were not closed.
>
> (emphasis added)

[101] As Glidewell J noted in *R v Sevenoaks DC, ex parte Terry* [1985] 3 All ER 226 at 233:

> Of course, the council must act honestly and fairly, but it is not uncommon for a local authority to be obliged to make a decision relating to land or other property in which it has an interest. In such a situation, the application of the rule designed to ensure that a judicial officer does not appear to be biased would, in my view, often produce and administrative impasse.

[102] I am satisfied that "open-minded" in contexts such as the present does not mean "without predisposition" but "prepared, despite predisposition, honestly to consider whether to change its mind".

[103] Here the question must be whether there has been an honest decision from a council conscientiously endeavouring to perform its task and complying with the low level *Wednesbury* requirements of taking into account no irrelevant considerations and all considerations that are relevant. The decision to add to the skyline further turbines, with what from a distance is a dandelion-like appearance, will certainly profoundly irritate some citizens even though it will be accepted by others. But unless the Council has failed to perform its statutory function, the manner of its accountability is to electors at the next election, not by an application of bias rules taken from another context.

[104] The agreement must be read and construed as a whole. Unlike the council in *Bank* this Council did not abdicate its function by committing itself to ensure that the change to the status of the reserve took place, without reservation of its right to perform that function by dismissing the application. Clause 17.2 ([61] above) expressly acknowledged its obligation to perform its statutory authority role even if that prevented the wind farm project from proceeding. That clause contains the stipulation, missing from *Bank*, that the Council did not fetter the exercise of its statutory functions; clause 12.2(1) makes plain that it is under no liability for delay or prevention of the wind farm by such exercise. Clause 17.17(a) recognises uncertainty as to whether the legal outcomes contemplated can be achieved.

[105] The high points of this aspect of the plaintiff's claim were:

a) the contract to receive and actual receipt of substantial funds from Mighty River;

b) the new clause 5.2A ([57] above) .

As to the first, certainly the decision of any judge who received payment, whether or not it was made in contemplation of a particular result, would be set aside: *Dimes v Proprietors of Grand Junction Canal* (1853) 3 HLC 759. But a judge has no role as proprietor or as local body. The notion of bias for reasons of self-interest does not travel comfortably across from the role of a judge to that of a council which is in substance a trustee for its ratepayers.

[106] It has been noted that the Local Government Act requires a council to ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district. The payments are not an entrepreneurial profit. They are closely analogous to the levy payable under s 53 the Building Act 2004. They are in my view a legitimate way for the Council to impose the inevitable cost of exploring and, if approved, developing the proposal on the would-be entrepreneur rather than on its ratepayers.

[107] As to clause 5.2A, read by itself it would afford support for the plaintiff's argument. But it is to be read with clause 17.2 which remains unaffected and meets the *Bank* argument.

[108] There is a further argument that the project was driven by Council staff and that there is institutional bias of the kind discussed in *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741, 762-3. But the Canadian authorities cited concern apparent bias which does not require further discussion. As a corporation the Council acted, as it was entitled, through many natural persons, councillors and staff. There may well be predisposition to a particular result. But in a case such as this provided the ultimate decision is made with minds not closed to argument it will not be invalidated for bias.

[109] Here both by the original form of the agreement and by the last-minute amendments the Council has tried very hard to do what it lawfully can to facilitate the wind farm project. But it has taken care to avoid over-stepping the line drawn in *CREEDENZ* and the later authorities. No attempt was made to challenge the denial

of closed minds by council members by cross-examination on their affidavits. It is notable that one councillor who had earlier been supportive of the venture was one of the three who in the end voted against it.

[110] I am not persuaded that the Council or its members were disqualified. The bias contention fails. The allegations as to withholding information fall more naturally within Contention 3 and are considered there.

[111] So too must that of administrative law unreasonableness. There is no basis for conclusion that the standard described at [103] above was not met.

Contention 3 – Did the Council fail properly to consult?

Submissions

[112] The applicant finally submits that the Council failed to comply with its obligations of consultation.

Discussion

[113] The common law principles were pleaded in addition to the requirements of the Reserves Act and the Local Government Act. In *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111, 1124 (PC) Lord Morris of Borth-y-Gest outlined the common law requirements of consultation:

> The [consultees] must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.

That decision was followed in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA). A clear theme is that interested parties must be provided with relevant information so as to know what is proposed. In *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164 at 167 Webster J stated:

> …it must go without saying that to achieve consultation sufficient information must be supplied by the consulting party to enable it to tender helpful advice… By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the party consulted might have relevant information or advice to offer.

