**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA702/2013**
**[2014] NZCA 601**

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| BETWEEN | PALMERSTON NORTH CITY COUNCIL<br>Appellant |
| AND | NEW ZEALAND WINDFARMS LIMITED<br>Respondent |

Hearing: 12 August 2014

Court: Randerson, Harrison and Wild JJ

Counsel: J W Maassen and N Jessen for Appellant
JBM Smith QC and M J Slyfield for Respondent

Judgment: 9 December 2014 at 3.30 pm

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**

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**REASONS**

**HARRISON AND WILD JJ**

(Given by Wild J)

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## Introduction

[1] When granting the respondent New Zealand Windfarms Ltd (Windfarms) a resource consent in February 2005 to build and operate Te Rere Hau Windfarm (the Windfarm) in the hills to the east of Palmerston North, the first of 30 conditions attached by the appellant, the Palmerston North City Council (the Council), was this:

> **General**
>
> 1. The proposed Te Rere Hau Wind Farm be constructed and operated generally in accordance with all the information, site plans and drawings accompanying the application or submitted as additional information. Each turbine shall be located within a 20m radius of its nominated coordinates as outlined in the Application (contained on File No: N21/PLN – Plans drawn by Connell Wagner drawing number 101E, 3A).
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> Advice Note: (a) the ability to alter the specific location of each turbine within a 20m radius is to provide for likely movement related to detailed design layout and the recommendations made in the Applicant's ecologist's report and (b) non-reflective finishes shall be used and be maintained in such a manner to prevent blade glint and to assist in reducing the prominence of the turbines when viewed from a distance.

[2] The issue on this appeal is whether Condition 1 enables the Council to hold Windfarms to its prediction of the noise effects which would be generated at source

by each of the proposed wind turbine generators (turbines). By "at source" we mean the sound measured at the turbine. The Environment Court held the Council could use Condition 1 in that way and made a declaration:[1]

> That condition 1 of the resource consent is being and has been breached by [Windfarms] in that the Te Rere Hau wind farm has been operated in such a way that the noise effects at local residential locations are considerably greater than those predicted in the application.

[3] On appeal to the High Court, Williams J held Condition 1 could not be used in that way, and set aside the declaration made by the Environment Court.[2]

[4] In a further judgment delivered on 11 October 2013, Williams J granted the Council leave to appeal to this Court on three questions of law.[3] We will footnote those questions, but need not set them out in this judgment.[4] What both parties need to know is whether the Council can hold Windfarms to Condition 1 in the way outlined in [2] above, or whether it needs to rely on the specific noise Conditions 4 and 5. These are:

> **Noise**
>
> …
>
> 4. [Turbine] sound levels shall not exceed:
>
> - the best fit regression curve of the A-weighted background sound level (L95) plus 5dB; and
>
> - 40dBA

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1 *Palmerston North City Council v New Zealand Windfarms Ltd* [2012] NZEnvC 133, (2012) 17 ELRNZ 10 at [108] [Environment Court judgment].

2 *New Zealand Windfarms Ltd v Palmerston North City Council* [2013] NZHC 1504 at [73] [High Court judgment].

3 *Palmerston North City Council v New Zealand Windfarms Ltd* [2013] NZHC 2654.

4 (a) Does condition 1 of the Te Rere Hau resource consent apply to either or both of (i) and (ii) below:
   (i) The noise generating characteristics and performance of the turbines installed at the Te Rere Hau windfarm. Specifically, the turbines' sound power level and the special audibility of the sound they generate;
   (ii) The noise effects at receiver locations based on the assessment of the scale character and intensity of those effects in the application for the Te Rere Hau windfarm including noise contours?

   (b) Is it lawful for the High Court (rather than the Environment Court) to decide whether or not the Te Rere Hau windfarm has been constructed, operated or maintained in a manner that complies with condition 1?

   (c) If the answer to question (a) is 'no' in both cases and the answer to question (b) is 'yes' then was Williams J right as to the scope of the application for the Te Rere Hau windfarm?

whichever is the higher.

5. The sound levels shall be measured and controlled using NZS6808:1998 *Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators* but with the following additional requirements to be met.

…

We explain Condition 4 in [15] below. Essentially, it gives effect to NZS6808:1998 *Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators*, the New Zealand Standard applied when measuring and controlling sound levels (we will refer to that as NZS6808).[5] Similarly, Condition 5 applies NZS6808 to the measurement of noise levels at the notional boundaries of the residential properties closest to the Windfarm. Because Condition 5 is very detailed, we have set the whole of it out as an appendix to this judgment.

**Summary of our view**

[5] We agree with Williams J that Windfarms' predictions of the noise effects the turbines would generate at source were not in themselves limits on the "scope" of the Windfarm, enforceable by the Council through Condition 1. We consider the Judge rightly regarded those predictions as components or "inputs" in the calculation specified in NZS6808 for assessing noise effects received at the boundaries of the closest neighbouring residential properties.

[6] The Council's District Plan required the assessment of noise effects to rely on the New Zealand Standard appropriate to the activity, as it did.[6] Significantly, NZS6808 could not be applied to the noise effects generated by the turbines at source, a point accepted by Mr Maassen. NZS6808 was applied through Conditions 4 and 5. We agree with, and cannot improve upon, the key reasoning of Williams J which we set out in [33] below.

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5 The New Zealand Standard is substantially based on the international standard (IEC61400-11). IEC is the International Electrotechnical Commission. With 88 full or associate member countries, the IEC is the world's leading organisation preparing and publishing international standards for electrotechnology. New Zealand is a full member of the IEC.

6 Alistair Aburn *Report and Decision of Hearings Commissioner* (11 February 2005) at [324] [Commissioner's decision].

**Why did the appellant not enforce the specific sound level conditions?**

[7] Given the specific noise Conditions 4 and 5, it might immediately be asked: why did or does the Council not simply enforce those conditions?

[8] Mr Maassen gave us two answers:

(a) Windfarms failed to comply with the monitoring requirements in Condition 5(h) to 5(s). Consequently, the Council did not have the evidentiary basis necessary to enforce Condition 4.

(b) It is simpler to measure sound at source, that is at the site of each turbine. Consequently it is easier to enforce any "exceedance" of the predicted sound level at source.

[9] As to the first of those answers, Mr Maassen informed us that the Council does now have a noise monitoring report based on data collected over three years. It also had a fixture on 29–31 October this year before the Environment Court for the hearing of its applications for declarations that Windfarms is in breach of Condition 4 and directing further monitoring pursuant to Condition 5. The Council had sought those declarations in its original application to the Environment Court, but did not pursue them at the hearing before the Environment Court in December 2011, for the reasons Mr Maassen explained. A temporary inability to enforce Condition 4 is not a sound basis for attempting to use Condition 1 in a manner not intended.

[10] As to the second answer, Mr Maassen drew an analogy with a resource consent for a discharge, for example a consent limiting the discharge of wastewater from a metered pipe into a river. Mr Maassen submitted:

> … you just go to the meter and you say look, you've exceeded your volume. To establish that there is a breach of the water quality limits in the consent would require multiple tests of water quality parameters in different flows, so it's a far more complex task, and that's why I say that really Conditions 4 and 5 are specific conditions responding to the environmental risk matrix that is described in the parameters of the activity.

