

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2019 02834

BALD HILLS WIND FARM PTY LTD (ACN 117 264 712)

Plaintiff

v

SOUTH GIPPSLAND SHIRE COUNCIL

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 10-11 June 2020
DATE OF JUDGMENT: 18 August 2020
CASE MAY BE CITED AS: Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council (No 2)
MEDIUM NEUTRAL CITATION: [2020] VSC 513

ADMINISTRATIVE LAW – Judicial review – Notification to Council of alleged nuisance due to noise from wind farm, under s 62(1) *Public Health and Wellbeing Act 2008* (Vic) – Council resolution under s 62(3), recording finding of intermittent nuisance of the kind alleged and Council’s opinion that matter better settled privately – Whether resolution amenable to certiorari – Whether Council failed to have regard to mandatory considerations in finding that a nuisance existed – Whether Council disregarded material essential to performance of its statutory task – No jurisdictional error established – *Public Health and Wellbeing Act 2008* (Vic), s 62.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr JD Pizer QC with Mr R Kruse	Allens
For the Defendant	Mr CJ Horan QC with Ms CL Symons	Maddocks

HER HONOUR:

- 1 In this proceeding, **Bald Hills** Wind Farm Pty Ltd seeks judicial review of a decision of the South Gippsland Shire **Council** to pass a resolution on 24 April 2019, in which it recorded its finding that there existed an intermittent nuisance caused by the operation of the Bald Hills' wind farm. The finding was made in relation to the notification of an alleged nuisance by Sascha Fox, under s 62 of the *Public Health and Wellbeing Act* 2008 (Vic). In the **April Resolution**, the Council also recorded its opinion that the matter was better settled privately, and listed several methods by which this might be achieved.
- 2 Bald Hills contends that the Council's decision to adopt the April Resolution was affected by jurisdictional error. It seeks an order in the nature of certiorari quashing the decision, or alternatively a declaration that the April Resolution is invalid and of no force or effect. The proceeding is defended by the Council, which argued that the April Resolution was valid and that no relief should be granted.
- 3 In a separate proceeding, Bald Hills sought judicial review of a similar resolution adopted by the Council on 27 March 2019 (**March Resolution**). The March Resolution recorded the Council's finding that there existed an intermittent nuisance of the kind alleged by five other complainants, who were joined as defendants to the first proceeding. I heard both proceedings together on 10 and 11 June 2020.
- 4 On 18 August 2020 I published my reasons for dismissing the first proceeding (**March Reasons**).¹ For substantially the same reasons, this proceeding must also be dismissed.
- 5 The relevant factual background is set out at [1] and [6] to [27] of the March Reasons.
- 6 In addition to the complaints referred to at [12] of the March Reasons, the Council received a notification of an alleged nuisance dated 24 June 2016 on behalf of Sascha Fox. The notification advised that Ms Fox was an occupier of 930 Buffalo-Waratah

¹ *Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council* [2020] VSC 512 (**March Reasons**).

Road, Tarwin Lower and that she believed a nuisance existed at the property caused by the noise transmitted by the Bald Hills wind farm into her residence:

The nuisance is adversely affecting Ms Fox's health: Ms Fox has a chronic health condition which she believes is aggravated by the constant whoosh sound generated by the Bald Hills Wind Farm.

Ms Fox's complaint was among those investigated by James C Smith & Associates in 2018, and considered by the Council at its meetings on 6 February 2019 and 27 March 2019.

7 In the March Resolution, the Council determined to seek further legal advice in relation to a number of other complainants, including Ms Fox. It did so because of 'doubts about the sufficiency of the evidence' about the nuisance alleged by the other complainants. Further legal advice was obtained from Paul Connor QC on 30 March 2019.

8 At its meeting on 24 April 2019, the Council resolved:

That Council notes:

A. That the following persons have notified council of the existence of a nuisance contrary to the provisions of the Public Health and Wellbeing Act 2008 (the Act):

- Tim Le Roy of 1671 Walkerville Road, Tarwin Lower;
- Andree and Michael Fox of 24 Bennetts Road, Buffalo;
- Tristan Wilson of 930 Buffalo-Waratah Road, Tarwin Lower;
and
- Andrew Kilsby and his sons John Kilsby and Stuart Kilsby of 965 Walkerville Road, Tarwin lower.

(collectively the complainants), and Sascha Fox of 930 Buffalo-Waratah Road, Tarwin Lower.

B. That an investigation into the alleged nuisance was carried out on Council's behalf by James C. Smith & Associates, the results of that investigation being presented in a report compiled by James C. Smith & Associates (the Smith Report).

C. That with the exception of Tim Le Roy, none of the complainants was able or willing to provide evidence of the alleged nuisance to James C. Smith & Associates.

- D. The evidence provided to James C. Smith & Associates by Tim Le Roy was inconclusive.
- E. Evidence of a nuisance affecting Sascha Fox can be discerned from the Smith Report; and
- F. The resolution made by council at its ordinary meeting on 27 March 2019 concerning the Bald Hills Wind Farm.