And in *Wellington International Airport Ltd v Air New Zealand* McKay J said at 676 that:

> For consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.

[114] In *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605, 643 Richmond J said that the purpose of consultation is to give consultees "a reasonable opportunity of stating their views". Professor Joseph argues in his *Constitutional and Administrative Law in New Zealand* (2nd ed) that the decision-maker's duty to disclose relevant material to interested parties derives from *audi alteram partem*, saying (at 23.4.2):

> All relevant information must be disclosed to allow interested parties an opportunity to controvert or to correct the material in issue…
>
> It is a prima facie breach of procedural fairness for a decision-maker not to disclose all relevant evidential material, whether the material becomes available before, during, or after the hearing.

[115] The common law duty of consultation is complemented by and overlaps like statutory duties. The requirements of s 24A of the Reserves Act 1977 are relatively simple. The Council must publicly notify the proposed change of purpose, giving reasons for the proposed change. The Council must allow one month for objections and then consider all objections received.

[116] The key provision of the Local Government Act 2002 is the principle in s 82(1)(c):

> that persons who are invited or encouraged to present their views to the local authority should be given *clear information* by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented.
>
> (emphasis added)

But since there is no reason to consider that s 82(1)(c) is more demanding than the provisions of the Reserves Act and the Local Government Act it does not require separate consideration. (It has been noted that by s 82(1)(e) such information must be received by a council with an "open mind": [98] and [102] above).

[117] Section 24A(2) of the Reserves Act requires that before a council changes the purpose of a reserve it must:

a) publicly notify the proposed change of purpose, giving the reason or reasons for the proposals;

b) allow a month for objections;

c) consider the objections.

[118] The Local Government Act sets out the obligations of local authorities in relation to decision making. By s 77 it must in the course of the decision-making process seek to identify all reasonably practicable options, the achievement of the objective of a decision, the costs and benefits, and the extent to which community outcomes would be promoted or achieved. By s 78 the Council must in the course of its decision making process give consideration of the views and preferences of persons likely to be affected by or have an interest in the matter. Consideration must be given at:

a) the stage at which the problems and objectives related to the matter are defined;

b) the stage at which the options that may be reasonably practicable options of achieving an objective are identified;

c) the stage at which reasonably practicable options are assessed and proposal developed;

d) the stage at which such proposals are adopted.

[119] Section 78 does not itself require any consultation process. Section 76 requires compliance with such of the provisions of ss 77, 78, 80 and 82 as are applicable but by s 79 its judgment about how to achieve compliance with those sections must be proportionate to the significance of the matters affected by the decision.

[120] Among the matters to be considered are the principle of s 14 that a local authority should conduct its business in an open, transparent and democratically accountable manner and give effect to its identified priorities and desired outcomes in an efficient and effective manner; that it should undertake any commercial transactions in accordance with sound business practices and in taking a sustainable development approach should take into account the social, economic and cultural well-being of people in communities. Another is the need to maintain and enhance the quality of the environment and the reasonably foreseeable needs of future generations.

[121] Section 82 states principles of consultation:

> (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:
>
> (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
>
> (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:
>
> …

[122] Subject to the principle of proportionality, these principles are to be observed by a local authority in such a manner as it considers to be appropriate in a particular instance. It is bound to have regard to the requirements of s 78 and to the extent to which the current views and preferences of affected or interested persons are known and the nature and significance of the decision or matter, including its likely impact from the respective persons who will or may be affected by or have an interest in the decision or matter. Sub-section (5) limits the scope of consultation required by any Act to the specific requirements of that Act's procedures that are inconsistent with the more general requirements of the Local Government Act.

[123] In the present context the common law duty of consultation may be said to serve two purposes. One is to avoid breach of natural justice. The other is to secure performance of the Council's specific obligations under the Reserves Act and its more general obligations under the Local Government Act: [40] above.

[124] The consultation process in this case may be summarised.

Home visit

[125] Between April and June 2006 Mr Adams, a member of the executive committee of the plaintiff, received three visits from a representative of Mighty River Power, Mike Omer. On Mr Omer's second visit Mr Adams was told that there would be around 120 turbines. These would be 3 megawatt, 125 metre turbines. Mr Omer showed Mr Adams the provisional location of the turbines but said that no final determination had been made.