The analogy with consent for a metered discharge of wastewater into a river is triply inapt. First, as the Council accepts, NZS6808 cannot be applied to limit the sound

generated by the turbines at source. For that reason there is no specific noise condition limiting noise levels at source. But those noise effects can be, and are, controlled and measured at the notional boundaries of the nearest neighbouring residential properties, by Conditions 4 and 5. Effectively, in terms of Mr Maassen's analogy, they are measured "downstream". Secondly, the analogy assumes any noise generated by turbines is harmful in and of itself, as any excess discharge of wastewater into a river will probably be. This is not the case, as we explain at [52] below. Thirdly, this second answer indicates the Council simply resorted to the most expedient course.

**Background**

[11] In September 2004 Windfarms applied to the Council for a resource consent for a windfarm comprising 104 turbines in the hills at the northern end of the Tararua Range approximately nine kilometres to the east of Palmerston North.

[12] The required Assessment of Environmental Effects (AEE) was filed in support of the application. Attachment 7 (of 13) to the AEE was a Noise Impact Assessment Report (NIAR) completed in August 2004 by Mr Malcolm Hunt of Malcolm Hunt Associates, Noise and Environmental Consultants. In that NIAR Mr Hunt calculated the sound power level (SPL) of the Windflow 500 (the type of turbine which was to be used in the Windfarm) as 100.7 dBA. He made that calculation based on measurements derived from the procedure set out in IEC61400-11 *Wind turbine generator systems – Part 11: Acoustic noise measurement techniques*, of the only operating prototype of the Windflow 500. That prototype was operating on Gebbies Pass on the Banks Peninsula in Canterbury.

[13] SPL is the level of sound energy created at source by a turbine. Because it measures the power of the sound created by the turbine rather than its audible noise, the human ear cannot hear SPL although a person can feel its effect. It is sound pressure level which measures the audible sound received by the ear. Sound pressure level (A-weighted, that is adjusted to the human audible range) is the metric used in standard noise control consent conditions, such as Condition 4 in this case. The sound from multiple turbines, as were proposed for the Windfarm, add together

to give the total sound pressure level at any given point. Like noise from a single turbine, cumulative noise decreases in sound pressure level as one moves further away from the turbines on the windfarm.

[14] Based also on Mr Hunt's testing of the Banks Peninsula prototype Windflow 500, the NIAR also assessed the turbines would not produce sound with Special Audible Characteristics (SACs). The NIAR stated: "On-site assessment and results of frequency analysis indicate the Windflow 500 is assessed as not producing sound with special audible characteristics." And, in its Appendix 3:

> No apparent tonal components were present within the measured sounds. The above spectra is consistent with the subjective evaluation made on-site whereby broadband aerodynamic sounds were mainly present with there being little or no detected sounds associated with mechanical equipment operation or electrical sounds.
>
> …
>
> No significant tonal components are present that would warrant a "tonal penalty" such as described in NZS6808:1998.

SACs are audible tones or impulses such as buzzes, hums, high pitched whines and so on. Sounds containing SACs can be annoying to the human ear at lower levels than sounds containing no SACs. Consequently, SPLs are given a 5 dBA loading when SACs are present in the noise effects in question.

[15] Condition 4 set the noise limit, measured as a sound pressure level, at whichever is the higher of 40 dBA or 5 dBA above background noise measured at the notional boundary of any receiving dwelling.[7] Condition 4 gave effect to NZS6808. The Standard recommended a limit on indoor noise levels of 30-35 dBA $L_{95}$ at any affected dwelling. To achieve this, the limit is set at 40 dBA $L_{95}$ outside the residence. $L_{95}$ is the noise level exceeded 95 per cent of the time at the particular location. NZS6808 sets out the recommended acceptable limit thus:

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[7] The notional boundary is a line drawn 20 m out from the dwelling in the direction of the noise generating turbine(s).

4.4.2 Acceptable limit

> As a guide to the limits of acceptability, the sound level from the [turbine] (or windfarm) should not exceed, at any residential site, and at any of the nominated windspeeds, the background sound level ($L_{95}$) by more than 5dBA, or a level of 40dBA $L_{95}$, whichever is the greater.

[16] Clause 4.5.1 of NZS6808 requires careful pre-consent monitoring of sound levels at residences where sound levels are predicted to exceed 35 dBA after establishment of a windfarm.

[17] In order to identify affected residences, Mr Hunt modelled $L_{95}$ background noise contours around the Windfarm at four different decibel levels. The 30 dBA contour was the lowest noise level and the furthest away from the proposed Windfarm. Only three residences came within that contour. On Mr Hunt's modelling, it was only at those three residences that the Windfarm might add enough extra noise to breach NZS6808. It appears Mr Hunt's modelling was wrong in three key respects:

(a) it underestimated the SPL generated by each turbine;

(b) contrary to NZS6808, it factored in the attenuating effect of topographical screening, that is, where there is no line of sight between the sources and receiver locations, and also overestimated that effect; and

(c) it made no allowance for SACs when the turbines did generate them, audible at 50 m from source.

[18] The Environment Court described the consequences of the errors in Mr Hunt's modelling in the following way:[8]

> [50] The conclusion contained in the NIAR that only three local residential locations would be affected by receipt of sounds at levels of 30dBA or more has proven to be wildly incorrect. The acoustic experts agreed that this is due to a combination of the increase in the sound power level generated by the turbines installed (on average about 5 decibels higher than stated in the NIAR) and an overestimation of topographical screening

8 Environment Court judgment, above n 1 (footnotes omitted).

> (in the order of 5 to 7 decibels). At the request of the Court, [Windfarms] produced amended noise contour maps showing the noise contours generated using a sound power level of 105.7dBA, with and without topographical screening. Taking the most conservative scenario of the amended sound power level and no topographical screening approximately 30 residences are shown within the 30dBA contour line and 16 of these are also within the 40dBA contour line.
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> [51] NZS6808:1998 specifies the equation to be used for the calculation of the outdoor sound level with distance from the source. The Standard notes that this equation does not take into account attenuation due to screening effects where there is no line of sight between the turbine and the receiver locations. The acoustic absorption and reflection effects due to vegetation and ground cover are also ignored.
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> [52] If this more conservative approach had been followed, the modelling would have predicted 16 residences within the 35dBA contour, even when using the incorrect sound power level of 100.7dBA. While the NIAR did show the effect of both a 50% and 100% reduction in the effect of topographical screening this was not considered to be realistic and was not reproduced in the primary AEE document. Mr Halstead told us that the updated NZS6808:2010 adopts ISO9613 (a sound propagation standard) and does take into account terrain shielding although in a different manner to that of the model used for the AEE.
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> [53] The actual noise levels at a number of residences have been measured. Data for residences along Ridgeview Road show that the levels of noise received from TRH are consistent with the AEE predictions for the prevailing winds (from the NW sector for approximately 66% of the time) but much higher for the less frequent downwind conditions (from the SE sector for approximately 29% of the time). Noise levels measured at the residences for the SSE winds are in the range 33 – 41dBA compared to the AEE predictions of 23 – 36dBA.

[19] "Wildly" is perhaps not an overly helpful way of describing the magnitude of the error. But undoubtedly Mr Hunt's assessments were significantly wrong with the result that people living in a much larger area on the boundaries of the Windfarm are affected by sound emitted by the turbines.

[20] As we have mentioned, Condition 5 set out the monitoring processes for measuring compliance with Condition 4.

[21] Following the grant of resource consent, construction of the Windfarm proceeded in stages and 65 of the 97 consented turbines were installed and began operating in September 2006 (Stage 1 with five turbines) and May 2009 (Stage 2 with 28 turbines). The 32 turbines in Stage 3 followed later. Stage 4 (with a further

32 turbines) is on hold, pending resolution of the problems with noise effects.[9] In about May 2009 the Council began receiving complaints about noise from the Windfarm from people living on its boundaries. By around October 2011, when this application was lodged, those complaints numbered over 500. By December 2011, the number had grown to 800.