Resolve that:

- 7. Council is not satisfied that there exists sufficient evidence of a nuisance of the kind alleged by the complainants.
- 8. Council write to the complainants, informing them of this decision and the reason for it (being insufficient evidence that a nuisance exists).
- 9. Council is satisfied that there exists a nuisance of the kind alleged by Sascha Fox, for the following reasons:
 - a. the credible and consistent character of the noise logs provided by her and/or the complaints made by her about sleep disturbance and the injury to her personal comfort;
 - b. the conclusions of the Smith Report; and
 - c. the weight of the other evidence presented to Councillors suggests the existence of a nuisance in respect of herbut notes that the nuisance exists only intermittently.
- 10. Council is, for the purposes of section 62(3)(b) of the Act, of the opinion that the matter concerning Sascha Fox is better settled privately because the nuisance is more likely to be abated if:
 - a. the parties are able to negotiate a mutually satisfactory resolution; or
 - b. Sascha Fox initiates proceedings of the kind described in paragraph 5 of this resolution and because of the difficulties associated with each action specified in section 62(4) of the Act set out in the opinion of Paul Connor QC (a copy of which has, in redacted form, been made publicly available by council).
- 11. Council write to Sascha Fox advising of the following methods for settling the matter privately:
 - a. the joint appointment of a mediator to assist the parties to resolve the dispute;
 - b. the commencement of legal proceedings in private nuisance;
 - c. the commencement of proceedings pursuant to section 114 of the Planning and Environment Act 1987, claiming that the Bald

Hills Wind Farm is not complying with the acoustic conditions contained in the relevant planning permit; and/or

- d. the commencement of proceedings pursuant to section 149B of the Planning and Environment Act 1987 seeking a declaration that that the Bald Hills Wind Farm is not complying with the acoustic conditions contained in the relevant planning permit.

12. Authorise the Chief Executive Officer to:

- a. provide a copy of the resolution to Allens Linklaters (solicitors for the operator of the Bald Hills Wind Farm);
- b. provide a copy of the resolution to Sascha Fox, subject to the redaction of the names of all individuals who, for reasons of privacy, should, in the opinion of the Chief Executive Officer, have their names redacted; and
- c. make public this resolution in the open council minute of this meeting, subject to the redaction of the names of all individuals who, for reasons of privacy, should, in the opinion of the Chief Executive Officer, have their names redacted.

9 Without conceding that it was obliged to give reasons for the April Resolution, the Council elaborated on the reasons why it was satisfied that a nuisance existed as alleged by Sascha Fox in a further resolution adopted on 29 May 2019. The full text of that resolution is set out at [25] of the March Reasons.

10 The grounds on which Bald Hills seeks review of the April Resolution are the same grounds it relied on in relation to the March Resolution, namely:

- (a) The Council failed to have regard to three mandatory considerations in deciding to pass the April Resolution, being:
 - (i) what reasonable precautions were taken by Bald Hills to minimise any interference constituted by noise caused by the operation of the wind farm;
 - (ii) the social or public interest value in Bald Hills' operation of the wind farm; and
 - (iii) the suitability of the locality for its operation of the wind farm;

(b) In making its finding that a nuisance existed, the Council disregarded the steps taken by Bald Hills to comply with the conditions of the planning permit and the measured acoustic levels at Ms Fox's property of the noise caused by the operation of the wind farm, which meant that it constructively failed to perform its statutory function.²

11 The primary remedy sought by Bald Hills in this proceeding is an order in the nature of certiorari quashing the decision to pass the April Resolution. In the alternative, it seeks a declaration that the decision of the Council to pass the April Resolution is invalid and of no force or effect.

12 For the reasons given in the March Reasons, I have concluded that:

(a) The April Resolution is not amenable to certiorari, because it had no legal effect or consequence and there is nothing that can be quashed.³

(b) The 'reasonableness factors' set out in *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*⁴ are not mandatory considerations for a council contemplating a finding of nuisance under s 62(3) of the Wellbeing Act.⁵ Even if they were, Bald Hills did not establish that the Council disregarded any matter put to it, or that it overlooked anything that was material to its finding.⁶

(c) In order to perform its statutory function under s 62(3) of the Wellbeing Act, in determining whether a nuisance existed the Council was obliged to, and did, consider the acoustic material relied on by Bald Hills.⁷

² Ground 4 was expressed in the amended originating motion to be a complaint that the Council misunderstood the legal test to be applied when determining whether there exists a nuisance. At trial, it was put on the basis that the Council had disregarded centrally important evidence and so had constructively failed to perform the function conferred on it under s 62(3) of the *Public Health and Wellbeing Act 2008* (Vic).

³ March Reasons, [36]-[64].

⁴ (2012) 42 WAR 287, [118] (McClure P, Buss JA agreeing).

⁵ March Reasons, [65]-[82], [108](a).

⁶ March Reasons, [84]-[108](b)-(d).

⁷ March Reasons, [110]-[117].

(d) Bald Hills has not established that the April Resolution was affected by jurisdictional error. There is no basis to make the declaration it seeks, and the proceeding must be dismissed.

13 I will hear the parties on the question of costs.

CERTIFICATE

I certify that this and the 5 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 18 August 2020.

DATED this eighteenth day of August 2020.


Madeleine Baker
Associate