The consultation document

[126] The Council issued a consultation document inviting residents to respond to the proposal of change of the reserve's purpose. The document discussed the proposed wind farm and eco-park, with discussion of Reserves Act processes. It described the wind farm as being in the Tararua Ranges, about 10 km south-east of the city. It included a map showing the reserve and the city and indicating which

parts of the reserves might have turbines and which will not. It noted that while final locations for around 60 turbines on the reserve had not been determined they would be visible from the city. There was brief discussion of the issue of their noise. The document stated that the consultation did not include Resource Management Act considerations, which would be addressed at a later stage. These would include re-vegetation.

[127] The plaintiff argues that this document was lacking in some of the relevant detail. The impact on the visual amenity of the reserve is one such aspect. Its witness Ms Dixon deposed that since the map in the consultation document lacked topographical detail she had difficulty translating the areas that were marked on the map as being possible turbine sites onto the ridgelines visible from her property. She also observed that the consultation document did not list the size of the turbines, nor did it address how the turbines might affect the reserve's visual amenity.

Information evening

[128] An information evening was held on 2 August 2006. It was arranged by the Council's Water and Waste Services Manager, Mr Pepper, and a member of the applicant society, Ms Mitchell. The plaintiff had requested the meeting to obtain more detail than was given in the proposal document.

[129] At the meeting Mr Pepper represented the Council. He disclosed the arrangements between the Council and Mighty River Power and, in particular, the progress payments, including the payment due to the Council on the change of the reserve's purpose. Mr Cookson, the chair of the plaintiff, says that Mr Pepper did not mention that the Council had committed itself to proceeding with the proposal to change the purpose of the reserve. Mr Cookson deposes that Mr Pepper gave a more specific indication of where the turbines would be situated than was given in the consultation document. The turbines were to be located on the back ridge line, on and adjacent to South Range Road, and along the access road towards Browns Flat. Mr Cookson says that Mr Pepper said that the turbines would be the "taller, larger" type. Mr Cookson said that Mr Pepper did not discuss any disadvantages or negative aspects of the proposed wind farm but told those present that further information was

available on the City Council web site. Mr Cookson had already visited that web site and after the meeting he visited it again. His evidence is that the web site contained both parts of the Turitea Management Plan, which had been available for some years, but nothing further about the wind farm.

[130] Mr Pepper disagrees that Mr Cookson's is a fair reflection of the meeting. He says that he did speak about the potential adverse effects of the wind farm. These included the visual impact of the turbines and noise, both issues that were to be addressed in the resource consent application. The 'internal' effects of the wind farm would be the loss of vegetation and the possible effects on water supply. Mr Pepper says he told those present that it was a term of the contract to ensure that the effects on water supply were no more than negligible. Mr Pepper also indicated that 42 ha of vegetation would be cleared to accommodate the turbines. He deposed that the Council has now reduced this to 25 ha. In the absence of cross-examination the plaintiff must fail on a disputed point unless the defence evidence is plainly unacceptable. That is not the case.

[131] Mr Pepper's evidence is that at least some of the group attending the evening had participated in resource consent hearings for other wind farms, and that there was a general appreciation of the potential impacts of the wind farm.

Turitea reserve open day

[132] On 13 August 2006 the Council held an open day, attended by Mr Pearson, treasurer of the applicant society, and his wife. Three hundred and fifty people were taken by bus and then army vehicles for a brief observation of a wind monitoring mast on a ridgeline in the reserve. Council and Mighty River Power staff were present but there was no formal presentation. Mr Pearson says that no information was given during the course of the trip but Mr Manson disagrees. An information sheet and Mighty River Power brochures on the wind farm were made available.

[133] The information sheet explained that the change in purpose of the reserve was one step of the process and if the community supported the change in purpose Mighty River Power would then apply to an independent commissioner for a

resource consent. The information sheet did not say where the turbines would be situated but did say:

> The ridgeline has been identified as having some of the most consistent wind found anywhere in the world. The harsh elements have restricted the growth of plant life on the ridgeline.

[134] The Mighty River Power brochures stated that early indications were that the reserve could support 50 – 60 turbines, but that further monitoring of the site's wind generation potential would be necessary. One brochure noted that the issue of transmission structures (such as pylons or poles) remained to be decided.

Official Information Act requests

[135] Mr Cookson made a request to the Council under the Official Information Act 1982 on 1 August 2006. He sought copies of a wide range of documents relating to the reserve and the wind farm proposal. The Council issued copies of 11 documents in response, with some deletions. The documents included reports on the wind farm, on the agreement between Mighty River Power and the Council, and on the change in the reserve's purpose. Mr Cookson was also sent the consultation document, both parts of the management plan and proposed amendments, and the 2003 Gazette Notice.