[22] Windfarms investigated, testing four representative turbines. Their SPLs at an 8 m/s wind speed were 103.3 dBA, 104.9 dBA, 105.6 dBA and 106.4 dBA respectively. Allowing for an agreed margin of error of between 1 and 2 dBA, Windfarms accepted these SPLs exceeded the 100.7 dBA prediction stated in the NIAR. The tests also showed the turbines were generating SACs audible at 50 m from source, contrary to Mr Hunt's prediction, although it remains unresolved whether the SACs are audible at points further afield – in particular, at neighbouring dwelling houses.

[23] In his judgment Williams J recorded:[10]

> [30] It is not yet known if the condition 4 upper limit of 40dBA or background and 5dBA is being breached. Initial calculations by Mr Halstead, the current acoustic engineer for [Windfarms], suggested that some down wind conditions (i.e. wind blowing from an SSE direction) did produce breaches of that standard at one property, but subsequent corrections by [Windfarms] suggested that may have been wrong. Monitoring continues.

[24] Counsel advised us that the extent, if any, to which the Windfarm is breaching Condition 4 would be in dispute at the hearing which took place in late October.

[25] Complaints from neighbours about the sound effects from the Windfarm led the Council to apply to the Environment Court for nine declarations. Because of the evidentiary difficulties we have referred to, the Council, at the December 2011 hearing, pursued only five of the declarations. Three of those declarations concerned Condition 5. For reasons the Court explained, it adjourned a decision on those three

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9 This fourth stage is within the territory of the Tararua District Council.

10 High Court judgment, above n 2.

applications until necessary monitoring had been completed.[11] In addition to the declaration set out in [2] above, the Court made a declaration:[12]

> That the acoustic information supplied in the AEE by the Respondent and the evidence of the Respondent was inaccurate to such an extent that Palmerston North City Council may rely on s128(1)(c) [of the Resource Management Act 1991] to conduct a review of the noise consent conditions applicable to the Te Rere Hau wind farm.

**The Environment Court's decision**

[26] The Environment Court described the AEE as "the bedrock upon which resource consent applications are founded".[13] It stated: "The need for accuracy and integrity in the application documents is self-evident."[14] The Court agreed with Windfarms's submission that Condition 1 "is a catchall condition which we understand to mean a general condition applying to all aspects of the consent".[15] It said: "such conditions … (in general terms) simply require that consent holders do what they said they were going to do in their applications".[16] The Court held Condition 1 had "the measure of certainty required to be a valid condition".[17]

[27] To the extent that Condition 1 conflicted with the specific noise level limit contained in Condition 4, the Court accepted Windfarms' submission that Condition 4 must prevail. But it did not accept there was conflict because Condition 1 applied to the information contained in the NIAR about sound power levels and SACs created at source by a turbine, whereas Conditions 4 and 5 addressed the noise received by neighbouring properties. The Court stated:[18]

> Condition 1 (and the NIAR) identifies the means (restricted sound power output and absence of SACs) by which [Windfarms] predicted it would be able to meet the noise requirement now contained in Conditions 4 and 5.

[28] At this point, the views of the three members of the Environment Court diverged. The facts that the turbines have a sound power level 5 dBA in excess of

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11 Environment Court judgment, above n 1, at [60].
12 At [132].
13 At [74].
14 At [74].
15 At [75].
16 At [75].
17 At [82].
18 At [93].

that stated in the NIAR and generate noise with SACs contrary to the statements contained in the NIAR led Judge Dwyer "to the conclusion that those facts of themselves mean [the Windfarm] was not constructed and is not operating as required by Condition 1".[19]

[29] The two Commissioners considered "a more wide ranging analysis is required".[20] The gist of their view was that the Windfarm could be operated in a way that complied generally with Condition 1 in terms of noise effects (and therefore presumably complied with Condition 4), but to date had not been. The declaration the Court made, which we have set out in [2] above, was narrower than had been sought by the Council.

[30] The balance of the Environment Court's decision dealt with the declaration relating to s 128 of the Resource Management Act 1991 (the Act), which we have set out in [25] above.

**The High Court's judgment**

[31] Williams J considered the appeal turned on the answers to two questions:[21]

(a) What was the intended acoustic scope of the application?

(b) What was (or were) the intended limit(s) on noise in the consent decision?

[32] Upon an objective reading of the NIAR, the Judge considered the SPL and SAC predictions were never matters of scope. They were not intended to be a parameter in their own right. Rather, they were components of the equation contained in cl 4.3.2 of NZS6808 which was the means by which noise levels at any given distance from source were predicted. The Judge noted that was the approach of Commissioner Aburn in his consent decision of 11 February 2005.[22] Mr Hunt's SPL and SAC predictions had provided the Commissioner with comfort that the

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19 At [95].
20 At [95].
21 High Court judgment, above n 2, at [53].
22 Commissioner's decision, above n 6.

scope applied for would not be exceeded. They were the means to that end. The Judge cited at some length from the Commissioner's decision in order to demonstrate this. The basis for Conditions 4 and 5 to set and monitor the accepted acoustic limits of the Windfarm was the Commissioner's finding that the level of noise is predicted to comply with the NZS6808 recommended noise levels.

[33] The key reasoning of Williams J is in this passage in his judgment:

> [62] In its simplest terms, I do not consider that the NIAR's SPL and SACs predictions were intended to go to scope. They related to *how* the predicted noise levels would be achieved, not what the levels should be. So operated "generally in accordance with the information accompanying the application" is to be read as affirming the scope of the application as the outer limit of consent. The term "operated" must mean operated within those limits because they were explicitly requested by the appellant and set by the consent commissioner as the allowable limits of operation. Here, conditions 1 and 4 are consistent. Properly interpreted they both say the wind farm must be operated so as to produce noise effects at the notional boundaries of local residents at no greater than 40dBA $L_{95}$ or 5dBA above background noise, whichever is higher. That is what [Windfarms] asked for. That must therefore be the scope of the application. Mr Hunt also said that these sound levels will be very achievable for [Windfarms] because of the positive noise generation characteristics of the *Windflow 500*. He was of course completely wrong, but that does not change what was actually asked for.

**The opposing submissions**

*For the Council*

[34] Fundamental to Mr Maassen's argument for the Council was a distinction he drew between what he termed Category 1 and Category 2 information. He submitted:

> Category 1 is that information relating to the noise performance specifications of [the turbines]. Category 2 information relates to the worst case assessment of effects calculated using Category 1 information and applying physical equations specified in the New Zealand Standard NZS6808:1998.

[35] Mr Maassen submitted Condition 1, applied to Category 1 information, operates as an "activity limit", although this is not a term of art. Condition 1, applied to Category 2 information, operates as a "worst case effect limit". In each case, the application was within the tolerances of the Condition 1 qualifier "generally".

[36] Condition 4 has a specific "red line" noise limit applied at residential boundaries (and monitored at one residence only) and prevails over Condition 1 with its "worst case effect limits" when it is more strict. That is, Condition 4 limits the proposal to a degree greater than was generally proposed.

