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Our ref: 0439469

31 January 2007

Murray Kennedy
Divisional Manager of Water Supply, Parks and Forests
Greater Wellington Regional Council
By email murray.kennedy@gw.govt.nz

Dear Murray

Process adopted to review the Battle Hill Farm Forest Park management plan

Question

- 1 You have asked for legal advice on the process followed by Council in its review of the Battle Hill Forest Farm Park (**Battle Hill**) management plan (**management plan**).
- 2 This advice has been sought in response to a Committee resolution dated 19 September 2007, which sought clarification of the following:
 - 2.1 Is the process Council has followed in reviewing the Battle Hill management plan valid at law?
 - 2.2 Can Council amend its current draft management plan by including additional policies in support of the Puketiro wind farm?
 - 2.3 Has Council met any obligations it has at law undertake consultation in relation to its review of the management plan?
- 3 We understand that the above resolutions arose from a concern regarding the amendments proposed to be made to the draft management plan by the Sub-committee (after the Sub-committee had received and heard submissions). If adopted by the Committee (and

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Council) the amendments would form part of the final management plan for Battle Hill.

- 4 You have advised that the Committee did not adopt the amendment (and therefore the management plan in final form) and instead resolved to consult further on the draft management plan. Therefore at this time the draft management plan remains in draft pending further consultation.

Conclusions and recommendations

- 5 We have considered the process followed by Council. In our view:
- 5.1 The process followed by Council complies with sections 619 and 619C to 619I the Local Government Act 1974. In particular:
 - 5.1.1 Council complied with section 619F by giving notice and inviting the comment of interested parties in March 2006.
 - 5.1.2 In accordance with sections 619G and H, Council then publicly notified a draft management plan, allowed two months for submissions (from 12 February to 13 April 2007) and gave submitters the opportunity to make oral submissions (on 20 June 2007).
 - 5.2 Council is entitled under section 619H to make amendments to the draft it considers appropriate before adopting it to replace the 1992 management plan, subject to the over-riding qualification that the amendments fall within the test set out in paragraph 16.2 below.
 - 5.3 There is a reasonable argument that the amendment is within the scope of amendments that the Council could reasonably and fairly make. However as the Council has already resolved to consult further on the draft management plan before adopting it, this issue need not be conclusively considered, as the Council has taken the prudent approach and has decided to consult further in any event.
- 6 In considering the proposed amendment we have noted that the draft management plan did not clearly set out the future process for decision-making about the Puketiro wind farm under the Battle Hill management plan. As Council has already resolved to undertake further consultation on the management plan, we recommend that the Council reconsiders the content of the draft management plan as it relates to Puketiro prior to undertaking further consultation.
- 7 We therefore recommend:
- 7.1 That Council considers further the content of the draft management plan in relation to the Puketiro wind farm.



- 7.2 That Council then re-notifies the draft management plan for public consultation.
- 7.3 That, as part of this second round of consultation:
 - 7.3.1 Council should make publicly available all submissions it received in relation to the 12 February 2007 draft management plan; and
 - 7.3.2 Council should allow both a two month period for submissions and a subsequent opportunity to present oral submissions.
- 8 The reasons for these conclusions are set out below.

Factual background

- 9 Battle Hill is a regional park owned by Council. It is not a reserve pursuant to the Reserves Act 1977. As a regional park and because of its ownership by a local authority, the management of Battle Hill is subject to:
 - 9.1 sections 619 and 619C to 619I of the Local Government Act 1974; and
 - 9.2 the Local Government Act 2002.
- 10 The impact of this legislation is addressed in more detail below.
- 11 Under section 619D of the Local Government Act 1974 Council is required to maintain a management plan for Battle Hill. The current and operative management plan was approved in 1992 (the **1992 management plan**).
- 12 Under section 619I of the Local Government Act 1974 Council is entitled to review and change the management plan for Battle Hill at any time.
- 13 Council commenced a review of the 1992 management plan in February 2006. That review is ongoing. The steps which Council has taken to date are set out comprehensively in the timeline you have provided us with as part of Council's instructions.
- 14 The most significant of those steps are:
 - 14.1 March 2006 Council sent letters to known stakeholders and published notices advising of the review and seeking written submissions on Battle Hill and the 1992 management plan by 28 April 2006.
 - 14.2 4 April 2006 A public meeting was held to discuss the review.