[136] The Council withheld the Water Quality Management Plan (WQMP), and the ecological and landscape reports (Mr Shaw and Mr Brown's reports). The Council's counsel, Mr Annabell, advised that the reports were withheld for reasons of commercial confidentiality. However, Mr Annabell noted that some of the information in the reports was included in the documents which were disclosed.

[137] Mr Cookson challenged the claim that the WQMP and the ecological and landscape reports were commercially sensitive or would prejudice the Council's ability to carry out commercial activities or negotiations. Mr Annabell responded by providing further documents. These did not include the WQMP and the ecological and landscape reports, to which Mr Annabell did not make reference.

Information not made public

[138] Mr Adams produced a number of confidential documents the Council has discovered to the applicant society. These include the development agreement and related agreements, reports to Council meetings, the WQMP, ecological and landscape reports prepared for Mighty River Power, and Mighty River Power's indicative wind farm design.

The withheld reports

[139] Ms Dixon deposed that the consultation document omitted technical information on visual amenity, ecological impacts and water quality. While the Council had technical reports on these topics they were not made public. Mr Manson, an executive officer employed by the Council, deposed that the reports were supplied by Mighty River Power to the Council in order to give councillors an appreciation of the worst-case scenario in terms of the various environmental aspects of the wind farm.

[140] Mr Shaw, an ecologist in private practice, was engaged in 2005 to co-write a preliminary report on the proposed wind farm for Mighty River Power. He characterises his advice as "to some degree generic as no firm wind farm proposal had been identified at that stage". He co-wrote a draft report in May 2006 on rehabilitation and revegetation of the wind farm. Mr Shaw presented his findings and conclusions to the Department of Conservation in June 2006 and to councillors in September 2006. At this stage his view was that the wind farm would have negative impacts during the construction phase, but that these impacts could be minimised and mitigated.

[141] Mr Shaw's report is based on a desk-top evaluation of the interim wind farm proposal together with field observations of flora and fauna. He observes that bird strike is not likely to be a significant problem, but that investigations of the migration patterns of particular species would be needed to obtain a more accurate understanding. Mr Shaw characterised the 42 ha vegetation clearance proposed at

that point as "significant" (in accordance with the advice of the Department of Conservation, clearance will now be limited to 25 ha). Much of the cleared area can be revegetated, however the report notes that this will a slow process. Mr Shaw's report advises that a significant nett gain in indigenous vegetation could be gained by returning over 100 ha of exotic forest and over 200 ha of rank grasses to indigenous vegetation. The report observes that the ecopark could be a means of providing significant mitigation.

[142] Mr Brown, a landscape architect, was engaged by Mighty River Power in October 2005 to write a report on the landscape and amenity effects of the proposed wind farm. He deposes that this assessment was to be fairly general as there was no specific wind farm proposal at that time. However, it was indicated that there would be approximately 63 turbines and that they would take up a large and highly visible part of the reserve. Mr Brown's conclusion was that because of the wind farm's rural catchment the turbines would have a high level of visual exposure. However, within Palmerston North itself the turbines would generally not be clearly visible.

[143] Mr Brown advised in the report that the wind farm would typically be visible from Fielding, Ashhurst, Pahiatua and Woodville as well as from Palmerston North. He continued:

> But for peripheral parts of the visual catchment, most vantage points exposed to the Turitea wind farm would reveal 10 or more turbines. Buildings, vegetation and landscape features would limit views of the turbines in some areas. Within urban areas such as Palmerston North and Pahiatua it would be difficult to find locations from which the wind farm would be clearly visible. Fifteen viewpoints were sampled, of which fourteen were rated as having a moderate to high overall 'impact rating'.

[144] Mr Franklin, a civil engineer, was engaged by Mighty River Power to provide a WQMP for the proposed wind farm. The WQMP was presented to Mighty River Power on 24 May 2006. Mr Franklin deposes that in developing the WQMP he did not identify that the wind farm would give rise to any unacceptable risks to water quality in the catchment and/or the operation of the water treatment plant which could not be effectively avoided, remedied, or mitigated.

[145] The WQMP identifies several factors having possible adverse effects on water quality. Sediment may enter watercourses from bare or disturbed soil areas created during the installation of the wind farm. Contamination from oil or lubricants (from turbines or vehicles) or washroom and toilet facilities may enter watercourses. Cement and related debris may contaminate watercourses and possibly shut down the water treatment plant temporarily. Detergent from equipment cleaning is another potential contaminant. A final source of contamination is rubbish or debris from construction or maintenance activities.