[37] In Mr Maassen's submission the Environment Court correctly held:

(a) the NIAR was information for the purposes of Condition 1;

(b) the NIAR included the noise emission specifications of the turbine under NZS6808 and Condition 1 operated as an "activity limit" based on these (Category 1 information); and

(c) the NIAR included the worst case assessment under NZS6808 of the scale, character and intensity of acoustic effects as modelled using the equation in NZS6808 in the AEE, identifying that only three houses would experience noise effects exceeding 30 dBA (Category 2 information). This operated as a worst case effect limit under Condition 1.

[38] But Mr Maassen argued the majority of the Environment Court erred in holding that failure generally to comply with Category 1 information was not sufficient for a breach of Condition 1 despite being an "activity limit".[23] The Court held there also had to be general non-compliance with Category 2 information, that is, non-compliance with the "worst case effect limit". That error is also at odds with the Court's finding that the assessments in the NIAR of SPL and the absence of SACs "are statements of fact which are indisputably part of the information accompanying the application".[24]

[39] Mr Maassen submitted: "Put simply the Council argues that Condition 1 applies to Category 1 information and failure to generally comply must be sufficient as a breach of Condition 1."

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[23] Environment Court judgment, above n 1, at [95].
[24] At [91].

[40] Turning to the judgment of the High Court under appeal, Mr Maassen submitted Williams J had:

(a) interpreted Condition 1 as shorthand for the "intended scope" of what was sought and only applying to the "outer limits" of the effect intended by the applicant in the AEE; and

(b) determined the "intended scope" of the AEE as compliance in any location, anywhere, at any time with the NZS6808 recommended guideline limit of 40 dBA, or background noise level plus 35 dBA (we think this should be plus 5 dBA) and that the scope was not limited by the Categories 1 and 2 information.

[41] The difficulty counsel saw with this interpretation is that Condition 1 applies to all information in the AEE, not just the *intended* "outer limits" of effects, and it introduces the term "scope" as a confusing substitution for the actual words of Condition 1, together with an inquiry into the applicant's intention.

[42] Mr Maassen then advanced some additional reasons why Williams J's findings as to the "scope" of the application were erroneous. In particular, counsel submitted Category 1 and Category 2 information were the "outer limits", and a change of scope can arise from change to the activity proposed. He argued the Judge had illegitimately contradicted and supplanted the findings of the Environment Court in a specialist and technical field where he should have accorded proper deference to the Environment Court.

[43] But in Mr Maassen's submission, the core error by the Judge was in his [62], which we have set out in [33] above. In summary, Mr Maassen's points were:

(a) The Judge had answered the wrong question concerning the interpretation and application of Condition 1. The AEE is objective. Intention is irrelevant. The Judge's conclusion that the stated specifications of the turbines were incidental matters of no consequence was unreasonable and lacked an evidential basis. In

practical terms it means Windfarms anticipated it may not be able to build all of its Windfarm which is absurd.

(b) The SPLs are part of "how" the activity is to be conducted, and also go to scope. The "how" cannot change where it materially increases potential effects and the environmental risks.

(c) The "how" is not prediction in the sense in which that term is normally used. It is a statement of fact concerning the activity or proposal. It did not relate to how the guideline limits would be achieved. Rather it was used to apply an equation to give an accurate "worst case" prediction.

(d) "What the effect limit should be" is not the function of the AEE, but of the decision-maker. The AEE assesses potential effects of an activity or proposal. If key information in an AEE is only what the limits should be at any residential location, but not as to the "where", "what" and "how" then AEEs and Condition 1 are practically useless to the public and not fit for purpose.

(e) The true context is that the AEE only said the guideline limit (NZS6808) was relevant for three houses. One does not set a guideline limit intending it to apply to houses that are stated to experience nil effect, that is, less than 30 dBA. Williams J's analysis is "decontextualised", not the Environment Court's as the Judge claimed.

[44] Mr Maassen argued Williams J was plainly swayed by the availability of an alternative remedy under s 128 of the Act,[25] which is no guide to the interpretation of Condition 1 and is not a remedy for an applicant carrying out the activity otherwise than as stated in an application.

[45] Mr Maassen outlined the Council's position as follows:

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[25] Mr Maassen referred to the High Court judgment, above n 2, at [65]–[72].

(a) it seeks restoration of the declaration (set out in [2] above) made by the Environment Court;

(b) it then wants the matter referred back to the Environment Court to reconsider the declaration originally sought by the Council, on the basis Judge Dwyer's conclusion, seemingly confirmed by all members of the Court, is right;[26]

(c) it considers Windfarms does not have resource consent for the completed stages of the Windfarm, as they have been and are being operated. The consent granted is "a nullity";

(d) it wants Windfarms to apply afresh under s 88 of the Act for a resource consent for those three completed stages, and for the yet to be built Stage 4. It wants that fresh application "to be evaluated fully and for the affected public to have full participation in decision making on that application"; and

(e) notwithstanding the declaration made by the Environment Court upon the Council's application, and the lack of challenge to that declaration by Windfarms, it does not consider the s 128 review process is appropriate:

(i) how s 128 assists with the interpretation question (interpretation of Condition 1 that is) is unclear. If s 128 is a sufficient response then it has far reaching implications for the application of Condition 1 in resource consents;

(ii) the question is what noise emissions and effects are "expressly allowed". Breach of the boundaries of the consent needs no

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[26] The declaration originally sought was (Environment Court judgment, above n 1, at [3]):

> 1.9 That condition 1 of the resource consent is being and has been breached by the respondent in that the Te Rere Hau wind farm is operated at levels higher than those predicted in the application.

remedy other than the cessation of the activity or proper authorisation of it; and

(iii) in any event it is incorrect to describe as an "inaccuracy" the performance of an activity contrary to that stated in the application or in excess of the stated "worst case" effects.

*For Windfarms*

[46] Windfarms supported the judgment of Williams J in the High Court. Mr Smith QC submitted the central issue is whether, as a matter of interpretation, the predictions of SPLs and SACs in the NIAR were intended in themselves to be parameters enforceable through the auspices of Condition 1, or whether they were merely inputs into the calculations which, through Conditions 4 and 5, made compliance with NZS6808 the control on noise effects.

[47] Mr Smith submitted the findings of Williams J should be upheld because they:

(a) are consistent with the authorities on the interpretation of resource consents;[27]

(b) sensibly resolve any potential conflict between Conditions 1, and 4 and 5, by confirming that Condition 1 is not intended to regulate noise effects. Conversely, the Council's approach potentially involves conflict between the conditions. Theoretically, the Windfarm could operate in compliance with Conditions 4 and 5, but in breach of Condition 1 if interpreted as importing the NIAR noise limit of 100.7 dBA on noise generation at the turbine. That interpretation is neither tenable nor sensible;

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[27] Mr Smith QC cited *Meadow 3 Ltd v van Brandenburg* HC Christchurch CIV-2007-409-1695, 30 May 2008 at [32]–[33]; *Red Hill Properties Ltd v Papakura District Council* (2000) 6 ELRNZ 157 (HC) at [45]; *JIT Hillend Investments Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2009-425-479, 15 December 2009; and *Manukau City Council v Warren Fowler Ltd* EnvC Christchurch C124/98, 19 November 1998.

(c) involve an appropriate purposive approach to the information provided by the NIAR; and

(d) appropriately recognise the decision-making process of the Hearings Commissioner to grant the resource consent, the material that contributed to his decision (including the information the Council relies on) and his reasons for his decision.