- 14.3 12 February 2007 A draft management plan was released for consultation, with submissions due by 13 April 2007. The draft was publicised through public notices and direct correspondence with stakeholders. The draft specifically referred to the Puketiro wind farm, including:
- 'development of the Puketiro Wind Farm Operation, including the location of turbines ... are "restricted activities"¹ (paragraph 3.46); and
 - 'The location of Puketiro wind farm turbines to remain above the 350 metre contour line and is subject to Policy 3.46' (paragraph 3.47).
- 14.4 28 March 2007 A public meeting was held to discuss the draft management plan. This meeting made specific reference to the Puketiro wind farm.
- 14.5 20 June 2007 Council's Parks and Forests Hearing Subcommittee heard oral submissions on the draft management plan.
- 14.6 Between 20 June and 19 September 2007 The draft management plan was amended within Council to propose additional policies in support of the Puketiro wind farm.
- 14.7 19 September 2007 Council's Landcare Committee resolved to delay final consideration of the draft management plan until further consultation has been carried out.

Legal context

15 Sections 619 and 619C to 619I of the Local Government Act 1974 remain in force but will be repealed as from 1 July 2008 by section 270 of the Local Government Act 2002. In summary they provide:

- 15.1 Section 619 Council has the same powers in relation to Battle Hill as it has in relation to other land it owns. In addition, Council has all of the powers created by section 601.

¹ The draft's description of 'restricted' activities states: 'Applications need to be made to Greater Wellington, and will be considered on a case by case basis in accordance with the factors outlined under the network plan policy for "Assessing Effects of Activities and Uses".'



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|------|--------------------------|---|
| 15.2 | Section 601 ² | Sets out a number of specific powers in relation to recreation and community development. |
| 15.3 | Section 619C | Council has responsibility for Battle Hill as a regional park. |
| 15.4 | Section 619D | Council must maintain a management plan for Battle Hill at all times. In the exercise of its functions in relation to a Battle Hill, Council 'shall comply with the approved management plan'. |
| 15.5 | Section 619E | Sets out matters the management plan for Battle Hill may provide for and states that it <i>must</i>

'... provide for and ensure that the public is allowed the use, enjoyment, and benefit of the park to which it relates ... in a manner and to an extent that is consistent with the conservation and protection of the intrinsic worth of the park'. |
| 15.6 | Section 619I | Council may undertake a comprehensive review of the management plan for Battle Hill at any time. In conducting a comprehensive review Council must follow the procedure specified in sections 619F to 619H. |
| 15.7 | Section 619F | Before preparing a draft management plan Council must give notice of its intention to do so and invite interested parties to send it written comments or suggestions on what the draft should encompass.

In preparing a draft management plan, Council must give full consideration to any comments or suggestions received. |
| 15.8 | Section 619G | Once a draft management plan has been prepared, Council must give public notice stating that it is available for inspection and calling on interested parties to make submissions. The minimum period for submissions is two months.

Copies of the draft management plan must be sent to parties that made comments or suggestions under section 619F. |

² Section 601 has been repealed but remains relevant because it is referred to and kept alive by section 619(5).



- 15.9 Section 619H After the period for submissions under section 619G has closed, before approving the draft management plan Council must (a) give full consideration to any submissions received; (b) give submitters the opportunity to make oral submissions; and (c) make any amendments Council considers appropriate.
- 16 The process prescribed by the Local Government Act 1974 is essentially one of consultation. Accordingly, the public law requirements for consultation apply regardless of Council's additional obligations under the Local Government Act 2002. To conduct a valid consultation the following principles apply:
- 16.1 Council must provide interested parties with sufficient information to enable them to be adequately informed and make intelligent and useful responses.³
- 16.2 If the final proposal is significantly different than that consulted on, then Council ought to turn its mind to whether it ought to conduct further consultation. In determining this question, the following High Court passage provides a useful test:⁴
- If, as a result of the submission and consultation process, the draft is so transformed that what the [decision-maker] is then considering is really a completely new rule, the [decision-maker] would have to start again. This will sometimes be a difficult question of fact and degree ...
- 16.3 Council must not predetermine the issue. However, Council is not required to approach the making of a decision with a completely blank mind. Before a decision can be set aside it must be established on the balance of probabilities that, as a matter of fact, the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria for decision, they simply went through the motions.⁵
- 16.4 Council must not have been suffering under a 'real danger' of bias in the sense that it might unfairly have regarded with favour, or disfavour, the case of a party to the issue under consideration.⁶

³ *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 (CA).

⁴ Authority adopted in *Contact Energy Limited v Electricity Commission* (29 August 2005, High Court, Wellington, MacKenzie J, CIV-2005-485-624).

⁵ *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741.

⁶ *Collier v Attorney-General* [2002] NZAR 257 (CA).



Conclusion

17 Our conclusions are set out above. Please contact us if you have any questions.

Yours sincerely

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A handwritten signature in black ink, appearing to read 'Sally Dossor', written over the printed name.

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