[146] The WQMP outlines monitoring to be undertaken at different phases of the project, with trigger points for investigation of potential problems. Water quality protection measures, such as sediment control, would be incorporated into the wind farm project. The document also discusses pine forest harvesting, which will go ahead regardless of the decision with regard to the wind farm.

[147] Ms Barton, a consultant planner, gives evidence that at the time of Mr Shaw's report and Mr Brown's report a number of key elements of the wind farm had not been finalised. These included the location, number and size of the turbines, the extent of the tracking and roading, the extent of the areas of clearance, and the volume of the earthworks. Ms Barton's evidence is that there is a danger that experts might be compromised by the early disclosure of such reports to the public. As the scale and nature of the wind farm plan is modified as the proposal is being formulated, early release of these reports might, she deposes, give rise to an inaccurate picture being formed in the minds of the public.

[148] Mr Manson's evidence is to similar effect. He specifies that the risk was that the information in the reports would be inaccurate in that it would not reflect the actual effects of the wind farm ultimately designed. Clearly, the issue was not that the reports were in any way inaccurate in themselves. The technical information was also seen as being germane to the resource consent process rather than the change of the purpose of the reserve. Mr Manson deposes that he was concerned that disclosing the reports would have created "an uncontrolled and irrational process" requiring Mighty River Power to explain the basis of the reports.

Reserves Act and Resource Management Act

[149] Evidence was given for the Council that the consultation process about the change of purpose under the Reserves Act is separate from the resource consent application under the Resource Management Act and quite different in nature. A number of deponents repeated the theme that a Reserves Act decision is about land status and a resource consent decision is about land use.

[150] Ms Barton gave detailed expert evidence on the different processes under the two statutes. Her evidence canvassed the necessary elements of the assessment of environmental effects required for an application for resource consent for a wind farm. This would include the visual, ecological and noise impacts of the wind farm. The likely benefits of developing renewable electricity and an eco-park would also be addressed. Ms Barton deposed that the Reserves Act does not provide for the same level of rigorous assessment of the particular proposal.

Conclusion

[151] The "promotional" flavour of the consultation document and other elements of the consultation process is evident. But that was due to the Council's role of initiating policy, which I have held to be lawful. The Council promoted the addition of a new purpose and the allied eco-park concept but also gave information about the likely impact if the change in land status were to lead to a change in land use.

[152] It did not give fine detail about possible adverse effects on water quality in the catchment. But in my view there was no need for that information, which would become important at the later resource consent stage.

[153] Moreover:

a) It cannot be said that withheld information indicated that the effect on water quality would be so adverse as to run counter to the conservation policies of the Reserves Act.

b) The “significant” vegetation clearance would have a temporary effect only and there would be a significant ultimate nett gain in indigenous vegetation.

c) Since the number and actual position of the proposed turbines had not been fixed, the Council could not be expected to include precise information in its consultation process. The visibility of the turbines was self-evident. Their significance could be appraised by reference to the existing substantial number of wind turbines visible to the north and south.

[154] The Council consulted with a number of interested parties as well as the general public using a number of means, such as the consultation document, the open day, and the information evening. It gave ample time for submitters to be heard and gave proper consideration to the submissions received.

[155] Returning to the two major purposes of consultation, it cannot fairly be said that anyone truly interested has lacked the opportunity to respond to the essential issues in the decision-making process. Nor that there has been loss of opportunity for the public to assist the Council to reach the optimum conclusion, whether or not that conclusion is accepted.

[156] I am satisfied that the requirements of the common law, the Reserves Act, and the Local Government Act as to consultation have not been infringed.

Discretion

[157] It follows that the issue of exercise of discretion does not arise.

Decision

[158] The application fails and is dismissed.

Costs

[159] Counsel agreed that costs should be reserved. I adopt that course. But it should be recorded that the debate between the supporters and opponents of wind turbines and the competing claims of providing clean power and altering the landscape are of great public importance both legally and factually in New Zealand as elsewhere (see *Le Monde Diplomatique* of February 2007 at 20-21). It is arguable that it is very much in the public interest that the difficult and important issues arising in this case should have been argued: cf *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 525-6 (PC) cited in *McGechan on Procedure* at HR46 Intro 16(4).

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W D Baragwanath J