[48] Section 128, in Mr Smith's submission, is not irrelevant. Its relevance is that it provides a remedy for the Council in the present situation, indeed it is "purpose built for these circumstances". The section allows the Council to review the conditions of a resource consent if it "contained inaccuracies which materially influence the decision [granting the consent]". Section 130 contains wide powers in respect of any such review. The existence of s 128 means a court does not need to interpret Condition 1 to make all information provided in the application into binding parameters of the consent in order to ensure the information provided is accurate. Mr Smith accepted the errors in the NIAR "fundamentally call into question whether the current conditions (including 4 and 5) are sufficient to manage the noise effects of [the Windfarm]", and urged the Council to embark on the s 128 review procedure.

**Our view**

[49] As already indicated, in our view Williams J is correct. Of the impacts of the proposed windfarm, noise was probably the most important. The decision of the Hearings Commissioner, Mr Alistair Aburn, appointed by the Council to decide Windfarms' application, demonstrates this. "Noise" tops the Commissioner's list of 12 "negative" points made in submissions.[28]

[50] The Council, before the Hearings Commissioner, rightly accepted noise was appropriately dealt with by requiring Windfarms to comply with NZS6808. That is the established Standard for controlling sound produced by wind turbines.

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[28] Commissioner's decision, above n 6, at [23].

[51] Mr Maassen's confirmation, recorded at [6] above, that NZS6808 is not applicable to sound generated by the turbines at source is significant, but not surprising. The Act has the purpose of promoting sustainable management of natural and physical resources.[29] The meaning of "sustainable management" includes managing the development of physical resources, such as the Windfarm, in a way which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while:[30]

> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

"Effect" includes any adverse effect, regardless of its scale, intensity, duration or frequency.[31] "Environment" includes amenity values.[32] The obvious one here is avoiding people living on the boundaries of the Windfarm being adversely affected by noise from the Windfarm. No doubt, the Council publicly notified Windfarms' application for resource consent because it was not satisfied "[t]he adverse effects of the activity on the environment will be minor".[33]

[52] All of this underlines that the amount of noise generated by the turbines at source does not matter, because it has no "adverse effects" (to use the wording of the Act) on other people. It is only the noise which reaches the places where other people live or work which is of concern. Consistent with that, the Council's District Plan requires windfarm applications to be assessed to "avoid, remedy or mitigate the effects of noise … on the amenity of the surrounding area".[34]

[53] It was for those reasons that the predicted SPLs and SACs at source were inputs or factors in the calculation of sound levels at the notional boundaries of adjoining properties, and not "parameters in their own right".[35]

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29 Resource Management Act 1991, s 5(1).
30 Section 5(2).
31 Section 3.
32 Section 2(1), definition of "environment", para (c).
33 Resource Management Act, s 93(1)(b). The section in that form was in force at the time the application for resource consent was made in 2004. It was repealed on 1 October 2009.
34 Palmerston North City Council District Plan, r 9.9.2(b).
35 High Court judgment, above n 2, at [56].

[54] Condition 4 is the condition expressly and specifically limiting sound at the notional boundaries of adjoining properties, so that it does not adversely effect people living and working on those properties. The monitoring requirements of Condition 5 demonstrate this. If Condition 4 is not being complied with, the Council has a straightforward remedy.

[55] It seems to us that Condition 4 remains appropriate, notwithstanding that many more than three properties are potentially adversely affected by noise from the Windfarm. The Condition simply applies to more rather than fewer affected properties. But, if, for some reason, Condition 4 is inadequate or inappropriate to deal with sound because the predictions on which it is founded are incorrect, then s 128 is the appropriate course. We agree with Williams J who said just that at the end of his judgment, and with Mr Smith's submission to like effect.

[56] It is obviously vital that the Council has effective means to control adverse effects on others from the noise generated by the Windfarm. It does: Conditions 4 and 5, and s 128. Resort to Condition 1 is as unnecessary as it is inappropriate in the circumstances here.

[57] What then is the point or purpose of Condition 1? It is a condition now routinely attached to resource consents. Its likely genesis is the doubt that existed as to whether a court could refer to the application for a resource consent and the documentation accompanying it for clarification as to the scope of the consent ultimately granted. For example, in *Attorney-General v Codner* McMullin J stated that the conditional use consent in issue "must be construed by reference to the written terms of that consent only; not by reference to the application, much less to the evidence tendered in support of it".[36] But McMullin J acknowledged English authority holding that other documents can be referred to when interpreting a planning permission, if incorporated into the permission by reference.[37] The decision of the Planning Tribunal in *Queenstown Bungy Centre Ltd v Hensman*

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[36] *Attorney-General v Codner* [1973] 1 NZLR 545 (SC) at 553 (SC refers to the old High Court).
[37] At 551 and 552.

instances a different approach.[38] The Tribunal construed the consent by reference to the application, explaining:[39]

> It is plain from reading the Council's decision, and also from reading the Tribunal's decision on appeal, that both relied on material that is contained in the accompanying document in order to reach their decisions to grant the application.

*Codner* and *Hensman* are the two cases cited by the author of the relevant chapter in the text *Environmental and Resource Management Law* in support of his view that:[40]

> The authorities are not entirely clear as to whether an original application for a resource consent and the documentation accompanying it, can be referred to where clarification is necessary as to the scope of the consent ultimately granted.

[58] Here, Condition 1 provided "each turbine shall be located within a 20 m radius of its nominated coordinates". That instances how Condition 1 might be applied. If turbines were located over 20 m away from their nominated coordinates, then Condition 1 could be invoked. Similarly, had the turbines been painted a highly reflective bright yellow. Clause (b) of the Advice Note attached to Condition 1 stipulated "non-reflective finishes shall be used and be maintained in such a manner to prevent blade glint and to assist in reducing the prominence of the turbines when viewed from a distance".

[59] Condition 1 has also been resorted to where no specific condition attaching to the resource consent deals with the problem. That occurred in *Gillies Waiheke Ltd v Auckland City Council*.[41] Condition 1 to the consent granted in that case was in similar terms to Condition 1 here. In the margin of one of the plans submitted with the application was the notation:[42]

> Earthwork: $20m^2$ allowed
> Approximately $765m^2$ proposed

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38 *Queenstown Bungy Centre Ltd v Hensman* [1994] NZRMA 360 (PT).
39 At 371.
40 David Kirkpatrick "Land use and subdivision" in Derek Nolan (ed) *Environmental and Resource Management Law* (4th ed, LexisNexis, Wellington, 2011) 241 at [4.65].
41 *Gillies Waiheke Ltd v Auckland City Council* HC Auckland A131/02, 20 December 2002.
42 It was common ground that $m^2$ should have read $m^3$.

Earthworks of some 2,300 $m^3$ were undertaken on the site. The Council prosecuted the applicants. The High Court Judge considered Condition 1 identified and incorporated the plans submitted with the application as well as the information contained on those plans and in other parts of the application and environmental assessment.[43] In dismissing the appeals, this Court's decision is silent about the effect of Condition 1.[44] But this Court was in no doubt, along with the Judges in the lower Courts, that the notation on the plan, read objectively, "imposed an upper limitation for earthworks".[45]

[60] In [34] to [35] above we detailed the construct of Category 1 and Category 2 information which underlays Mr Maassen's argument for the Council. This was his own construct. Our understanding of the nub of Mr Maassen's argument is that Condition 1 (using Category 1 information) applies to and limits noise generated by the turbines at source. So it operates as an "activity limit". The argument viewed the consented activity as comprising what is happening at the sites of the turbines. In terms of noise, the argument imposes the limits at source and not at the boundaries of neighbouring properties. The increase in noise effects at source has changed the activity from that proposed in the application.

