

applications and performance of licensees has resulted in increased work for the Mining Warden that is expected to continue well into the future.

WIND ENERGY PROVOKES NIMBY ATTACK*

Perry v Hepburn Shire Council [2007] VCAT 1309 (Planning & Environment List)

The Issues

For the first time in more than five years, the Victorian Civil and Administrative Tribunal (VCAT) has had occasion to consider a proposal for the development and operation of a wind energy facility. VCAT has the primary court/tribunal responsibility in planning matters under the *Planning and Environment Act 1987* (Vic). In a time of increasing pressure to abandon traditional energy sources in favour of renewable supplies, VCAT's decision in *Perry v Hepburn Shire Council* serves as a timely reminder of the planning considerations for wind energy generation, and issues commonly raised both in support of, and opposition to, such proposals.

The Hepburn Renewable Energy Association (Association) devised a proposal to develop and operate Australia's first community-owned wind farm, to be situated at Leonard's Hill, approximately 10 kilometres south of Daylesford in central Victoria. Hepburn Shire Council (Council) granted the Association a permit to construct two wind turbines on the site, designed to produce up to 14,000 megawatt hours of energy per year, or enough to service approximately 2,000 homes. The Association's proposal opposed by residents and property owners in the area, who argued that construction and operation of the facility would detrimentally affect the Leonard's Hill site and their enjoyment of their nearby properties. Their objections brought the matter to VCAT for review of the Council's decision to issue a planning permit.

VCAT commented that the issues raised by those opposing the Association's proposal were those commonly raised in opposition to the construction and operation of such facilities, namely:

- whether projected greenhouse and wind energy benefits would be achieved;
- whether the visual impact would be acceptable for the area's residents and tourists;
- whether noise emissions from the turbines would be acceptable in terms of resident amenity;
- whether the turbines would be too close to existing dwellings and roads with respect to shadow flicker, blade glint and safety;
- whether the mortality and risks to existing animals in the area would be acceptable; and
- whether the presence of the turbines would impact on traffic and aviation safety.¹

VCAT heard argument and expert evidence from each side on these issues, including submissions from acoustic engineers, environmental scientists and a representative from Sustainability Victoria. Much of this evidence centred on the potential visual and aural impact of the proposed facility on local residents. These aspects were considered generally, and with specific reference to 24 dwellings identified as those closest to the proposed facility. Other discussion of note included the potential impact on local wildlife, including bats and threatened or protected bird species.

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¹ *Perry v Hepburn Shire Council* [2007] VCAT 1309, paragraph 16 per Senior Member Baird and Member Potts.

The Decision

Although VCAT found that the construction and operation of the proposed facility would impact visually and aurally on residents and other occupants of the Leonard's Hill area, VCAT determined that any adverse effects would fall within tolerable levels, and were insufficient to warrant withholding a planning permit from the Association. Noting that the site's topography, the orientation of relevant dwellings and the existence of vegetation went some way to mitigating the likely adverse effects of the operation of the facility,² VCAT provided for additional safeguards in the conditions imposed in the Association's permit.

Primary among the conditions imposed by VCAT was the undertaking of on-site and off-site landscaping and planting, designed to 'screen' the noise and sight of the facility, and therefore further mitigate the visual and aural impact of the facility on residents and other occupants of the Leonard's Hill area. Additional conditions of note included the formulation of acceptable management plans relating to the preservation of local wildlife and vegetation.

Relevantly, as VCAT noted in its reasons, one group of stakeholders in the Leonard's Hill area would be disappointed no matter what decision VCAT reached – the Association, which had invested considerable time and effort in devising and promoting the proposal, or the residents and other occupants in the area, who considered the proposed facility to be an inappropriate addition to the Leonard's Hill landscape.³ Ultimately, the Association's interests in promoting environmentally friendly generation of energy were preferred by VCAT to the opposing views.

Going forward, decisions like that in *Perry v Hepburn Shire Council* are significant in a closely-settled State like Victoria, where environmental imperatives were seen to trump those of wholly unspoiled and uninterrupted enjoyment of land, reflecting an appropriate balance between planning objectives that reflect societal change and the NIMBY (not in my backyard) arguments of local residents. The case shows us that identification of suitable sites which naturally lend themselves to the mitigation of the adverse effects of such projects, and a willingness on the part of developers to take reasonable further steps to mitigate such effects, present as key ingredients in the advancement and exploitation of renewable energy sources.

WESTERN AUSTRALIA

TRADING INFORMATION ON SURRENDER OF TENEMENTS*

Korab Resources Ltd v Richmond [2007] WAMW 16 (Mining Warden's Court, Perth, 7 September 2007, Calder M)

Collusion – Contravention of s 69 of the Mining Act 1978 (WA) (Mining Act) – Exercise of Ministers discretion under s 111A of the Mining Act to refuse tenement applications – Where tenement holder and prospective tenement applicant entered into agreement to trade information on surrender of tenements.

² *Perry v Hepburn Shire Council* [2007] VCAT 1309, paragraph 21 per Senior Member Baird and Member Potts.

³ *Perry v Hepburn Shire Council* [2007] VCAT 1309, paragraph 17 per Senior Member Baird and Member Potts.

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