[61] Mr Maassen's argument, at least as we understand it, rather sidelined the operation of Condition 1 (Category 2 information) by saying it operated to limit noise at the boundaries as a "worst case effect limit", whatever that conveys.

[62] Mr Maassen supported his argument that it is Condition 1 which controls the scope, scale and intensity of the Windfarm, in particular its acoustic scope, by referring to the High Court's decision in *Atkins v Napier City Council*.[46] *Atkins* concerned an application for a resource consent for a childcare facility in suburban Napier. The AEE annexed to the application had contained a detailed expert assessment of predicted noise levels, stating the proposal complied with the Council's permitted activity daytime noise limit of 45 dBA $L_{10}$, measured at any point beyond the site boundary. The Council granted a consent.

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43 At [26].
44 *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385 (CA).
45 At [26].
46 *Atkins v Napier City Council* (2008) 15 ELRNZ 84 (HC).

[63] Several neighbouring residents appealed to the Environment Court. By the time the matter came before the Environment Court it was common ground that the generated noise over the relevant receiving boundaries would likely be in the order of 50 dBA $L_{10}$. The issue for the High Court was whether, in that situation, the Environment Court had jurisdiction to embark on the appeal, or should have treated the application as a nullity from the outset. From cases which had dealt with that type of situation, the Court distilled this test:[47]

> … whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:
>
> - The scale or intensity of the proposed activity, or
> - The altered character or effects/impacts of the proposal.

[64] *Atkins* was not a case turning – as does the present appeal – on the application of a condition similar to Condition 1. Indeed, one of the conditions imposed by the Napier City Council in granting resource consent related specifically to noise. That condition limited the noise generated by the childcare facility received at the boundaries of the neighbouring properties, in a similar way to Condition 4 here. So, if it has any relevance, *Atkins* perhaps supports Windfarms rather than the Council, and indeed Mr Smith relied on it. He submitted *Atkins* demonstrated the distinction to be drawn between a windfarm as an activity, and the noise effects of that activity. It is the former that the consent authorises. Information or predictions in the application as to the effects of the activity do not define or affect its scope.

[65] *Atkins* is primarily relevant to the situation which will have confronted the Environment Court at the hearing in late October. As outlined in [45](c) above, the Council's foreshadowed stance at that hearing was that the resource consent Windfarms holds is a nullity, because it does not permit an activity of the scale or intensity which is being operated.

[66] We have probably said enough to explain why we do not accept Mr Maassen's submission that Condition 1 is the control on the acoustic scope and

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47 At [20].

intensity of the Windfarm. In our view the controls are the specific noise Conditions 4 and 5 which are rightly imposed at the boundaries of the Windfarm with neighbouring properties, in terms of the sound levels experienced by people living and working on those properties. We consider the Council's reliance on Condition 1 is an elaborate rationalisation for its perceived evidential difficulties in enforcing the specific noise Condition 4.

[67] Our focus has obviously been on the judgment of Williams J under appeal, and upon Mr Maassen's argument that it is wrong. But we do have two observations about the judgment of the Environment Court. First, of the assessments made by Mr Hunt in the NIAR, the Court stated: "They are statements of fact which are indisputably part of the information accompanying the application."[48]

[68] This view underpinned Judge Dwyer's conclusion "that those *facts* of themselves mean that [the Windfarm] was not constructed and is not operating as required by Condition 1".[49]

[69] We consider the Environment Court was wrong to categorise Mr Hunt's assessments as facts. They were not expressed by Mr Hunt in the NIAR to be facts, and could not have been. A fact is a thing that is known to have occurred or to exist or to be true. Mr Hunt was predicting the sound levels which would be generated by turbines yet to be manufactured and installed on a windfarm yet to be built.

[70] Our second observation relates to the reasoning of the other two members of the Court. One of the facts which influenced the two Commissioners to agree with Judge Dwyer's view that the Windfarm was being operated in breach of Condition 1 was: "Noise from [the Windfarm] received at local residential locations exceeds the levels predicted in the NIAR."[50]

[71] That "fact", if it is a fact, supports enforcing Condition 4 rather than Condition 1. On the two Commissioners' approach, if the noise levels at the notional boundaries of neighbouring residences are higher than those predicted in the NIAR

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48 Environment Court judgment, above n 1, at [91].
49 At [95] (emphasis added).
50 At [106].

but still within Condition 4, then the Environment Court was enforcing a breach of Condition 1 when it conflicted with Condition 4. Yet the Court had expressly accepted that any conflict should be resolved in favour of the specific Condition 4.

[72] While it could be said the Windfarm is not being "operated generally" in accordance with the SPL and SAC predictions in the NIAR "accompanying the application", we do not consider Condition 1 was intended to be the control on sound levels generated. To suggest it was is to render Conditions 4 and 5 largely if not completely otiose. It is not a case of reading Condition 1 down, but the converse. Mr Maassen's argument seeks to have Condition 1 do work which expressly, and quite specifically, Conditions 4 and 5 were intended to do.

**Result**

[73] We can see no error in the approach Williams J took to Condition 1. Indeed, we agree with the Judge's reasoning.

[74] In accordance with the majority, the appeal is dismissed.

[75] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

**RANDERSON J (DISSENTING)**

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[76] I gratefully adopt the background set out in the judgment of the majority but I regret that I am unable to agree with the conclusion reached.

[77] In brief summary, I would have found that the appeal be allowed for these reasons:

(a) Condition 1 of the resource consent is an important Condition and is enforceable in its own right.

(b) Condition 1 does not conflict with Conditions 4 and 5. All three conditions form part of the resource consent controlling the noise effects of the Windfarm.

(c) The information accompanying the application for the resource consent is relevant in determining the scope of the activity for which consent is given.

(d) The Environment Court was right to declare that the resource consent was being, and had been, breached in that it was operated in such a way that the noise effects at local residential locations were considerably greater than those predicted in the application.

**The statutory framework**

[78] The starting point is s 9(1) of the Act which relevantly provides:[51]

> **9 Restrictions on use of land**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; …

[79] Here, the Windfarm was a discretionary activity under the Council's District Plan and thus contravened a rule in the Plan. The use of land as a windfarm was not therefore permitted unless expressly allowed by a resource consent.

[80] Section 88(2) of the Act required Windfarms to provide an AEE in accordance with sch 4 of the Act in such detail as corresponded with the scale and significance of the effects that the activity may have on the environment. As noted by the majority, the terms "effects" and "environment" are widely defined.[52]

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[51] As in force in 2004 when the application for resource consent was made.

[52] Resource Management Act, ss 2 and 3.

[81] Schedule 4 required at the relevant time that the AEE include (amongst other things) a description of the proposal;[53] an assessment of the actual or potential effects on the environment of the proposed activity;[54] an identification of the persons affected by the proposal; the consultation undertaken, if any, and any responses from those consulted;[55] and, where the scale and significance of the activity's effect are such that monitoring is required, a description of how, once the proposal is approved, effects will be monitored and by whom.[56]

[82] The mandatory requirement for a detailed AEE and the information contained in it are of critical importance in defining the scope of the activity "expressly allowed" by a resource consent. Importantly too, the information supplied in the AEE or otherwise in support of the application for resource consent is vital in assisting the relevant consent authority to determine whether the application should be publicly notified and the persons upon whom the application should be served.[57] As noted below, the admitted errors in the NIAR submitted as part of the AEE were such that the number and locations of persons affected were substantially greater than indicated.

[83] As noted in the High Court in *Gillies Waiheke Ltd*:[58]

> [22] A resource consent is defined by s 2 of the Act as having the meaning set out in s 87 and "includes all conditions to which that consent is subject". Under s 87, the resource consents available under the Act are defined. The one relevant in the present case is defined as:
>
> > A consent to do something that otherwise would contravene s 9 or s 13 (in this Act called a "land use consent").
>
> [23] It is plain from the definition of resource consent that the expression includes any conditions imposed. Consent authorities have extensive powers to impose conditions under s 108 of the Act. There is good reason for the Act to include the conditions of a resource consent in the definition of that expression. The conditions usually define (at least in part) the scope and extent of the consent granted. The proper scope of the resource consent cannot ordinarily be ascertained without reference to the conditions and

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53 Clause 1(a).
54 Clause 1(d).
55 Clause 1(h).
56 Clause 1(i).
57 Resource management Act, s 93 as in force in 2004 when the application for resource consent was made.
58 *Gillies Waiheke Ltd v Auckland City Council*, above n 41. I accept that this case is factually distinct from the present but the principles apply nevertheless.

> sometimes to other material such as the application and supporting information lodged with it. A resource consent in open ended terms is rarely granted.

[84] In upholding the outcome in *Gillies*, this Court said:[59]

> [22] It is convenient to begin by first noting that it is common ground – and has been the law for many years in this country – that in planning matters of this kind the scope of the permitted activity is to be determined not just by the bare consent, but also by reference to the supporting documentation which was submitted to obtain that consent. But even if that were not so, this consent was specifically subject to the condition (imposed pursuant to s 108 of the Resource Management Act 1991) that the proposed activity was to be carried out in accordance with the information and plans submitted as part of the application.

[85] It is accepted that a condition such as Condition 1 is commonly, if not invariably, included as a condition of a resource consent. The validity of such a condition is not in doubt. It follows from the definition of resource consent that the scope and the effect of the resource consent is controlled by the terms of the consent and all conditions imposed.

**Interpretation of the conditions of a resource consent**

[86] As this Court accepted in *Gillies*, the interpretation of a resource consent including the accompanying conditions is to be approached objectively and in context.[60] Relevant context may include the plans, drawings and other information submitted with the application for resource consent or subsequently and the terms of the district plan or any other relevant plan under the Act.[61]

[87] The purpose of a condition will also be a relevant consideration. The purpose of the conditions at issue in the present case became important for reasons canvassed by the majority. I discuss this below.

[88] In some cases, the interpretation of conditions may require resolution of the conflict between two or more conditions. But that is not an issue here. Both the Environment Court and the High Court found there was no conflict between

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59 *Gillies Waiheke Ltd v Auckland City Council*, above n 44, at [22].
60 At [23] and [25].
61 See also *Red Hill Properties Ltd v Papakura District Council*, above n 27, at [42]–[45].

Condition 1 and Conditions 4 and 5.[62] So there was no need to apply principles of interpretation such as the principle that a particular condition will usually override a general condition.

[89] The use of the word "generally" in Condition 1 does not affect its validity as an enforceable condition. It is intended to permit minor variations to the activity described in the application for resource consent and the accompanying documents. It does not permit the consent holder to conduct the activity in a materially different way from that described.

[90] Finally, in disagreement with the majority, the term "information" in Condition 1 is not confined to facts submitted with the application for resource consent. I agree with the High Court Judge that the material contained in the NIAR accompanying the AEE was "information" for the purposes of the Condition. In my view, to the extent that the relevant material contained predictions as to the noise effects of the proposal, it was nevertheless "information" whether or not it could be regarded as established fact.[63] As such, it prima facie fell within the terms of Condition 1.

**The interpretation of the conditions in this case**

[91] The principal point of departure from the views of the majority is that I consider Conditions 1, 4 and 5 are all relevant to the control of the noise effects of the Windfarm and each are separately enforceable by the Council.

[92] In simple terms, the overall noise effects of the Windfarm are controlled by all three of the relevant Conditions. The information provided in the NIAR was that the SPL of the Windflow 500 turbines specified for use in the Windfarm was calculated to be 100.7 dBA. This was based on measurements taken from a prototype of the Windflow 500 turbine operating in Canterbury. The NIAR also stated that the turbines would not produce sound with SACs. As such, it was said that there was no need for a "tonal penalty" (of 5 dBA) as provided in NZS6808.

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62 Environment Court judgment, above n 1, at [92]–[93]; High Court judgment, above n 2, at [50]-[51].

63 In a different context, see *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC) at 593.

[93] As explained in the majority judgment, SPL is the level of sound energy created at source by a turbine. While SPL does not by itself control the level of sound experienced at the boundary of affected properties in the vicinity of the turbine, it is a critical component of the equation provided for in NZS6808 to establish the maximum permitted noise levels at the affected properties. Those levels are referred to as sound pressure levels as also explained by the majority. As the Environment Court said: "Accurate determination of sound power level is essential for the accurate prediction of sound pressure level."[64]

[94] Differing from the majority, I consider the SPL at source does matter as part of the overall control of noise impacts and that the analogy of a discharge into a water body is appropriate. The volume and characteristics of contaminants to be discharged into a river or stream are both critical factors even if separate conditions are imposed in respect of the receiving environment such as the levels of contaminants after reasonable mixing in the receiving body of water. The information submitted in support of the application for a discharge permit would be expected to include information as to volume and characteristics of the discharge. Those parameters would usually be made the subject of a condition as well as separate conditions controlling the effects of the discharge in the receiving environment. In my view, it does not matter that the SPL is not itself harmful. It is significant as the derivation or source of the noise ultimately experienced in the receiving environment and in the calculation of sound pressure levels at affected properties.

[95] I accept that the SPL and SACs are taken into account as a component of the setting of the noise levels at affected properties but I do not agree with the majority's view that the noise effects of the activity were intended to be controlled solely by Conditions 4 and 5. The fact that not all of NZS6808 can be applied to Condition 1 is not a decisive point. To the contrary, the fact that significant components of the Standard apply to matters covered by Condition 1 supports the conclusion that all three conditions were intended to control the noise effects from the Windfarm.

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64 Environment Court judgment, above n 1, at [44].

[96] The purpose of Condition 1 is relevant to its interpretation. First, as indicated, the information submitted by the respondent was critical in determining the scope of the proposed activity. Windfarms was seeking consent to a windfarm utilising turbines with defined characteristics as to SPL and SACs. Secondly, as accepted by Windfarms, the inaccuracies in the NIAR meant that a much larger area was likely to be affected by noise from the Windfarm. This led to a major underestimate of the properties likely to be affected by noise. This in turn would have affected the Council's decision as to the residents who were to be specifically notified of the application for a resource consent.

[97] The importance of accuracy in the information submitted in an AEE was emphasised by the Environment Court when it said that the AEE is the "bedrock upon which resource consent applications are founded" and that "the need for accuracy and integrity in the application documents is self-evident".[65]

[98] The key role of the information submitted with the application is also underlined by NZS6808 itself. Clause 4.4.1 stipulates that it is necessary to compare the predicted windfarm sound levels with background sound levels measured in accordance with cl 4.5. As the majority point out, cl 4.5.1 of the Standard recommends that background sound level measurements be carried out where predicted sound levels of 35 dBA or higher are calculated for relevant locations. Detailed provisions are also contained in the Standard for measurement locations. These requirements are contained in a section of the standard headed "Preliminary Planning Issues – Pre-Installation". They apply before any consent is given and the information supplied in the NIAR was no doubt intended to comply with these requirements.

[99] In my view, Conditions 1, 4 and 5 all apply in differing ways to the overall control of noise effects. In the absence of any conflict between those provisions, all could be separately enforced. With respect to the view of the majority and to the opinion of the High Court Judge, Condition 1 was also relevant to the scope of the activity for which consent was given. It was critical to determining what was

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[65] Environment Court judgment, above n 1, at [74].

expressly allowed by the terms of the resource consent for the purposes of s 9(1) of the Act.

**Was it appropriate for the Environment Court to declare there was a breach of Condition 1?**

[100] I am satisfied that the evidence strongly supported the making of the declaration in the form described at [2] of the majority judgment. Mr Smith did not dispute that there were material errors in the information contained in the NIAR in the three key respects identified at [17] of the majority judgment. Nor did he dispute that the consequences of those errors were as described by the Environment Court and summarised at [18] of the majority judgment.

[101] As the High Court Judge recorded, a relatively small difference in decibel levels can result in a major difference in the subjective appreciation of loudness, a phenomenon that is well understood by acoustic experts.[66]

[102] I agree it was theoretically possible for the Council to seek to enforce Conditions 4 and 5 rather than Condition 1 but it is clear why that did not happen in the first instance. There was insufficient data available at the time of the Environment Court hearing to enable that to occur. The Council cannot be criticised in that respect.

[103] Finally, reference has been made to the Council's ability to serve notice on Windfarms of its intention to review the conditions of consent under s 128 of the Act. I do not view the availability of that course of action as having any bearing on the interpretation of the conditions or the ability of the Council to seek a declaration as to breach of Condition 1. It was no more than another remedy available to the Council as the Environment Court found.[67]

[104] As Mr Maassen pointed out, if Windfarms was operating the Windfarm in breach of Condition 1, that may have the consequence that its activities are outside the scope of the resource consent and are not therefore expressly allowed by the

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66 High Court judgment, above n 2, at [17].
67 Environment Court judgment, above n 1, at [132].

consent.[68] However, since this point was not argued before us in any detail, I say no more about it.

Solicitors:
Cooper Rapley, Palmerston North for Appellant
Atkins Holm Majurey, Auckland for Respondent

[68] *Gillies*, above n 41, at [24].

**APPENDIX**

5. The sound levels shall be measured and controlled using NZS6808:1998 – *Acoustics – The Assessment and Measurement of Sound from Wind Turbine Generators* but with the following additional requirements to be met.

   a) The 10 minute background sound levels (L95,10) shall be measured at the notional boundary of the dwelling existing at the date of this consent on Lot 2 DP 307640 (being the nearest dwelling to the wind turbines other than the dwellings on Lot 1 DP 20911 (130 Harrison Road), Lot 2 DP 85413 (629 Pahiatua Track) and Lot 1 DP 85413 (631 Pahiatua Track)), the principle being that if the WTG noise was excessive, then the largest difference between the post-installation noise level and the acceptable limit would be obtained.

   b) The 10 minute average wind speeds shall be measured at a height of 10 metres, and 30 metres along with the wind direction and these measurements shall be made at the same time as the 10 minute background L95,10 measurement (and called data pairs).

   c) The wind speed and wind direction measurements shall be made near to where the wind turbines are located. In any case these are not to be taken at a distance further than 1.5km from the measurement point.

   d) Background sound level L95,10 shall be correlated with wind speed, and wind direction and time of day.

   e) The size of each class in each parameter shall not be more than:

      - wind speed – 1 m/s bins
      - wind direction – 45˚ arc
      - time of day – night-time (1 hour after sunset to 1 hour before sunrise) and daytime

      The four predominant wind direction arcs are:

      - WNW – 270˚ – 315˚ relative to true north (typically 37% frequency)
      - NNW – 315˚ – 360˚ relative to true north (typically 28% frequency)
      - SSE – 135˚ – 180˚ relative to true north (typically 19% frequency)

- ESE – 90˚ – 135˚ relative to true north (typically 8% frequency)

The total number of data points obtained across all wind speeds and directions shall not be less than 1440. In respect of each of the four predominant 45˚ wind direction arcs, the total number of data points obtained for background sound or compliance testing shall (unless exceptional wind conditions preclude it) be not less than 200 (but not less than 350 for arcs SSE and ESE) and shall be sufficient to cover the range of wind speeds set out in NZS6808:1998.

In respect of the other four 45˚ wind direction arcs, there shall be no minimum number of data points for any or all wind speed bins.

f) The following effects shall be excluded from the analysis:
- seasonal sounds (eg of seasonal cicadas, crickets and frogs etc);
- other identifiable noise sources (eg tractors working at night, pumps, periods of precipitation, etc)

g) Sufficient data shall be gathered such that accurate best-fit regression curves can be obtained.

h) Post-installation compliance testing shall be carried out at the same location as the background sound monitoring as soon as reasonably practicable over a 6 month period after completion of the wind farm. If the wind farm is installed in stages then compliance testing shall be undertaken as soon as reasonably practicable over a 6 month period after each stage or annually if there is more than one stage installed per year. The applicant shall notify Council when a stage is completed.

i) The same parameters as required for the background noise monitoring shall also be measured for post-installation compliance testing. The

cut-in operation times of the WTG shall also be recorded and this shall be indicated on the results.

j) The best fit regression curve shall be provided for:
- the times [turbines] are operating above cut-in;
- wind speeds up to 14m/s at 10m height;
- wind directions including adequate samples for the 45° arc from the nearest wind turbines to the measurement location; and
- day and night.

k) The best fit regression curve of the L95,10 of the WTG's is not to exceed the noise limit under the same wind speed, wind direction and time of day.

l) If noise is judged to be tonal then the tonal correction as contained in NZS6808:1998 shall be applied except the assessment technique is that contained in IEC61400-11(2002) *Wind Turbines – Part 11 – Acoustics – Noise Measurement Technique*. No correction is to be applied to a measured noise level for the additive effect of the background noise.

m) Where reasonable doubt exists regarding compliance at any other dwelling (at the notional boundary) existing at the date of this consent (other than the dwellings on Lot 1 DP 20911 (130 Harrison Road), Lot 2 DP 85413 (629 Pahiatua Track) and Lot 1 DP 85413 (631 Pahiatua Track), then monitoring shall be repeated at that location.

n) Sound monitoring equipment shall conform to the following requirements:
- the complete measurement and analysis measurement system shall conform to the requirements of NZS6808:1998 and the Standards referred to by NZS6808, and

- microphones shall be fitted with a wind shield such that the noise generated by wind on the wind shield is, to the extent practicable, at least 10dBA below the noise being measured.

o) All results shall be provided in a timely manner to the Principal Planner, City Contacts Unit, Palmerston North City Council.

p) All sound monitoring shall be carried out by suitably qualified and experienced persons.

q) The consent holder shall provide all necessary data required to carry out the compliance testing including:
- wind speeds at 10m and 30m and direction during periods of compliance testing;
- the times at which individual wind turbines are operating above the cut-in wind speed;
- any other information required by the Principal Planner, City Contacts Unit, Palmerston North City Council.

r) The operator of the wind turbines shall pay all costs associated with compliance testing.

s) Where compliance is not achieved then the consent holder shall propose and implement remedies within three months. If the sound levels have not been remedied within that time then the consent holder shall cease operation of the WTG's until modifications are made to reduce the noise. Further operation of WTG operation shall only be for sound measurement checks as specifically agreed with Council's Principal Planner to demonstrate compliance.